



Date and Time: Thursday, October 19, 2023 8:48:00 AM CST

Job Number: 208418739

Documents (100)

1. [Lerma v. Univision Communs., Inc., 52 F. Supp. 2d 1011](#)

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2. [Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metro. Bottling Co., 94 F. Supp. 2d 804](#)

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3. [Endsley v. City of Chicago, 1999 U.S. Dist. LEXIS 9481](#)

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4. [AD/SAT v. AP, 181 F.3d 216](#)

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5. [AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568](#)

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6. [Caldera, Inc. v. Microsoft Corp., 87 F. Supp. 2d 1244](#)

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7. [Abbott Lab. v. Durrett, 746 So. 2d 316](#)

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8. [Archer Daniels Midland Co. v. Seven Up Bottling Co., 746 So. 2d 966](#)

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9. [Cardtoons, L.C. v. Major League Baseball Players Ass'n, 182 F.3d 1132](#)

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10. [Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745](#)

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11. R.J. Reynolds Tobacco Co v. Phillip Morris Inc., 60 F. Supp. 2d 502	
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12. Solla v. Aetna Health Plans of New York, Inc., 1999 U.S. App. LEXIS 14628	
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13. Callahan v. A.E.V., 182 F.3d 237	
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14. Dyno Nobel, Inc. v. Amotech Corp., 63 F. Supp. 2d 140	
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15. FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25	
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16. [North Star Steel Co. v. MidAmerican Energy Holdings Co., 184 F.3d 732](#)

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17. [Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340](#)

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18. [Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096](#)

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19. [Den Norske Stats Oljeselskap A.S. v. Heeremac Marine Contrs., 1999 U.S. Dist. LEXIS 23595](#)

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20. [Sea-Land Serv. v. Atlantic Pac. Int'l, 61 F. Supp. 2d 1092](#)

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21. [Sea-Land Serv. v. Atlantic Pac. Int'l, 61 F. Supp. 2d 1102](#)



Client/Matter: -None-

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22. [In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781](#)

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23. [United States v. Andreas, 1999 U.S. Dist. LEXIS 11166](#)

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24. [Neo Gen Screening, Inc. v. New England Newborn Screening Program, 187 F.3d 24](#)

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25. [Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957](#)

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26. [Robert's Haw. Sch. Bus. Inc. v. Laupahoehoe Transp. Co., 91 Haw. 224](#)

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27. [Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268](#)

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28. [United States v. Nippon Paper Indus. Co., 62 F. Supp. 2d 173](#)

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29. [CDC Techs., Inc. v. IDEXX Lab., Inc., 186 F.3d 74](#)

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30. [American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc., 185 F.3d 606](#)

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31. [Sheet Metal Div. v. Local Union 38 of the Sheet Metal Workers Int'l Ass'n, 63 F. Supp. 2d 211](#)

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32. [Granite Partners, L.P. v. Bear, Stearns & Co., 58 F. Supp. 2d 228](#)

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33. [Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp., 185 F.3d 154](#)

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34. [Miller Pipeline Corp. v. British Gas PLC, 69 F. Supp. 2d 1129](#)

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35. [South Milwaukee Sav. Bank v. Barczak, 229 Wis. 2d 521](#)

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36. [Long v. Abbott Labs., 1999 NCBC 10](#)

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37. [Subsolutions, Inc. v. Doctor's Assocs., 62 F. Supp. 2d 616](#)

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38. [Bizzle v. N. Mont. Healthcare, 1999 Mont. Dist. LEXIS 1136](#)

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39. [Century 21 Region V, Inc. v. Prudential Real Estate Affiliates, Inc., 1999 U.S. Dist. LEXIS 21092](#)

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40. [J & S Oil, Inc. v. Irving Oil Corp., 63 F. Supp. 2d 62](#)

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41. [Red Lion Med. Safety, Inc. v. Ohmeda, Inc., 63 F. Supp. 2d 1218](#)

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42. [Rhode Island Laborers' Health & Welfare Fund v. Philip Morris, Inc., 99 F. Supp. 2d 174](#)

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43. [JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775](#)

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44. [Center for Legal Studies, Inc. v. Lindley, 64 F. Supp. 2d 970](#)

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45. [SMS Sys. Maintenance Servs. v. Digital Equip. Corp., 188 F.3d 11](#)

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46. [Fogie v. THORN Ams., Inc., 190 F.3d 889](#)

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47. [Modesto Irrigation Dist. v. Pacific Gas & Elec. Co., 61 F. Supp. 2d 1058](#)

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48. [Pan Asia Venture Capital Corp. v. Hearst Corp.](#), 74 Cal. App. 4th 424

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49. [Concho Residential Servs., Inc. v. MHMR Servs.](#), 1999 Tex. App. LEXIS 6356

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50. [7-UP Bottling Co. v. Archer Daniels Midland Co. \(In re Citric Acid Litig.\)](#), 191 F.3d 1090

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51. [Found. for Interior Design Educ. Research v. Savannah College of Art & Design](#), 73 F. Supp. 2d 829

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52. [Merck-Medco Managed Care, LLC v. Rite Aid Corp.](#), 1999 U.S. App. LEXIS 21487

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53. [National Asbestos Workers Med. Fund v. Philip Morris, Inc., 74 F. Supp. 2d 221](#)

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54. [American Ad Mgmt., Inc. v. General Tel. Co., 190 F.3d 1051](#)

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55. [Redwood Empire Life Support v. County of Sonoma, 190 F.3d 949](#)

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56. [Rockholt Furniture, Inc. v. Kincaid Furniture Co., 1999 U.S. App. LEXIS 22436](#)

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57. [Glen Holly Entertainment, Inc. v. Tektronix, Inc., 100 F. Supp. 2d 1073](#)

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58. [Western Parcel Express v. UPS of Am., 190 F.3d 974](#)

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59. [Noack v. Blue Cross & Blue Shield, Inc., 742 So. 2d 433](#)

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60. [Amundson & Assocs. Art Studio v. Nat'l Council on Comp. Ins., 26 Kan. App. 2d 489](#)

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61. [Arkansas Carpenters' Health & Welfare Fund v. Philip Morris, Inc., 75 F. Supp. 2d 936](#)

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62. [Philip Morris, Inc. v. Grinnell Litho. Co., 67 F. Supp. 2d 126](#)

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63. [Bayou Fleet, Inc. v. Alexander, 68 F. Supp. 2d 734](#)

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64. [Albany Specialties v. Bd. of Educ., 1999 U.S. Dist. LEXIS 21040](#)

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65. [Toscano v. PGA Tour, Inc., 70 F. Supp. 2d 1109](#)

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66. [In re Cardizem CD Antitrust Litig., 90 F. Supp. 2d 819](#)

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67. [Hawaii v. Gannett Pac. Corp., 99 F. Supp. 2d 1241](#)

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68. [Hingel v. Exxon Corp., 1999 U.S. Dist. LEXIS 16126](#)

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69. [Alabama Ambulance Serv. v. City of Phenix City, 71 F. Supp. 2d 1188](#)

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70. [Pickett v. HCA Hosp. Corp., 1999 U.S. App. LEXIS 39318](#)

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71. [In re Baseball Bat Antitrust Litig., 75 F. Supp. 2d 1189](#)

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72. [United States v. Dentsply Int'l, Inc., 190 F.R.D. 140](#)

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73. [Ess Tech. v. PCTel, Inc., 1999 U.S. Dist. LEXIS 23227](#)

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74. [Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295](#)

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75. [Chawla v. Shell Oil Co., 75 F. Supp. 2d 626](#)

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76. [Rock-It, Inc. v. Futura Coatings, Inc., 74 F. Supp. 2d 420](#)

Client/Matter: -None-

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77. [Allegheny Gen. Hosp. v. Phillip Morris, Inc, 116 F. Supp. 2d 610](#)

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78. [Intergraph Corp. v. Intel Corp., 195 F.3d 1346](#)

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79. [Bar Techs., Inc. v. Conemaugh & Black Lick R.R., 73 F. Supp. 2d 512](#)

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80. [Park Ave. Radiology Assocs., P.C. v. Methodist Health Sys., 1999 U.S. App. LEXIS 29986](#)

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81. [Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, 196 F.3d 818](#)

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82. [Randall v. Buena Vista County Hosp., 75 F. Supp. 2d 946](#)

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83. [Ports Auth. v. Compania Panamena de Aviacion \(Copa\), S.A., 77 F. Supp. 2d 227](#)

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84. [Chromalloy Gas Turbine Corp. v. United Techs. Corp., 9 S.W.3d 324](#)

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85. [Dauro Adver., Inc. v. GMC, 75 F. Supp. 2d 1165](#)

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86. [Jeffers Vet Supply, Inc. v. Rose Am. Corp., 75 F. Supp. 2d 1332](#)

Client/Matter: -None-

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87. [Bourns, Inc. v. Raychem Corp., 1999 U.S. Dist. LEXIS 23679](#)

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88. [Hewlett-Packard Co. v. Boston Sci. Corp., 77 F. Supp. 2d 189](#)

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89. [Access Telecom, Inc. v. MCI Telecomm. Corp., 197 F.3d 694](#)

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90. [Roniger v. McCall, 72 F. Supp. 2d 433](#)

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91. [Massachusetts Food Ass'n v. Massachusetts Alcoholic Bevs. Control Comm'n, 197 F.3d 560](#)

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92. [Serpa Corp. v. McWane, Inc., 199 F.3d 6](#)

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93. [Ford Motor Co. v. Metro Ford Truck Sales, Inc., 1999 Tex. App. LEXIS 9187](#)

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94. [Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 79 F. Supp. 2d 1219](#)

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95. [George Lussier Enters. v. Subaru of New Eng., Inc., 1999 U.S. Dist. LEXIS 19769](#)

Client/Matter: -None-

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96. [Covad Communs. Co. v. Pac. Bell, 1999 U.S. Dist. LEXIS 22789](#)

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97. [Stucky v. City of San Antonio, 1999 U.S. App. LEXIS 38905](#)

Client/Matter: -None-

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98. [Ocean View Capital, Inc. v. Sumitomo Corp. of Am., 1999 U.S. Dist. LEXIS 19194](#)

Client/Matter: -None-

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99. [Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823](#)

Client/Matter: -None-

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100. [Santana Prods. v. Sylvester & Assocs., 121 F. Supp. 2d 729](#)

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Lerma v. Univision Communs., Inc.

United States District Court for the Eastern District of Wisconsin

June 11, 1999, Decided ; June 11, 1999, Filed

Case No. 99-C-447

Reporter

52 F. Supp. 2d 1011 *; 1999 U.S. Dist. LEXIS 9251 **

RAMON LERMA d/b/a BLUE SCREEN ADVERTISING, ROBERT MONTEAGUDO, DELTA MORALES, MARIO OMAR d/b/a BIEI ADVERTISING, YVETTE VELASQUEZ d/b/a MUFFLERS FOR LESS, and W46AR CHANNEL 46, Plaintiffs, v. UNIVISION COMMUNICATIONS, INC., Defendant.

Disposition: [**1] Plaintiffs' motion to remand DENIED. Claims of plaintiffs Lerma and Omar DISMISSED. Plaintiffs' motion to stay briefing and consideration of pending motion to dismiss DENIED.

Core Terms

advertising, cable, monopolist, broadcasting, Skiing, competitor, antitrust, programming, monopoly, switch, allegations, anticompetitive, anticompetitive conduct, viewers, monopolization, over-the-air, ticket, cases, consumers, cable television, refusals, purchaser, removal, monopoly power, television, barrier, prices, anti trust law, plaintiffs', terminate

LexisNexis® Headnotes

Civil Procedure > Parties > Joinder of Parties > Fraudulent Joinder

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Removal > Procedural Matters > Fraudulent Joinder

HN1[] Joinder of Parties, Fraudulent Joinder

While diversity ordinarily must be complete for federal court subject matter jurisdiction to exist, a plaintiff cannot avoid diversity jurisdiction by fraudulently joining nondiverse parties.

Civil Procedure > Parties > Joinder of Parties > Fraudulent Joinder

Civil Procedure > Parties > Joinder of Parties > General Overview

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Civil Procedure > Parties > Joinder of Parties > Misjoinder

HN2 [down] **Joinder of Parties, Fraudulent Joinder**

Joinder is fraudulent when there are false allegations of jurisdictional fact, or more commonly, when the claim against the nondiverse defendant has no possible chance of success in state court.

Civil Procedure > ... > Removal > Procedural Matters > Fraudulent Joinder

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > Parties > General Overview

Civil Procedure > Parties > Joinder of Parties > Misjoinder

HN3 [down] **Procedural Matters, Fraudulent Joinder**

The removing party bears the burden of proving fraudulent joinder, and the burden is a heavy one. The removing party must show that, after resolving all issues of fact and law in favor of the plaintiffs, the nondiverse plaintiffs cannot establish a cause of action against the defendant. If there is any reasonable possibility that a state court would rule against the nondiverse defendant, then joinder is not fraudulent. If there is any doubt as to the right of removal, ambiguities are to be resolved against removal.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN4 [down] **Sherman Act, Claims**

There are two elements to a monopolization claim under the Sherman Act, [15 U.S.C.S. § 2](#), and, thus, under [Wis. Stat. § 133.03\(2\)](#): (1) the defendant's possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power by anticompetitive or exclusionary means. Although not a specifically-stated element of a monopolization claim, in order for any particular plaintiff to pursue an antitrust claim, he or she also must assert personal antitrust injury.

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

HN5 [down] **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. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The antitrust injury requirement ensures that a plaintiff can recover only if his or her loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

52 F. Supp. 2d 1011, *1011LÁ1999 U.S. Dist. LEXIS 9251, **1

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN6 **Monopolies & Monopolization, Attempts to Monopolize**

The Supreme Court has indicated that neither growth nor development as a consequence of a superior product, nor business acumen, nor historic accident can be considered illegal. And conduct is not condemned when it is determined that it constituted no more than aggressive competition or the rigorous pursuit of legitimate business objectives. Monopoly power does not itself constitute unlawful monopolization. Not the possession, but the abuse, of monopoly power violates the Sherman Act, [15 U.S.C.S. § 2](#).

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

HN7 **Monopolies & Monopolization, Actual Monopolization**

One stated test of anticompetitive conduct is whether monopoly power is used to foreclose competition, gain a competitive advantage, or destroy a competitor. Courts should consider whether the conduct has impaired competition in an unnecessarily restrictive way. Anticompetitive or exclusionary conduct impairs the opportunities of rivals and is neither competition on the merits nor more restrictive than reasonably necessary for such competition. The definition is objective and does not depend, in any ordinary sense, on the purpose, intent, or willfulness of the defendant or on the non-inevitability of its action.

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

HN8 **Monopolies & Monopolization, Actual Monopolization**

Whether valid business reasons motivated a monopolist's conduct generally is a question of fact.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

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

HN9 **Antitrust & Trade Law, Exemptions & Immunities**

The antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute. A monopolist has no duty to reduce its prices or to keep them low in order to help consumers. When the defendant is a legal monopolist, insofar as a plaintiff pays high prices because the defendant is a monopolist, the plaintiff's claim

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must fail; a lawful monopolist can charge what it wants. Provided it does not engage in any unlawful exclusionary practice, a monopolist is entitled to charge whatever price the market will bear.

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

HN10[] **Monopolies & Monopolization, Actual Monopolization**

It is not anticompetitive conduct for a party, even a monopolist, to terminate an at-will contract with one dealer and enter into a similar contract with another dealer.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

HN11[] **Antitrust & Trade Law, Exemptions & Immunities**

In practice, a complaint must contain either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory. The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a violation of the Sherman Act, plaintiffs will get nowhere merely by dressing them up in the language of antitrust. Invocation of antitrust terms of art does not confer immunity from dismissal; to the contrary, conclusory statements must be accompanied by supporting factual allegations.

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

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

HN12[] **Private Actions, Remedies**

In regard to determining whether an antitrust claim is stated, the court is not required to don blinders and to ignore commercial reality. To survive a motion to dismiss, a claim must make economic and factual sense.

Counsel: For Plaintiff: Scott W. Hansen.

For Defendant: Thomas L. Shriner.

Judges: LYNN ADELMAN, District Judge.

Opinion by: LYNN ADELMAN

Opinion

[*1012] DECISION AND ORDER

Issues of fraudulent joinder and antitrust coalesce in this case involving the decision of the sole provider of Spanish-language television programming in the Milwaukee area to switch from over-the-air broadcasting to a direct cable feed.

I. PROCEDURAL HISTORY

Plaintiffs filed this lawsuit and a motion for a temporary restraining order on Wednesday, April 28, 1999, seeking to prevent defendant Univision Communications, Inc. from terminating plaintiff W46AR Channel 46's over-the-air broadcast of Univision's Spanish-language network programming. Channel 46's contractual right to broadcast [*1013] Univision programming was due to expire on April 30.

Plaintiffs filed the case in Milwaukee County Circuit Court and waited in the courtroom of the assigned judge, Lee Wells,¹ for an opportunity to address the TRO request. When the case was called, Judge Wells [**2] telephoned defendant's general counsel, located in Los Angeles, California, who then conferred in outside counsel, also located in California. The court and parties discussed the matter and then scheduled an expedited hearing for the next day, Thursday, April 29, at 2:00 p.m. At the end of the telephone conference, however, Judge Wells stated as follows:

Here's what I'm going to do, though, so that the status quo is retained until we have our hearing tomorrow, and that is as follows:

That is, I am verbally ordering that the status quo procedure remain now and intact until such time as at the conclusion of tomorrow's hearing, at which time I'll take some action one way or the other, and that is that Channel 46 must remain in business. They must continue to be able to transmit programming through -- provided by Univision in the same manner that they are right now, not being on cable but being regular television programming without Cable TV, and that will be the order at least until tomorrow until I can make some decision on what I hear tomorrow; and tomorrow I'll make a new order one way or the other, one way on this aspect as well as the other aspects requested by the plaintiff [**3] or the defendant or both.

(Tr. of 4/28/99 at 36.) Upon an objection by Univision's attorneys because the "order is unnecessary . . . because the contract doesn't expire until the 30th," the judge indicated: "I know. But the reason I'm doing this is I wouldn't want somebody down there in your office to haphazardly decide to cancel tomorrow and, therefore, claim we're not retaining the status quo; and that's why I'm doing it to protect the status quo." (*Id.* at 36-37.)

At 1:23 p.m. the next day, Univision removed the case to federal court, where it was assigned to me. Counsel for Univision attended the state court's hearing at 2:00 p.m. but made no formal appearance, instead informing Judge Wells of the removal. Noting that removal prevented him from doing anything further in the case, Judge Wells nevertheless noted that

because [**4] of . . . the needs of the community to have the benefit of ongoing free television for Hispanics and Latinos in this community, I did order a temporary restraining order on the record, and that order remains intact and in place until there's further order of this Court. Since I cannot make further order of this Court, it remains intact unless otherwise changed or altered or removed by some other Court of appropriate jurisdiction.
(Tr. of 4/29/99 at 4-5.)

On Friday, April 30, my chambers contacted the parties' attorneys to arrange a TRO hearing and further proceedings in the case. Also on April 30, plaintiffs filed a motion to remand the case to state court. Upon the setting of an in-person status conference for the following Tuesday, May 4, Univision's counsel questioned the validity of Judge Wells's order but agreed to abide by it until the status conference could be held.

Defendants removed this case under [28 U.S.C. § 1332](#) based on diversity jurisdiction. It is undisputed that more than \$ 75,000 is involved. But according to the complaint and notice of removal, plaintiffs Ramon Lerma and Mario Omar are citizens of California, and defendant Univision Communications, Inc. [**5] has its principal place of business in California. Lerma, Omar and Univision thus are citizens of the same state, which ordinarily defeats federal court subject matter jurisdiction. [*1014] [Hoosier Energy Rural Elec. Co-op., Inc. v. Amoco Tax Leasing IV](#)

¹ Actually, Judge Michael Malmstadt was assigned the case, but was unavailable at the time the case was filed. Judge Wells was Judge Malmstadt's substitute that day.

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Corp., 34 F.3d 1310, 1314-15 (7th Cir. 1994) (diversity must be "complete," meaning that no plaintiff may be a citizen of the same state as any defendant). Whether the case should remain in this court therefore was a serious question.

At the May 4 status conference I indicated that I would address the motion to remand before dealing with the TRO because of my belief that in the absence of federal subject matter jurisdiction, the decision on the TRO should be handled by the state court. The parties agreed to a briefing schedule for the remand motion and Univision agreed to continue supplying Channel 46 with broadcasting until I could issue a decision. On May 24, 1999, I heard oral argument on the remand motion.

Since then Univision filed a motion to dismiss. Plaintiffs in turn moved to stay briefing on and consideration of the motion to dismiss until the remand issue is decided.

II. FRAUDULENT JOINDER

HN1 While diversity ordinarily **[**6]** must be complete for federal court subject matter jurisdiction to exist, plaintiff cannot avoid diversity jurisdiction by fraudulently joining nondiverse parties. *Id. at 1315*. Thus, if Univision can show that the joinder of Lerma and Omar was fraudulent, as it alleged in its notice of removal, removal will nevertheless be allowed. See *Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97, 66 L. Ed. 144, 42 S. Ct. 35 (1921); Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992)*.

HN2 Joinder is fraudulent when there are false allegations of jurisdictional fact, or more commonly and as is alleged here, when the claim against the nondiverse defendant has no possible chance of success in state court. *Hoosier Energy, 34 F.3d at 1315*. Even though plaintiffs filed the motion to remand, **HN3** the removing party bears the burden of proving fraudulent joinder, see *Wilson, 257 U.S. at 97*, and the burden is a heavy one. The removing party must show that, after resolving all issues of fact and law in favor of the plaintiffs, the nondiverse plaintiffs cannot establish a cause of action against the defendant. *Poulos, 959 F.2d at 73*. If there is any reasonable possibility that a **[**7]** state court would rule against the nondiverse defendant, then joinder is not fraudulent. *Id.* If there is any doubt as to the right of removal, ambiguities are to be resolved against removal. *Tom's Quality Millwork, Inc. v. Delle Vedove USA, Inc., 10 F. Supp. 2d 1042, 1044 (E.D. Wis. 1998)*.

When analyzing whether Lerma and Omar can establish a cause of action against Univision I look at the allegations in the complaint. See *Poulos, 959 F.2d at 74* ("only present allegations count"); *Lynch Ford, Inc. v. Ford Motor Co., 934 F. Supp. 1005, 1007 (N.D. Ill. 1996)* (where plaintiff alleged additional facts in support of its theory in motion to remand, "those factual allegations will be ignored The Court's inquiry is limited to the factual assertions of [the] complaint."). Jurisdiction depends on the situation at the time of removal. *Id.*

As a result, I must analyze the claims made by Lerma and Omar as pled in the complaint to determine whether there is a reasonable possibility that Lerma and Omar could prevail. The inquiry is similar to an analysis under *Federal Rule of Civil Procedure 12(b)(6)*.

III. THE MONOPOLIZATION CLAIM

A. General Allegations **[**8]** in the Complaint

According to the complaint, Univision is the largest and most dominant Spanish-language broadcast network in the United States, with 90 percent of the national market for Spanish-language television and 100 percent of the Milwaukee area market. (Compl. PP 1 & 12.) The only other Spanish-language broadcast network in the country, Telemundo, has no presence in Milwaukee. (Compl. P 15.)

[*1015] For over nine years Univision has broadcast its programming in the Milwaukee area over W46AR Channel 46, which supplies the Milwaukee area with free, over-the-air broadcasting. (Compl. P 1.) Channel 46 is the only

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station in the Milwaukee area that currently broadcasts Spanish-language programming. (Compl. P 5.) Univision now plans to withdraw its programming from Channel 46 and make it available only through cable television. (Compl. P 3.) Univision's switch to a direct-feed on cable thus will deprive persons in the Milwaukee area of the free broadcast of any Spanish-language programming. (Compl. P 16.)

More than half of the 19,000 Milwaukee area Hispanic households currently do not have cable television. (Compl. PP 2 & 13.) Many of these households depend exclusively or primarily [**9] upon Spanish-language television programming for news, entertainment, sports, and other local and national information. Most of these families -- those who do not or cannot purchase cable packages -- have access to Univision's programming only through Channel 46. (Compl. P 14.)²

Plaintiff Ramon Lerma is a California resident who runs an advertising agency called Blue Screen Advertising. Plaintiff Mario Omar owns an advertising agency located in California, called BIEI Advertising. Both Blue Screen and BIEI buy and sell advertising time for broadcast in Hispanic communities. (Compl. PP 9 & 10.) Blue Screen and BIEI need access to local advertising time to reach Hispanic [**10] communities within certain areas. Blue Screen purchases advertising time from Channel 46. (Compl. P 11.)

In regard to the claims of Lerma and Omar, the complaint asserts that because of Univision's switch to cable television in the Milwaukee area, advertisers who currently run advertising on Channel 46 and who would in the future purchase advertising slots on Univision's cable broadcasts "will be foreclosed from reaching any Hispanic households which do not, or cannot, purchase cable television packages." (Compl. P 19.) Further, advertisers also will be subject to higher rates after Univision's switch, as the amount of advertising minutes available to local advertisers will decrease substantially and the price will rise as available minutes become more scarce and the local advertisers have no viable substitutes or alternatives for broadcasting their advertisements. (Compl. P 20.)

B. Lerma's and Omar's Legal Claims

As set forth in the complaint Lerma and Omar sue Univision under Wisconsin's **antitrust law** for monopolization and attempted monopolization, Wis. Stat. § 133.03(2).³ [**12] This statute was intended as a reenactment of § 2 of the federal Sherman Antitrust Act, 15 U.S.C. § 2,⁴ with application to anticompetitive activity having an impact in Wisconsin. See Emergency One, Inc. v. Waterous Co., Inc., 23 F. Supp. 2d 959 [*1016] (E.D. Wis. 1998). Wisconsin courts have held that the state version is generally controlled by federal court decisions regarding the Sherman Act. See Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc., 190 Wis. 2d 650, 665, 529 N.W.2d 905 (1995); American Med. Transport of Wisconsin, Inc. v. Curtis-Universal, Inc., 148 Wis. 2d 294, 299, 435 N.W.2d 286 (Ct. App. 1988), rev'd on other grounds, 154 Wis. 2d 135, 452 N.W.2d 575 (1990). The purpose of

² From what counsel indicated at the status conference I held on May 4 and as discussed in Univision's brief on the remand motion -- and from what is plainly visible on Milwaukee area cable itself -- Channel 46's signal presently is rebroadcast on cable. Thus, cable watchers currently may view Univision programming as part of their cable packages.

³ Wisconsin Statute § 133.02(3) reads:

Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce may be fined not more than \$ 100,000 if a corporation, or, if any other person, may be fined not more than \$ 50,000 or imprisoned for not more than 7 years and 6 months or both.

⁴ Section 2 states:

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.

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such antitrust laws is to preserve the health of the competitive process. *Brunswick Corp. v. Riegel Textile Corp.*, [752 F.2d 261, 266 \(7th Cir. 1984\)](#).

HN4 [↑] There are two elements to a monopolization claim under [§ 2](#) of the Sherman Act, and thus under *Wis. Stat. § 133.03(2)*: (1) the defendant's possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power by anticompetitive or exclusionary means. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, [504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#) (citing *United States v. Grinnell Corp.*, [384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#)); *Chase v. Northwest Airlines Corp.*, [\[**13\] F. Supp. 2d , , 1999 U.S. Dist. LEXIS 6072](#), No. 96-74711, 1999 WL 248936, *11 (E.D. Mich. April 23, 1999); *American Med.*, [148 Wis. 2d at 301](#); see *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, [472 U.S. 585, 595, 86 L. Ed. 2d 467, 105 S. Ct. 2847 \(1985\)](#). Although not a specifically-stated element of a monopolization claim, in order for any particular plaintiff to pursue an antitrust claim, he or she also must assert personal antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, [429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#).

For purposes of the current motion, Univision does not deny that it has a monopoly in the "relevant market." The possession of monopoly power depends on a defendant's market power regarding a "product market" within a "geographic market." Irving Scher, *Antitrust Adviser* § 1.22 (4th ed. 1998). The complaint asserts that the Milwaukee area constitutes the geographic market and that Spanish-language programming constitutes the product market for antitrust purposes. (Compl. P 27.) I assume for present purposes that these allegations are true and sufficient for asserting the first element of a monopolization claim.

Univision, however, vigorously challenges [\[**14\]](#) plaintiffs on the second element. Univision asserts that its planned action -- switching to cable -- does not and will not constitute anticompetitive or exclusionary conduct. It also contests whether the two California plaintiffs can establish, under the facts of the complaint, any antitrust injury allowing them to bring the antitrust claims.⁵ I will address the two issues in reverse order.

[**15] C. Antitrust Injury

HN5 [↑] 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." *Pueblo Bowl-O-Mat*, [429 U.S. at 489](#). The antitrust injury requirement ensures that a plaintiff can recover only if his or her loss stems from a competition-reducing aspect or effect of the defendant's behavior. *Atlantic Richfield Co. v. USA Petroleum Co.*, [\[*1017\] 495 U.S. 328, 344, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#).

For argument's sake, I assume for the moment that Univision's switch from supplying Channel 46 with its programming for over-the-air broadcast to supplying such programming to the Milwaukee cable operator can be considered anticompetitive behavior. Also, I note at the outset that while my decision regarding remand does not turn on this (as there are two California plaintiffs), the facts alleged in the complaint support no finding of antitrust injury whatsoever to Omar. The extent of the allegations specifically mentioning Omar are, in total, as follows:

[\[**16\]](#) "Plaintiff Mario Omar also owns and runs his own advertising agency, BIEI Advertising, located at . . . Marina del Rey, CA 90292. Biei Advertising also buys and sells advertising time for broadcast to Hispanic communities." (Compl. P 10.) In contrast to the allegations about Lerma's business, regarding which the complaint states that "Blue Screen purchases advertising time from Channel 46 because it is the best way to reach consumers within the Hispanic community in the Milwaukee Metropolitan area," (*id.* P 11), no allegation is made

⁵ While I have set forth the elements of only the monopolization claim, the requirements of anticompetitive conduct and antitrust injury apply to plaintiffs' attempted monopolization claim as well. See *Spectrum Sports, Inc. v. McQuillan*, [506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 \(1993\)](#) (attempted monopolization requires (1) predatory or anticompetitive conduct, (2) specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, [797 F.2d 370, 373 \(7th Cir. 1986\)](#) ("Conduct lawful for a monopolist is lawful for a firm attempting to become a monopolist."). Therefore, if the monopolization claim fails on these points, the attempt claim fails too.

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that Omar or BIEI Advertising ever arranged for advertising on Channel 46 or in the Milwaukee area. (At oral argument counsel indicated that such an allegation was made regarding Omar, but I have not found it in the complaint.) As a result, Omar asserts no injury related to Univision's actions regarding the relevant product in the relevant geographic area.

In arguing the issue of antitrust injury, Univision tries to shift the focus from Lerma's claims to those asserted by Channel 46, the distributor being replaced. But for present purposes I must look at the claims of Lerma, as a purchaser of local-only advertising time. While Univision is correct [**17] that "the antitrust laws were enacted for 'the protection of competition, not competitors,'" *Atlantic Richfield*, 495 U.S. at 338 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)), Lerma is not alleged to be a competitor of Univision. As a consumer or purchaser of advertising time, Lerma is an indirect customer of Univision, not a competitor.

As alleged in the complaint, Lerma himself will face higher prices and lower availability of advertising time if Univision switches to cable. If Univision changes to a direct-feed to cable, a chunk of its advertising time now devoted to local advertising will be replaced by nationwide advertising. There is no other Spanish-language broadcasting in Milwaukee to which Hispanic-targeted local advertisers can turn and there are only so many available minutes of advertising during Univision programs. If advertising minutes available to local advertising purchasers, which Lerma is asserted to be, are fewer, Univision's local advertising "output" will be lower. Further, if, as Lerma alleges, prices for local advertising will rise as the supply of local advertising minutes decreases, consumers [**18] like Lerma also will pay more.

Higher prices and lower output from the consumer's perspective are the principal vices prescribed by the antitrust laws. See *Nelson v. Monroe Reg'l Med. Ctr.*, 925 F.2d 1555, 1562 (7th Cir. 1991). In *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.*, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1087 (D.C. Cir. 1998), the D.C. Circuit found antitrust injury in a broadcaster's charging of excessive prices for advertising related to the broadcaster's unlawful monopolistic actions. The court indicated that "paying higher prices is certainly a direct harm to customers. . . . It appears that antitrust injury to [plaintiff] CBS is ultimately a harm to U.S. purchasers of radio advertising. By keeping CBS out of the market, [defendants] CCC and C&W denied such purchasers the benefit of competition." *Caribbean Broadcasting*, 148 F.3d at 1087. In the present case, Lerma is a similar purchaser of television advertising, and is similarly harmed by Univision's alleged monopolistic practices that reduce competition in the market.

[*1018] Lerma is also like Shearin Inc., a plaintiff in *Community Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. [**19] 1998). This recent case concerned the acquisition of one local daily newspaper by the owner of the other leading local daily newspaper. The Eighth Circuit upheld a finding of a threat of antitrust injury based upon Shearin's status as a purchaser of advertising in one of the papers:

Shearin alleged that a combination of the Times and the Morning News would raise advertising rates as a result of the two newspapers' dominant market position. The threat of higher prices resulting from dominant market power being a primary concern of Section 7 [of the Clayton Act, *15 U.S.C. § 18*], the District Court correctly determined that Shearin had shown antitrust injury.

Id. at 1183.

In its brief, Univision argued that plaintiffs' economics are all wrong because Channel 46 itself has been a monopolist and therefore already should be capturing monopoly advertising rates. Changing who holds the monopoly will have no effect, says Univision. Univision may be correct. But plaintiffs' theory -- based on the well-known doctrine of "supply and demand" -- is not wholly implausible, and thus there is a reasonable possibility that Lerma will be harmed by Univision's switch to cable. [**20] Even Univision conceded at oral argument that, based on the above cases, advertisers like Lerma could in theory suffer antitrust injury if the available slots for advertising go down and/or the prices of advertising go up as a result of anticompetitive conduct.

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The assumption I made above regarding anticompetitive conduct is extremely important, however, for purposes of antitrust injury. As stated above, antitrust injury arises only when a private party is adversely affected by an anticompetitive aspect of the defendant's conduct. See *Atlantic Richfield*, 495 U.S. at 339. Lerma must show an injury to him resulting from Univision's *illegal* conduct. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). This means that Lerma must allege not only an injury to himself, but an injury to the market as well. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984). While I find that the complaint adequately alleges some injury to Lerma from Univision's switch to cable, it remains to be seen whether Univision's switch to cable is anticompetitive conduct and thus whether Lerma's injury is *antitrust* [**21] injury.

D. Anticompetitive Conduct

As stated above, the second element of a monopolization claims is acquisition or maintenance of monopoly power through anticompetitive or exclusionary means. Commentators have noted that this element, as stated, is a vague one. See Scher, *supra*, § 1.27 ("The issue of the kind of conduct that fulfills this requirement has perplexed courts ever since Judge Learned Hand stated in *Alcoa* [*United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945)] more than 50 years ago that willfully monopolistic conduct can be found without a showing of 'specific' intent to monopolize."); Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 Antitrust L.J. 749 (1995) ("Courts have long struggled to define the specific forms of business conduct that constitute monopolization under *Section 2* of the Sherman Act."). Anticompetitive conduct has been said to "come in too many different forms, and [be] too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *Caribbean Broadcasting*, 148 F.3d at 1087.

Some general principles [**22] provide some guidance, often focusing on what does not constitute unlawful conduct. **HN6** [↑] The Supreme Court has indicated that neither growth or development as a consequence of a superior product, nor business acumen, nor historic accident can be considered illegal. *Kodak*, 504 U.S. at 481 [*1019] (quoting *Grinnell*, 384 U.S. at 570-71); see *American Med.*, 148 Wis. 2d at 301. And conduct will not be condemned "when it is determined that it constituted no more than aggressive competition or the rigorous pursuit of legitimate business objectives." Scher, *supra*, § 1.27. Monopoly power does not itself constitute unlawful monopolization. "Not the possession, but the abuse, of monopoly power violates *section 2* [of the Sherman Act]," *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, (7th Cir. 1986), and thus *Wis. Stat. § 133.03(2)*. "The mere existence of the power to control prices or exclude competition is not unlawful unless it is coupled with an element of deliberateness (conduct intended to use or preserve such power)." Scher, *supra*, § 1.21 (citing *Grinnell* and other Supreme Court cases).

HN7 [↑] One stated test of anticompetitive conduct, however, is whether [**23] monopoly power is used to foreclose competition, gain a competitive advantage, or destroy a competitor. *Kodak*, 504 U.S. at 482-83. Courts should consider whether the conduct "has impaired competition in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605. Anticompetitive or exclusionary conduct "impairs the opportunities of rivals and is neither 'competition on the merits' nor more restrictive than reasonably necessary for such competition. The definition is objective and does not depend, in any ordinary sense, on the purpose, intent, or willfulness of the defendant or on the non-inevitability of its action." III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* P 650a (rev. ed. 1996). Courts should ask

whether the underlying purpose of the firm's conduct was to enable the firm to compete more effectively. Did the firm engage in the challenged conduct for a legitimate business reason? Or was the firm's conduct designed solely to insulate the firm from competitive pressure? . . . When courts speak of a firm's intent in a monopolization case, they refer to the legitimacy of the firm's conduct as measured by its intended effect on the competitive process. [**24] . . . Conduct that tends to exclude competitors may therefore survive antitrust scrutiny if the exclusion is the product of a "normal business purpose" . . .

State of Ill. ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1481 (7th Cir. 1991). **HN8** [↑]
Whether valid business reasons motivated a monopolist's conduct generally is a question of fact. *Id.*

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Monopolization cases involve a wide variety of challenged conduct, falling into categories such as "monopoly leveraging," which is the use of monopoly power in one market to obtain a competitive advantage in a second market; predatory pricing; and refusals to deal. Scher, *supra*, §§ 1.27-1.30. Through its references, especially at oral argument, to such cases as [Aspen Skiing, 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847](#); [Byars v. Bluff City News Co., 609 F.2d 843 \(6th Cir. 1979\)](#); and [Chase, 49 F. Supp. 2d 553, 1999 U.S. Dist. LEXIS 6072, 1999 WL 248936](#), plaintiffs construe their antitrust claims as the refusal to deal type.

Monopoly cases also sometimes are separated based on whether the monopolist is the single entity in a market or whether, even though the defendant is a monopoly, other competitors exist. [**25] Many of the single-entity market cases involve natural monopolies, which exist in markets where the entire demand can be satisfied at lowest cost by one producer. See Neil W. Hamilton & Anne M. Caulfield, *The Defense of Natural Monopoly in Sherman Act Monopolization Cases*, 33 DePaul L. Rev. 465, 465 (1984); Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 Stan. L. Rev. 548, 548 (1969). No allegations in the complaint assert that Univision has a natural monopoly. Nevertheless, it is undisputed that Univision is the only Spanish-language program provider in town.

Plaintiffs allege that three different anticompetitive effects will occur after Univision's planned switch to a direct cable [*1020] feed, all of which, they say, should be added together to assess whether anticompetitive conduct has occurred: (1) higher advertising rates for advertisers like Lerma, (2) the charging of a fee for cable to viewers currently receiving Univision broadcasting over-the-air, and (3) entry barriers for Telemundo.

1. Higher Prices and Reduced Supply for Lerma and Viewers

The fact that Lerma, as alleged in the complaint, will face a lower supply and thus higher prices for an advertising [**26] slot following Univision's switch to cable does not itself equal anticompetitive conduct; the same is true of the result that Univision's viewers are to be charged a price in order to obtain its programming. "[HNG†](#) The antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute." [Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406, 1413 \(7th Cir. 1995\)](#). A monopolist has no duty to reduce its prices or keep them low in order to help consumers. [Olympia, 797 F.2d at 376](#). When the defendant is a legal monopolist -- and plaintiffs do not claim that Univision is otherwise -- insofar as a plaintiff pays high prices because the defendant is a monopolist, the plaintiff's claim must fail; "a lawful monopolist can charge what it wants." [Blue Cross, 65 F.3d at 1415](#). "Provided it does not engage in any unlawful exclusionary practice, a monopolist is entitled to charge whatever price the market will bear." Areeda, *supra*, P 657c1.

A monopolist's raising of prices, in fact, is a procompetitive act. The higher a monopolist's prices, the greater the opening for competitors. [Blue Cross, 65 F.3d at 1415](#). It is "an attracting [**27] rather than an excluding practice." *Id. at 1413*; see [Matsushita, 475 U.S. at 583](#) ("respondents stand to gain from any conspiracy to raise the market price"). The same is true for a monopolist's limiting of output. See *id.* (limitation of distribution in United States by Japanese firms cannot create cognizable claim for antitrust damages).

2. Refusal to Deal

Plaintiffs argue that Univision's conduct is anticompetitive because Univision refuses to deal. The refusal to deal category originated in dictum in [United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#), where the Supreme Court declared:

In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and of course, he may announce in advance the circumstances under which he will refuse to sell.

The Sixth Circuit has labeled the question "under what circumstances does a monopolist have a duty to deal?" as "one of the most unsettled and vexatious [**28] in the antitrust field." [Byars, 609 F.2d at 846](#).

The most easily spotted refusal to deal is Univision's decision to terminate its contract with Channel 46. The fact that Univision is changing distributors of its product does not constitute anticompetitive conduct, though. Suppliers should have the discretion to structure their own distribution. Glazer, *supra*, at 787. As Judge Easterbrook suggested in [*Premier Electrical Construction Co. v. National Electrical Contractors Association, Inc., 814 F.2d 358, 369 \(7th Cir. 1987\)*](#):

In selecting a method of distribution, manufacturers act in the consumers' interest. Neither wants a higher markup unless that is beneficial to purchasers. If the manufacturer adopts a restricted distribution policy in order to serve its own interests, therefore, there is no reason to doubt that the policy is beneficial to consumers and consistent with the purposes of **antitrust law**. Perhaps a given manufacturer is mistaken, but if so the reaction of consumers (and the lower profits) will send the message faster than courts could.

[*1021] [**HN10**](#) It is not anticompetitive conduct for a party, even a monopolist, to terminate an at-will contract with one [**29] dealer (assuming, for present purposes, that is what Channel 46 is) and enter into a similar contract with another dealer. See [*Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 539 \(7th Cir. 1986\)*](#); [*Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1249 \(5th Cir. 1975\)*](#) ("it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business"). Where a monopoly exists, from the standpoint of **antitrust law** it is a matter of indifference whether one party versus another -- in this case, one dealer versus another -- exploits the monopoly. [*Riegel, 752 F.2d at 267*](#).

In arguing the anticompetitive nature of defendant's refusal to deal plaintiffs, however, do not emphasize the effects on Channel 46. Rather, they argue the effects of Univision's conduct on advertisers, viewers, and Telemundo. It is uncertain whether Univision's actions toward advertisers constitute refusals to deal at all. Univision has not blocked access to its product, but instead has changed the terms and price [**30] which, as discussed above, is usually lawful. The same is generally true regarding viewers. Plaintiffs, however, have alleged or implied that the price to be charged viewers by the cable company will in fact prevent some viewers from obtaining any access to the station, and at this stage I will assume that indicates a refusal to deal.

Plaintiffs liken their antitrust claims to those in *Aspen Skiing*, *Byars*, and *Chase*, cases discussed at oral argument. In *Aspen Skiing* the defendant ("Ski Co.") terminated the "all-Aspen, six-day ticket," which was first developed when three independent companies (one of which was Ski Co.) operated three different ski mountains in the Aspen area. The ticket allowed Aspen visitors to ski the mountain of their choice on the day of their choice. The interchangeable ticket continued to provide a desirable option for skiers when the market was enlarged to include a fourth mountain, also owned by Ski Co. Ski Co. thereafter acquired one of its competitor's mountains, giving it monopoly power. It then refused to continue the all-Aspen ticket, thereby refusing to deal with the remaining independent operator, Aspen Highlands Skiing Corp. ("Highlands"), [**31] and instead offered a similar ticket good only on its three mountains. Further, Ski Co. blocked Highlands' attempts to develop a substitute package by turning away skiers who attempted use the substitute package.

The Court upheld the jury's verdict that Ski Co. had committed unlawful anticompetitive conduct. While recognizing that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor," [*Aspen Skiing, 472 U.S. at 600*](#), the Court indicated that the right to refuse to deal with a competitor was not unqualified, [*id. at 601*](#). Ski Co. did not merely reject a novel offer to participate in a cooperative venture; rather, it elected to alter the character of the market itself -- the all-Aspen ticket was the product of competition when the market contained three independent operators. [*Id. at 603-04*](#). While such a market change is not necessarily anticompetitive, the Court found evidence in the record that there were no valid business reasons for Ski Co.'s actions in terminating the all-Aspen ticket. Consumers were angered and were not skiing the mountain of their choice because their ticket would not permit it; Ski Co.'s rejection [**32] of skiers attempting to use the Highlands' substitute package indicated it chose to forgo the short-run benefits of those revenues in order to harm Highlands over the long run; and Ski Co. maintained similar all-area tickets in other locations where it owned ski resorts. As a result, the Court deemed Ski Co.'s conduct to be illegal anticompetitive behavior. See [*id. at 605-11*](#).

[*1022] Plaintiffs attempt to draw parallels between *Aspen Skiing* and this case, arguing that there are no legitimate business reasons for Univision's switch to cable and that the switch will substantially change the market. However, the complaint does not allege that there are no legitimate business reasons for Univision's decision to switch to cable (a suggestion which Univision also vigorously disputes). And plaintiffs' argument that Univision's switch will change the market has no antitrust relevance in the present circumstances where Univision already has a one hundred percent monopoly. The fact that Univision presently broadcasts on free television is, unlike the situation in *Aspen Skiing*, not the result of an arrangement between competitors that permitted the market to function in a manner favorable [**33] to consumers. Rather, it was the result of Univision's unilateral decision upon entering the market. Univision's decision to switch to cable occurs in a context where no competition exists.

Following *Aspen Skiing*, the Seventh Circuit issued *Olympia*. There, Western Union, a monopolist of telex service, was forced to stop requiring subscribers to lease their telex terminals from it in order to obtain service. It then decided to sell off all of its terminal inventory to get out of the equipment business. At first Western Union gave subscribers a list of other vendors, including Olympia, from which they could purchase terminals. Western Union stopped the practice, though, when its own inventory of units was declining too slowly. Olympia sued under [§ 2](#) when its business then plummeted, as it had no sales staff of its own and relied upon the Western Union referrals. The court found no anticompetitive conduct when a monopolist extends a helping hand to competitors and then withdraws it. [797 F.2d at 375-76](#). In discussing *Aspen Skiing*, now-Chief Judge Posner indicated that *Aspen Skiing* was narrowly written. "If it stands for any principle that goes beyond its unusual facts, [**34] it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." [Id. at 379](#). Unlike *Aspen Skiing* as interpreted in *Olympia*, in the present case there is no competitor with whom Univision could cooperate; the affirmative duties imposed upon the monopolist in *Aspen Skiing* thus are not appropriate in this case.

In [Chase, 49 F. Supp. 2d 553, 1999 U.S. Dist. LEXIS 6072, 1999 WL 248936](#), Northwest Airlines was sued by an individual challenging the company's "refusal to sell" policy regarding "spoke-hub-spoke" tickets for "spoke-hub" travel. The case arose out of Northwest's policy of pricing tickets beginning or terminating at one of its three hubs at higher prices than tickets for travel merely going through the hubs. When hub-originating and hub-bound consumers began purchasing spoke-hub-spoke tickets and then disposing of the legs they did not need, Northwest instituted a policy of refusing to sell such passengers spoke-hub-spoke tickets, imposed the policy on any travel agents who wanted to sell Northwest tickets, and enforced the policy on passengers by requiring [**35] luggage to be checked through to the final destination and canceling any ticket with an abandoned leg. Northwest's motion to dismiss Chase's monopolization claim, based on Northwest's argument that its policy was not anticompetitive, was denied. The district court held that Chase sufficiently alleged an anticompetitive barrier to intrabrand competition because the refusal to sell policy interfered with how the competitive (between travel agents) intrabrand market operated.

Again, however, as with *Aspen Skiing*, Lerma's case is unlike *Chase* in that here, with Univision's one hundred percent monopoly, no competitive market exists, thus, there is no standard of competition Univision can be charged with altering. Plaintiffs have not alleged that Univision previously authorized two different stations to broadcast in Milwaukee (competing against each other) and then altered the market. Univision's switch to cable will not reduce the number of affiliates permitted [*1023] to broadcast Univision programming. Univision is simply replacing the current monopolist dealer with a different monopolist dealer, which generally is insignificant from an antitrust standpoint. See [Riegel, 752 F.2d \[**36\] 261](#).

The *Byars* case involved another distinguishable scenario. For years, Byars distributed Bluff City's magazines to small neighborhood stores. After Bluff City changed ownership, the new owners decided to vertically integrate by taking over distribution themselves and eliminating the middleman Byars. Byars sued. The Sixth Circuit vacated the district court's decision for Bluff City, remanding for further findings on whether a refusal to deal occurred. See [Byars, 609 F.2d at 864](#). Byars, however, was not a customer nor even simply a dealer of Bluff City. Although he started out as a dealer or distributor, upon Bluff City's vertical integration his position changed to that of competitor, and there was evidence that Bluff City attempted to squeeze him out of that role. Upon remand, the district judge was told to carefully consider whether Bluff City's vertical integration was justifiable on efficiency and business

grounds and whether it had committed predatory conduct. Again, in the present case plaintiffs have not alleged that Univision's decision is not justifiable on business grounds nor that Univision is making a currently competitive market less competitive. And if Univision's [*37] actions can in someway be considered vertical integration (by cutting out the Channel 46 middleman in its current cable broadcasts), such vertical integration into distribution has been approved. See *Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984) (newspaper owner lawfully eliminated 250 independent carriers and took over retail business itself).

Lerma and Univision's viewers do not resemble customers whose rejection by a monopolist led to a finding of anticompetitive conduct, such as the Highlands skiers turned away by Ski Co. or the advertisers in *Lorain Journal Co. v. United States*, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951). In *Lorain Journal*, the Supreme Court upheld a verdict that the one daily newspaper serving a small town violated § 2 by refusing to accept advertisements from customers who also advertised on a fledgling radio station, which was the newspaper's main competitor in the local advertising market. The Court found substantial evidence that the paper's conduct "amounted to an attempt by the publisher to destroy WEOL [the radio station] and, at the same time, to regain the publisher's pre-1948 substantial monopoly over the mass [*38] dissemination of all news and advertising." *Id. at 153*. Univision's Milwaukee viewers are unlike the advertisers in *Lorain Journal* and the skiers in *Aspen Skiing* in that Univision is not blocking them from, or penalizing them for, patronizing a competitor. The defendants in *Lorain Journal* and *Aspen Skiing* were acting to destroy the competitive market by depriving customers of choices. In this case, there is no competition in the relevant market, and thus no concern that Univision is eliminating consumer options in order to destroy a competitor.

As a result, because Lerma and Univision's viewers have not been blocked from or penalized for patronizing a competitor, are not victims of the alteration of a market characterized by competition, and are merely the subjects of a monopolist's right to raise its prices, they cannot show any anticompetitive conduct or effect merely because Univision refuses to deal with them.

My finding comports with the analysis of refusal to deal cases in Glazer's and Lipsky's 1995 article, *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*. The authors divide refusal to deal cases into two groups that can lead to a finding [*39] of anticompetitive conduct: (1) "single monopoly cases," which include (a) refusals to deal with customers or suppliers that deal with the monopolist's competitors (as in *Lorain Journal* and *Aspen Skiing*), (b) refusals to participate in a joint venture [*1024] with a competitor (as in *Aspen Skiing*), and (c) refusals to license technology to a competitor; and (2) refusals to deal to gain or protect a monopoly in another market (integration into complementary markets, for instance). Glazer, *supra*, at 767-780. The authors indicate that a third category exists as well, but it is one that generally does not lead to any illegality: cases where there is no competitive relationship between the monopolist and the party allegedly injured by the refusal. *Id. at 781-82*. This third category

consists of cases in which there is no danger of preserving or extending monopoly. In the most familiar pattern, a monopolist supplier refuses to deal with firms playing a role in the distribution of the supplier's product. . . .

Another common scenario involves a monopolist supplier of goods or services refusing to deal with a purchasing consumer rather than with a distributor of its product. [*40] . . .

Finally, some cases involve refusals to deal representing pure monopolistic exploitation: a refusal to sell except at a high price or on terms reflecting an exercise of the bargaining power inherent in the defendant's market position.

Id. at 781-82. According to the authors, in all cases in this third category, the rule should be one of legality. *Id. at 783*. "Indeed, a monopolist invites erosion of its market position by discriminating among its customers or by exploiting them. Although neither . . . is desirable, at least their tendency to encourage competitive erosion of the monopolist's position is consistent with antitrust objectives." *Id.* The complaints of Lerma and Univision's viewers fall into this third category.

3. Market Entry Barrier For Telemundo or Other Potential Competitors

Plaintiffs have not alleged that defendant has refused to deal with competitors in Spanish-language programming, specifically Telemundo. There are no allegations, for instance, that Telemundo has attempted to enter the relevant market and been rebuffed by Univision.⁶ or that Univision is or controls an essential facility.⁷ Instead, as the parties more clearly [**41] focused the issue at oral argument, because there currently is no competition in Spanish-language programming in the Milwaukee area, the key question is whether Univision's change to cable makes it more difficult for Telemundo (or any other competitor that may start up) to enter the market.

[**42] As stated above, monopolists, like any other businesses, usually may replace dealers and alter distribution methods without violating antitrust laws. If Univision were merely swapping one over-the-air broadcasting station for another in the Milwaukee area, there would be no anticompetitive effect. But does the fact that one distributor is an over-the-air broadcaster and the other is cable make a difference? And does plaintiffs' complaint actually allege that Univision's switch from Channel 46 to a direct feed to the cable television provider will make it more difficult for competitors to enter the Milwaukee area market?

Allegations in the complaint relating to this issue are sparse, but there are some:

18. To maintain access to Univision's Spanish-language programming, many [*1025] of the Milwaukee Area's Hispanic households undoubtedly will give in and purchase cable television packages. The remaining Hispanic households which do not, or cannot, purchase cable television will be too small in number to economically justify entry into the market by any other provider of free-broadcast Spanish-language programming (such as Telemundo). Univision's actions, therefore, will have the effect [**43] of erecting significant economic barriers which will foreclose other Spanish-language programming networks from entering the market.

....

29. Univision has violated [Wis. Stat. § 133.03\(2\)](#) by monopolizing the Milwaukee Area market for Spanish-language television programming, and by engaging in anticompetitive acts designed to, among other things, (a) erect barriers foreclosing other Spanish-language programmers/networks from entering the Milwaukee Area market . . .

(Compl. PP 18, 29.)

HN11 [↑] In practice, a complaint must contain either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory. [Car Carriers, 745 F.2d at 1106](#). "The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust." *Id.* (internal quotation marks and citation omitted). "Invocation of antitrust terms of art does not confer immunity from [dismissal]; to the contrary, these conclusory statements must be accompanied by supporting factual [**44] allegations." [Id. at 1110](#).

Further, **HN12** [↑] in regard to determining whether an antitrust claim is stated, "the court is not required to don blinders and to ignore commercial reality." *Id.* To survive a motion to dismiss, a claim must make economic and factual sense. See *id.*; cf. [California Dental Ass'n v. Federal Trade Comm'n, 526 U.S. 756, 143 L. Ed. 2d 935, 119 S. Ct. 1604, 1999 U.S. LEXIS 3606 \(1999\)](#) (in case involving "quick look" at restraint of trade, court stated that unless economic view is implausible court should not initially dismiss it as presumptively wrong); [Matsushita, 475 U.S. at 587, 596-97](#). In *Car Carriers*, for instance, the court granted Ford's motion to dismiss, finding "implausible"

⁶ There are no allegations or suggestions in the record that Telemundo is even interested in the relevant market or that it is a real competitor of Univision's in the sense of offering a similar product.

⁷ A facility is essential if it is necessary for access to the relevant market and a competitor cannot practically or reasonably duplicate it. [MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1132-33 \(7th Cir. 1983\)](#). Examples are electrical transmission lines, see [Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\)](#), and the only railroad terminals in town, see [United States v. Terminal R.R. Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 \(1912\)](#). Antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available to competitors on nondiscriminatory terms. [MCI, 708 F.2d at 1132](#).

and "preposterous" allegations in the complaint that Ford, having absolute control over and being highly concerned about the rates charged by its suppliers, would conspire with a company called Nu-Car to eliminate plaintiff from competition so Nu-Car could later charge Ford monopoly prices. [Car Carriers, 745 F.2d at 1107 n.4, 1110.](#)

Lerma's key allegation -- that "remaining Hispanic households which do not, or cannot, purchase cable television will be [**45] too small in number to economically justify entry into the market by any other provider of free-broadcast Spanish-language programming (such as Telemundo)" -- is extremely conclusory and relies upon several factual assumptions, none of which is even alleged in the complaint. It assumes, for instance, that: (1) a competitor would itself choose over-the-air broadcasting versus cable; (2) assuming the competitor chose over-the-air broadcasting, the signal would not be picked up and rebroadcast by the cable provider;⁸ (3) if the over-the-air signal is not picked up, cable viewers do not and will not change back and forth between cable television and over-the-air broadcasting; and (4) those Hispanic households that give in and purchase cable television to get Univision would not drop cable television if a competitor came into the geographic market with free over-the-air broadcasting. [*1026] The failure of any one of these assumptions likely renders plaintiffs' barrier allegation false.

[**46] [Federal Rule of Civil Procedure 8](#) requires simple notice pleading. While thin, the allegation itself is specific enough to inform Univision about the market entry barrier theory. See, e.g., [Sanjuan v. American Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 \(7th Cir. 1994\)](#) (at pleading stage, plaintiff receives "the benefit of imagination, so long as the hypotheses are consistent with the complaint").

But plaintiffs' allegations about a potential market barrier fail to make factual and economic sense. For fraudulent joinder purposes, in order for me to deem the allegations inadequate, I must be able to say that, even assuming them to be true, Lerma cannot establish a cause of action against the defendant. [Poulos, 959 F.2d at 73.](#) If there is any reasonable possibility that a state court would rule against Univision, then the claim is not fraudulent. *Id.* If the allegations, though, are preposterous or implausible like the situation in *Car Carriers* or bare legal conclusions dressing up inadequate facts in antitrust lingo, the allegations cannot survive and will not block removal.

Besides being tenuous because of the underlying assumptions mentioned above, the [**47] market barrier allegation and some of the assumptions themselves run contrary to accepted economic theory. For instance, the assumption that once current over-the-air Hispanic viewers purchase cable they will not return to free television if a free-broadcaster appears in the market is implausible. It flies in the face of the accepted principle that a monopolist's higher prices in fact attract competitors because consumers will jump to a lower-cost provider. The Spanish-language television market is likely to be *more* rather than less attractive after Univision's move to cable. Telemundo has not chosen to attempt to compete against Univision under current circumstances. It is hard to see how it could be more difficult to compete against Univision than it is now. As pled in the complaint, currently there are approximately 19,000 Hispanic households watching Spanish-language television in Milwaukee either via cable or over-the-air, all of whose viewing needs are satisfied by Univision. After the switch, of the approximately 11,000 current over-the-air Univision viewers, say 6,000 choose to purchase cable television to get Univision broadcasting. That will leave 5,000 noncable viewers, [**48] *none* of whose viewing needs will be met by anyone. It seems to me that 5,000 people -- whether affluent or not⁹ -- desperately wanting some Spanish-language programming is a more attractive market than 19,000 viewers who are fully satisfied by the present situation.

What if there currently were no Spanish-language programming at all in Milwaukee and Univision wanted to enter the market? Could plaintiffs stop Univision (or any other network) from choosing a direct cable feed rather than free-broadcasting, even when the company would be acquiring a monopoly? Although I did not pose this question to the parties and am not myself an economist, intuitively I think the answer must be no. [**49] If Univision, initially

⁸ While plaintiff made some vague references at oral argument about a lack of space on the cable network for a second Spanish-language channel, there are absolutely no allegations in the complaint asserting that fact or that Univision has forced the cable provider, as controller of a possibly essential facility, to sign an exclusivity agreement.

⁹ Plaintiffs suggested at oral argument that the viewers left behind after Univision's switch to cable will be those at the low-end of the economic scale who cannot afford cable, and they will be unattractive to Telemundo or any other competitor. No such allegation is made in the complaint, however, which focuses on numbers.

coming into the market and acquiring a monopoly, had chosen a direct cable feed rather than Channel 46's broadcasting, the resulting situation would not differ from that involving a switch from over-the-air to cable. The similarity of result in either situation makes it extremely implausible that Univision's jump to cable is unlawfully harmful to competition.

Moreover, such similarity highlights the fact that plaintiffs really have failed to allege any *misuse* of monopoly power at all. As plaintiffs themselves indicate, anticompetitive conduct is found when "a monopolist [*1027] who claims to have lawfully acquired its power misuses it." (Pls.' Reply Br. at 7 (citing *Intergraph Corp. v. Intel Corp.*, 3 F. Supp. 2d 1255 (N.D. Ala. 1998); see also Pls.' 5/28/99 Letter to Court at 1 ("The thrust of plaintiffs' argument is that Univision may not use its dominant market power . . . to create barriers that prevent others from competing here.").) See also *Kodak*, 504 U.S. at 482-83 (second element of a § 2 claim is "use of *monopoly power*" to foreclose competition) (emphasis added)). Plaintiffs have failed to allege how Univision's switch to cable is enabled [**50] by or the result of Univision's dominant market power as opposed to being a choice any programmer -- whether or not a monopoly and whether or not it is part of a competitive market -- could make.

In sum, the allegation of a market entry barrier caused by too few viewers remaining after Hispanic households able to purchase cable television do so is a speculative, conclusory, and economically implausible prediction insufficient to sustain Lerma's claim.

IV. CONCLUSION

Lerma's claim makes no factual and economic sense and fails to assert any form of anticompetitive conduct; it therefore fails to state an antitrust claim under *Wis. Stat. § 133.03(2)*. The same problem defeats Omar's claim, and, in addition, the complaint fails to provide sufficient facts regarding Omar's relation to the relevant market.

I find that Lerma and Omar cannot possibly state a claim upon which a state court would find in their favor against Univision. As a result, they are both disregarded for diversity jurisdiction purposes, removal was proper, and the claims of these two plaintiffs will be dismissed.

With this Decision and Order, plaintiffs' motion to stay briefing regarding Univision's motion to [**51] dismiss becomes moot and will therefore be denied.

THEREFORE, IT IS ORDERED that plaintiffs' motion to remand is **DENIED**.

IT IS ORDERED that the claims of plaintiffs Lerma and Omar are **DISMISSED**.

IT FURTHER IS ORDERED that plaintiffs' motion to stay briefing and consideration of the pending motion to dismiss is **DENIED**.

FINALLY, IT IS ORDERED that a status conference to discuss the TRO motion, other pending motions, and scheduling of this case will be held on **June 15, 1999, at 1:30 p.m. in Room 204** of the United States Courthouse.

Dated at Milwaukee, Wisconsin, this 11 day of June, 1999.

LYNN ADELMAN

District Judge



Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metro. Bottling Co.

United States District Court for the Eastern District of Kentucky, Ashland Division

June 11, 1999, Decided ; June 11, 1999, Filed

CIVIL ACTION NO. 96-114

Reporter

94 F. Supp. 2d 804 *; 1999 U.S. Dist. LEXIS 21663 **

LOUISA COCA-COLA BOTTLING CO., PLAINTIFF, v. PEPSI-COLA METROPOLITAN BOTTLING CO., INC., DEFENDANT.

Disposition: [**1] Defendant's motion for summary judgment on Plaintiff's claims GRANTED; Defendant's motion for partial summary judgment on Counts II and III of its counterclaims DENIED; Plaintiff's complaint DISMISSED WITH PREJUDICE.

Core Terms

retailers, products, bottlers, space, prices, antitrust, shelf, display, loaders, dealer, territory, contracts, employees, Counts, secret, gifts, commercial bribery, summary judgment, competitor, consumer, soft drink, Bottling, programs, anticompetitive, counterclaims, promotions, violations, discounts, franchise, regional

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN1[] Summary Judgment, Evidentiary Considerations

Under [Fed. R. Civ. P. 56](#) a court must view the evidence in the light most favorable to the nonmoving party, in this case the plaintiff. Thus, when examining the record the court will resolve doubts and construe inferences in favor of the plaintiff in an effort to determine if any genuine issues of material fact exist. However, in a series of decisions commonly referred to as the "trilogy", the U.S. Supreme Court emphasized that the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. In short, the "trilogy" requires the nonmoving party to produce specific factual evidence that a genuine issue of material fact exists.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

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

94 F. Supp. 2d 804, *804LÁ999 U.S. Dist. LEXIS 21663, **1

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2[**Entitlement as Matter of Law, Appropriateness**

The nonmoving party must produce enough evidence, after having had a reasonable opportunity to conduct discovery, so as to withstand a directed verdict motion. The movant could challenge the opposing party to put up or shut up on a critical issue and if the respondent did not put up, summary judgment is proper.

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

HN3[**Bribery, Commercial Bribery**

See [Ky. Rev. Stat. Ann. § 518.020](#).

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

Torts > ... > Proof > Violations of Law > Criminal & Penal Legislation

HN4[**Crimes Against Persons, Bribery**

Civil remedies for violations of Ky. Rev. Stat. An.. [§ 518.020](#) are generally available through [§ 446.070](#).

Torts > Business Torts > Unfair Business Practices > General Overview

HN5[**Business Torts, Unfair Business Practices**

See [Ky. Rev. Stat. Ann. § 365.050](#).

Torts > Business Torts > Unfair Business Practices > General Overview

HN6[**Business Torts, Unfair Business Practices**

To succeed on a claim under [Ky. Rev. Stat. Ann. § 365.050](#), a plaintiff must demonstrate (1) a secret payment, (2) made to the injury of a competitor, (3) which tends to destroy competition. An actual intent to destroy competition does not matter.

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

HN7[**Private Actions, Remedies**

Before a plaintiff can succeed on any antitrust claim, it must first demonstrate an antitrust injury as opposed to a mere economic injury. Actionable antitrust injury is an injury to competition rather than just competitors. It requires proof (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury

would result from a decrease in that competition rather than from some other consequence of the defendant's actions.

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

HN8 [down] **Private Actions, Remedies**

Low prices which remain above predatory levels do not constitute an antitrust injury because they benefit consumers regardless of how they are set.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN9 [down] **Private Actions, Remedies**

When a firm or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an anticompetitive consequence of the claimed violation. A firm complaining about the harm it suffers is really claiming that it is unable to raise prices. This is not antitrust injury; indeed, cutting prices in order to increase business often is the very essence of competition. The antitrust laws were enacted for the protection of competition, not competitors. To hold that the antitrust laws protect competitors from the loss of profits due to non-predatory price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share.

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

HN10 [down] **Private Actions, Remedies**

A single competitor's lost profits does not demonstrate a market wide competitive detriment.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN11 [down] **Price Fixing & Restraints of Trade, Vertical Restraints**

Dominant firms can lawfully try to drive out their inefficient rivals through above cost price cuts even if they intend to raise prices later once the competition is eliminated.

Counsel: For LOUISA COCA-COLA BOTTLING COMPANY, INC., plaintiff: Richard A. Getty, Gregory A. Keyser, Getty, Keyser & Mayo, LLP, Lexington, KY.

For PEPSI-COLA METROPOLITAN BOTTLING CO., INC., PEPSICO, INC., defendants: William P. Emrick, McKenzie, Woolery, Emrick & Webb, P.S.C., Ashland, KY.

For PEPSI-COLA METROPOLITAN BOTTLING CO., INC., PEPSICO, INC., defendants: Richard T. Colman, Edward P. Henneberry, Michael P.A. Cohen, Howrey & Simon, Washington, DC.

For PEPSI-COLA METROPOLITAN BOTTLING CO., INC., PEPSICO, INC., counter-claimants: William P. Emrick, McKenzie, Woolery, Emrick & Webb, P.S.C., Ashland, KY.

For PEPSI-COLA METROPOLITAN BOTTLING CO., INC., PEPSICO, INC., counter-claimants: Richard T. Colman, Edward P. Henneberry, Howrey & Simon, Washington, DC.

For LOUISA COCA-COLA BOTTLING COMPANY, INC., counter-defendant: Anthony P. Tokarz, Bowles, Rice, McDavid, Graff & Love, P.L.L.C., Richard A. Getty, Gregory A. Keyser, Getty, Keyser & Mayo, LLP, **[**2]** Lexington, KY.

Judges: Henry R. Wilhoit, Jr., Chief Judge.

Opinion by: Henry R. Wilhoit, Jr.

Opinion

[*805] MEMORANDUM OPINION & ORDER

Plaintiff, a soft drink distributor, brought this antitrust action against its chief rival for monopolizing the local soft drink market. Plaintiff accuses the Defendant of unfair trade practices including coercive marketing plans, illegal payoffs, and commercial bribery to obtain an unfair competitive advantage. Defendant denies any wrongdoing and accuses the Plaintiff, in turn, of unfair, anticompetitive conduct as well, including defaming Defendant and abusing the Court system in an effort to stifle legitimate competition.

This matter is currently before the Court on Defendant's motions for (1) summary judgment on each of Plaintiff's claims and (2) partial summary judgment on Counts II and III of Defendant's counterclaims. The parties fully briefed these motions and the Court conducted oral argument on the same. The Court having been sufficiently advised, the motions are now ripe for decision.

[*806] I. Facts

A. The Parties

Pepsi ¹ and Coke ² both manufacture a variety of beverage syrups and concentrates which they distribute to bottling companies. **[**3]** The bottlers manufacture bottled and canned beverages from the syrups which they sell to retailers for resale to the public. Each bottler has a franchise territory in which it holds exclusive distribution rights for its products.

Pepsi Cola Metropolitan Bottling Co., Inc ("Pepsi-Metro") and the Louisa Coca-Cola Bottling Co. ("Louisa Coke") are bottlers servicing parts of Eastern Kentucky and West Virginia ³ **[**5]**. Pepsi-Metro, one of the world's largest bottlers, is a wholly owned subsidiary of the Pepsi Cola Co. It began distribution in Kentucky and West Virginia after

¹ The term "Pepsi", as used in this opinion, shall refer generically to the entire Pepsi Cola Company system including its product bottlers and distributors. Similarly, the term "Coke" shall reference the entire Coca Cola Company system including the bottlers and distributors of Coke products.

² See note 1, *supra*.

³ Though identified as a bottler, Louisa Coke no longer does any actual bottling. Rather, it simply serves as a distributor. While it holds the exclusive distribution rights for all Coke products in its franchise territory, it does not provide fountain syrup services or carry the complete line of Coke products such as Nestea, Fruitopia and the like. Britton complains that it would not be profitable to provide these other services because of Pepsi's market dominance. Though Britton has not made his ability to market these other services an issue in his case, Pepsi-Metro has raised the matter to suggest that Louisa Coke suffers in its market from its own refusal to compete on a broad scale.

acquiring one of Pepsi's independent bottlers, East Kentucky Beverage Co. ("EKB") in the early 1990's. Louisa Coke, by contrast, [**4] is a small, privately-held business owned and operated by Harold Britton ("Britton") which consists of ten employees and services only a seven county area.⁴ Coke services the remainder of Kentucky and West Virginia through Coca-Cola Enterprises, Inc. ("CCE"), the largest Coke bottler in the world; Coca-Cola Bottling Co. Consolidated ("Coke Consolidated"), Coke's second largest bottling operation; and Middlesboro Coca-Cola Bottling Works ("Middlesboro Coke"), another small, independent bottler servicing an eight county, tristate rural franchise. Pepsi-Metro's Pepsi franchise territory covers the entire Louisa Coke franchise territory and parts of those serviced by each of these other Coke bottlers. Thus, Pepsi-Metro competes with all of these Coke bottlers, large and small, for business in the Eastern Kentucky/West Virginia market.

B. Marketing Programs

National and regional retailers are the biggest outlets for Coke and Pepsi products. Many larger grocery and convenience store retailers like SuperAmerica, Kroger, and Winn Dixie have stores in more than one bottler's territory and operate out of multi-state marketing and distribution centers without regard to local bottlers. To provide these larger clients with consistency in distribution, pricing, service, advertising and promotion of soft drink products, Coke and Pepsi implement national and regional marketing programs. They coordinate the displays and advertising and give the retailers certain promotional allowances. They also provide their bottlers with funds for promotions in local stores within the bottler's sale territory. At issue in this case are two promotional tools, Calender Marketing Agreements ("CMAs", also known as Customer Development Agreements or "CDAs" by Pepsi); and "dealer loaders".

[**6] 1. CMAs

CMAs are written agreements in which the retailer agrees to promote a particular brand on certain weeks and holidays by [*807] featuring that product in newspaper ads to the exclusion of the competition, providing a certain amount of shelf space and the opportunity to place vending equipment, as well as displaying the product in a certain way or place during the promotional period. The retailer is usually compensated for his performance on a per case basis. Large retailers frequently enter into CMAs with more than one company on an annual basis. Thus, Coke will be the retailer's featured product on some weeks, Pepsi on others. The retailers are free to cancel the agreement at any time and the only penalty for noncompliance is loss of the per case discount.

Coke USA and Pepsi enter into many CMAs with retailers at the national and regional level on behalf of all their bottlers. Similarly, all of the individual Coke and Pepsi bottlers in the Kentucky/West Virginia market area with the exception of Louisa Coke offer CMAs of their own to local retailers. Pepsi, Coke USA and all Coke bottlers other than Louisa Coke agree that CMAs foster competition, drive up volume, improve efficiency [**7] and reduce retail prices. Everyone agrees consumer prices would rise if CMAs were eliminated.

Even though a few customers have requested CMAs from Louisa Coke, it refuses to offer such. Britton testified that he refuses to offer the same because he believes they are anticompetitive. Pepsi claims Britton does not want to go to the expense of competing in this fashion or investing in his company's future. To prove its point, Pepsi notes that Britton's warehouses are nearly completely depreciated and he has purchased no new equipment for his operations other than two used trucks. Pepsi further notes that Britton has made a number of interest free loans to himself and his family, abandoned his contracts with the Jenny Wiley State Park System, and refuses to carry the full line of Coke products or any fountain syrups. Britton does not deny these facts but says his decision to abandon fountain syrups and other coke products are attributable to Pepsi's lock on the market. Britton also says he abandoned the Jenny Wiley account because of a dispute with the park service over a decision to reopen the bidding process.

⁴ Specifically, Louisa Coke's territory covers Lawrence, Johnson, Martin, and Floyd Counties in Kentucky, as well as Wayne, Mingo and Lincoln Counties in West Virginia.

Whatever Louisa Coke's reasons are for not offering its own CMAs, the fact [**8] remains that it does operate under and benefit from the national and regional CMAs negotiated by Coke USA and other bottlers with such large clients as Winn-Dixie, Kroger, Wal-Mart, Food City, SuperAmerica, and Happy Mart, though. Louisa Coke simply reports its case sales to Coke USA who then makes its contractual payments to the retailer's account.

Louisa Coke sells 40% of its volume to customers with national or regional Coke CMAs. Furthermore, every other Coke bottler in this region negotiates CMAs of their own -- some of which Louisa Coke benefits from. Louisa Coke insists, however, that the Court should enjoin Pepsi-Metro from offering or participating in the same. It complains that Pepsi-Metro has secured for itself the best advertising, display, shelf and storage space for all of the key marketing weeks and holidays. Louisa Coke says there is no point in providing CMA benefits to retailers in its franchise territory because Pepsi has already taken the most desirable promotional dates. Louisa Coke further complains that the CMAs restrict the shelf space available for Coke products. This causes diminished shelf and storage space which means Coke drivers make more trips to deliver [**9] less product. This increases costs and decreases efficiency. Finally, Louisa Coke says it has to offer retailers lower prices than Pepsi in order to keep its products priced competitively by the retailer during the Pepsi promotions. Thus, it sells for less than which it is delivering inefficiently for more. Until the CMAs are eliminated in its territory, Louisa Coke complains it will not be able to compete effectively and that prices will remain artificially low.

2. Dealer Loaders

Dealer loaders are sales incentive contests and display programs implemented [*808] through written agreements with the retailers in which the bottlers award prizes to retailers who meet specific performance criteria like increased sales. The retailer is free to accept or reject these promotions. Those who do participate are free to do with the prize as they like. Most raffle them off to customers or employees. Like CMAs, dealer loaders are designed to increase sales volume which leads to lower retail prices. Dealer loaders are commonly offered nationwide by many product manufacturers including those outside the soft drink industry.

As with CMAs, Louisa Coke does not offer dealer loaders but Coke USA and [**10] all of the other Coke bottlers servicing the eastern Kentucky region do. For example, Coke USA gave SuperAmerica's racing team \$ 100,000 in exchange for its bottlers' exclusive right to market soft drinks for a one month period, two to one display space over Pepsi during the promotional period, "first position" on displays and cold ice barrel placements; and a lowered promotional margin to consumers. Louisa Coke benefitted from this dealer loader and Coke USA assessed Louisa Coke's proportionate share of the costs against a Louisa Coke marketing account funded by Coke USA. Other Coke USA dealer loaders funded from Louisa Coke's account include golf outings, trips to the beach, World Cup Soccer tickets; Final Four tickets; golf clubs, Disney World passes and NFL tickets. Because of the widespread use of these programs, all of the other regional Coke Bottlers agree that Pepsi-Metro would be placed at a serious competitive disadvantage if enjoined from participating.

Louisa Coke believes that dealer loaders are anticompetitive and that it would be a waste of time trying to compete with such against Pepsi given Pepsi's control over the market. Louisa Coke also believes there is more going [**11] on here. It claims Pepsi gives retail managers and employees gifts "under the table" and without the owners' knowledge in exchange for the best display and shelf space and even the elimination of Coke shelf and storage space. To support this claim, Louisa Coke submitted many affidavits most of which contain either irrelevant information or hearsay. Pepsi vehemently denies making any cash payments and claims any "gifts" it gave were promotional items exchanged pursuant to the written dealer loader incentive plans.

C. Prior Litigation

This is not Louisa Coke's first antitrust venture. In 1987, it sued Pepsi-Metro's predecessor, EKB, in an antitrust and state law unfair competition case. *Louisa Coca-Cola Bottling Co., v. East Kentucky Beverage Co.*, No. 87-240 (E.D.Ky.). That case challenged, among other things, EKB's use of CMA's, dealer loaders and secret payments.

The Court summarily dismissed the CMA issues but permitted Plaintiff's secret payment allegations to proceed. EKB settled the remaining claims before the case went to trial by paying Louisa Coke \$ 400,000.⁵

[**12] Before the settlement was finalized on the EKB suit, Britton asked Coke USA to fund another lawsuit against Pepsi.⁶ Coke USA declined this request.

In 1992, Britton informed Coke USA that he intended to sue Pepsi-Metro for unfair trade practices. He claimed Pepsi's illegal incentives to store managers "on the take" prevented him from obtaining a fair retail price and display space for his Coke products. Coke USA sent a team to Louisa Coke's territory to investigate these charges. The Coke team surveyed a dozen stores throughout Louisa Coke's territory before finding Britton's accusations unsubstantiated. The team reported to Coke USA its findings that Louisa Coke did not (1) provide its customers with regular merchandising on the weekends; (2) [*809] did not always receive a display for its featured promotions but the retailers indicated this was due to Coke's failure to keep its shelves stocked during the promotion; [**13] and (3) though Britton claimed Wal-Mart locked him out of business there, the store manager said he would like to have a Coke CMA but he had not heard from anyone at Coke in more than ten months. Ultimately, the Coke team concluded that Britton's competitive shortcomings were the product of his marketing methods and factors entirely in his control. The team recommended that Britton train his team better to combat his low sales level though this alone would not solve his problems. The team then concluded that Britton was competitive or fairly represented with regard to retail pricing and permanent display space -- his two biggest complaints.

D. Effect of Litigation on Parties

During the EKB case, the parties estimated that EKB had a 70% market share. The parties estimate that Pepsi-Metro's market share is the same as its predecessor. Thus, there has been no change in Pepsi's position whatsoever.

As for Louisa Coke, its business and profits have increased significantly since settling the EKB suit. Its sales volume is up at least 47.5%, gross profits are up 65.58%; and operating income has risen 336.5%. Plaintiff's expert says these increases are lower than that which he would [**14] expect in a competitive market, though, and attributes them to Plaintiff's low overhead.

E. Current Case

Plaintiff's current claims are as follows:

Counts I & XIII (contracts in restraint of trade): Pepsi-Metro has entered into contracts which provide certain rebates and discounts to preferred retailers in exchange for promises not to (1) sell Louisa Coke's products at a lower price than Pepsi; (2) offer Louisa Coke equal shelf space; and (3) display Louisa Coke's products. Such contracts constitute an unreasonable restraint on trade in violation of [15 U.S.C. § 1](#) and [W.Va. Code § 47-18-3](#).

Counts II & VI (price discrimination): Pepsi-Metro offers certain preferred retailers special rebates and discounts in an effort to monopolize the market in violation of [15 U.S.C. § 15](#); [KRS 365.020](#).

Count III (tying agreements): Pepsi-Metro denies retailers its Pepsi products unless they also agree Pepsi's snack foods and other products and also exclude Louisa Coke's products in violation of [15 U.S.C. § 14](#).

⁵ Interestingly, Britton put none of that \$ 400,000 into Louisa Coke. Rather, he divided this money amongst his family.

⁶ A copy of that letter is not in the record but Coke USA's response referencing this letter is.

Count IV & XI (monopolization): Pepsi-Metro has an 80% share of the soft drink market in Louisa [**15] Coke's territory which makes it a monopoly. It has maintained that monopoly power by (1) purchasing other brands such as 7-UP, Dr. Pepper, etc.; (2) buying certain fast food franchises; (3) entering contracts with retailers that discriminate in price; (4) offering certain select retailers special rebates in exchange for preferential treatment; (5) entering contracts which prohibit retailers from promoting, displaying, or giving equal pricing or shelf space to Louisa Coke's products; and (6) conditioning the sale of Pepsi products on the sale of other products such as snack foods as well. Maintenance of this monopoly through such anticompetitive acts violates [15 U.S.C. § 2](#) and [W.Va. Code 47-18-4](#).

Counts V & XII (attempted monopolization): Pepsi-Metro engaged in anti-competitive conduct for the sole purpose of controlling prices and/or output and/or destroying competition in violation of [15 U.S.C. § 2](#) and [W.Va. Code § 47-18-4](#).

Counts VII & X (secret rebates): Pepsi-Metro offers secret payments, gifts, allowances, rebates, refunds, commissions, discounts and incentive programs to certain retailers and store managers in violation of [**16] [KRS 365.050](#) and [W.Va. Code § 47-11a-9](#).

Count VIII (unlawful acts): Pepsi-Metro's unfair acts, contracts and monopolies violate [KRS 367.170](#) & [367.175](#).

[*810] Count IX (commercial bribery): Pepsi-Metro gives gifts, payments, and the like to retail employees without their employer's consent in order to influence the employee's conduct in ways contrary to the employer's interests. Such conduct violates Kentucky's commercial bribery statute, [KRS 518.020](#).

II. Summary Judgment Standard

HN1 Under [Rule 56 of the Federal Rules of Civil Procedure](#) the Court must view the evidence in the light most favorable to the nonmoving party, in this case the Plaintiff. Thus, when examining the record the Court will resolve doubts and construe inferences in favor of the Plaintiff in an effort to determine if any genuine issues of material fact exist. However, in a series of decisions commonly referred to as the "trilogy", [Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#); [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#); [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#), [**17] the U.S. Supreme Court emphasized that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." [Anderson, 477 U.S. at 252](#). In short, the "trilogy" requires the nonmoving party to produce specific factual evidence that a genuine issue of material fact exists.

The United States Court of Appeals for the Sixth Circuit has interpreted the "trilogy" to mean that **HN2** the nonmoving party must produce enough evidence, after having had a reasonable opportunity to conduct discovery, so as to withstand a directed verdict motion. [Street v. J.C. Bradford & Co., 886 F.2d 1472, 1477 \(6th Cir. 1989\)](#). As that Court stated, "the movant could challenge the opposing party to 'put up or shut up' on a critical issue...[and] if the respondent did not 'put up', summary judgment [is] proper." [Id. at 1478](#).

III. Pepsi-Metro's Motion for Summary Judgment on Plaintiff's Claims

A. Price Discrimination, Tying Agreements and Unlawful Acts

Plaintiff has stipulated to the dismissal of its price discrimination, tying [**18] agreement and unlawful acts claims as set forth in Counts II, III, VI and VIII. of its complaint. Accordingly, the Court shall grant summary judgment to the Defendant on these claims.

B. Commercial Bribery

Count IX accuses Pepsi-Metro of giving secret payments and gifts to various retail employees without their employers' consent in violation of Kentucky's Commercial Bribery Statute, [HN3](#)⁷ [KRS 518.020](#). As it pertains to this action, that statute makes it a crime to

Offer[], confer[], or agree[] to confer any benefit upon any employee ... without the consent of the latter's employer ... with intent to influence his conduct contrary to his employer's ... best interests.

Id. [HN4](#)⁷ Civil remedies for violations of this criminal statute are generally available through [KRS 446.070](#)⁷. *Big Rivers Electric Corp. v. Thorpe*, 921 F. Supp. 460, 462 (W.D. Ky. 1996). Plaintiff can only pursue this civil relief, however, if it has standing to assert such a claim. This means Louisa Coke must belong to that class of persons for whose benefit the Kentucky General Assembly passed the commercial bribery statute. See, [State Farm Mutual Automobile Ins. Co. v. Reeder](#), 763 S.W.2d 116, 118 (Ky. 1989); [\[**19\]](#) & [Hackney v. Fordson Coal Co.](#), 230 Ky. 362, 19 S.W.2d 989, 990 (Ky. 1929).

In considering the question of Louisa Coke's standing, the Court found the [\[*811\] Hackney](#) decision very helpful. Hackney was a small retailer who challenged a coal company's decision to pay its employees in scrip redeemable only at company stores. [230 Ky. 362, 19 S.W.2d 989](#). This decision cost the retailer a great deal of business because any employee redeeming the scrip outside the company store was subject to discharge. [19 S.W.2d at 990](#). The retailer argued that such conduct violated § 2738s1 which made it unlawful for any company to directly or indirectly require employees to purchase items at a company store or to punish employees who shop elsewhere. *Id.* The retailer further argued that [\[**20\]](#) it had standing to pursue these violations by the coal company pursuant to § 466, the equivalent of current KRS 466.070. *Id.* The trial court and appellate court both disagreed. *Id.* These courts noted that § 2738s1 was passed solely to protect employees from being coerced into trading at the employer's commissary where they might be subject to extortion and unfair dealing. *Id.* It did not intend to protect merchants competing with the company stores. *Id.* Thus, the courts concluded that the coal company employees had standing to contest the scrip but an outside retailer clearly did not. *Id.*

Though the *Hackney* decision is seventy years old, the Kentucky Supreme Court has cited it with approval as recently as 1989. [Reeder](#), 763 S.W.2d at 118. Applying it to the instant action, this Court can only conclude that Louisa Coke lacks standing to assert a commercial bribery claim in this case. The commercial bribery statute, on its face, seeks to protect employers from the manipulation of their employees in ways contrary to the employer's interests. [KRS 518.020\(a\)](#). Louisa Coke is a business competitor rather than an employer for purposes of this action. [\[**21\]](#) The retailers whose employees Pepsi allegedly bribed might have a cause of action but Pepsi's rivals, like those of the coal company stores, do not. Thus, Louisa Coke, though allegedly injured by Pepsi's conduct, does not have a cause of commercial bribery cause of action under [KRS 446.070](#) as it falls outside the class of persons the commercial bribery statute was intended to protect.

In rendering this decision, the Court considered but found Judge Coffman's decision in *Big Rivers Electric Corp. v. Thorpe*, 921 F. Supp. 460 (W.D.Ky. 1996) inapposite. Judge Coffman permitted utility rate payers to pursue commercial bribery claims against a coal company which entered into fraudulent coal contracts with an electric company who then passed the costs of those contracts on to distribution companies. The distribution companies, in turn, passed them on again to the ultimate utility rate payers in the form of higher utility bills. [Id. at 462](#). Though Judge Coffman declined to apply a "direct-purchaser" rule which would have limited [KRS 446.070](#)'s availability to persons directly injured by the alleged violators, [id. at 462](#), she did not address [\[**22\]](#) nor was she asked to address whether the General Assembly intended to protect anyone other than employers with its commercial bribery statute -- the issue in the instant action. Thus, *Big Rivers* has no application to this Court's conclusion that only employers and principals have standing to civilly pursue such violations under [KRS 446.070](#).

C. Secret Payments

⁷ [KRS 446.040](#) provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

Counts VII and X accuse Pepsi-Metro of giving retailers secret payments and gifts in violation of Kentucky and West Virginia's Unfair Trade Practice Acts.⁸ These Acts contain virtually identical language and prohibit:

The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services [*812] or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor, and where such payment or allowance tends to destroy competition, is an unfair trade practice, and no person shall resort to such trade practice.

HN5 [KRS 365.050](#); [W.Va. Code § 47-11a-3](#). **HN6** To succeed on these claims, Plaintiff must demonstrate (1) a secret payment, (2) made to the [**23](#) injury of a competitor, (3) which tends to destroy competition. [Jefferson Ice & Fuel Co. v. Grocers Ice & Cold Storage Co., 286 S.W.2d 80, 83 \(Ky. 1955\)](#). An actual intent to destroy competition does not matter. *Id.*

Defendant insists it made no secret payments. It says it prohibits its personnel from "taking cash to the street" and that this has not occurred to the best of its knowledge. Indeed, Pepsi-Metro obtained affidavits from all but one of the retailers Plaintiff originally identified as receiving illegal payments. Each affiant denied these secret payment allegations. While Pepsi and the retailers agree that "gifts" were exchanged, they state that such only occurred [**24](#) pursuant to formal, written dealer loader incentive plans which the retailers authorized.

Plaintiff has little if any evidence to contradict Pepsi-Metro's position. Indeed, Plaintiff's proof of a West Virginia violation is limited to the affidavit of Vernon Adkins.⁹ Adkins is the owner of a small family grocery store in West Virginia -- the only store originally identified by Plaintiff as receiving cash payments which has not since denied the allegation. Adkins averred that Pepsi personnel offered to buy Coca Cola's shelf space from him on two occasions but that he refused these offers. Adkins admitted that Pepsi continues to provide him with Pepsi products though at a less favorable price.

[**25](#) Though it is a fairly close call, the Court finds this scant evidence does not suffice to defeat summary judgment on Plaintiff's West Virginia Unfair Trade Practice claim. Assuming the offer was made, Adkins refused it. Thus, no secret payment occurred. Furthermore, there is no question that Pepsi continued to provide Adkins with Pepsi products after the offers were refused. Though Adkins does say Pepsi-Metro subsequently canceled his CMA, he does not say when this happened. Louisa Coke infers that Adkins began paying more for Pepsi some undefined time later because he refused this cash offer. Without more information, though, this is a leap that neither this Court nor any reasonable juror could make. This is particularly so here given the overwhelming evidence from every other retailer Plaintiff identified that such secret gifts did not occur.

As for a Kentucky violation, Plaintiff's proof is limited to the affidavits of Steven Banks, Lisa Burke, and Peggy Wallace.¹⁰ Banks and Burke are employees of local SuperAmerica stores who claim their district manager, James

⁸ Count VII specifically asserts violations of [KRS 365.050](#) and relief for such through [KRS 365.070](#). Count XI alleges that the same conduct also violated W.Va. law though no specific statute is mentioned. Plaintiff demands relief through [W.Va.Code 47-11a-9](#) but is apparently asserting a violation of [W.Va.Code § 47-11a-3](#).

⁹ Plaintiff also presented affidavits from its drivers who claim various retail personnel told them they had received cash payments from Pepsi-Metro. Plaintiff did not produce any affidavits or testimony from these retailers. Those statements, as presented to the Court, are hearsay. Since [Fed.R.Civ.P. 56\(e\)](#) requires that supporting affidavits be based on personal knowledge and set forth facts as would be admissible in evidence, the Court shall not consider these drivers' affidavits to the extent they offer inadmissible hearsay evidence.

¹⁰ Plaintiff also presented an affidavit from Junior Curtis, the manager of a Foodland Grocery Store in Louisa, Kentucky, who states that Pepsi paid Foodland a "special fee" for more shelf space. Curtis does not say when this occurred or how he knows this to be true. Contrary to Plaintiff's original allegations, Curtis does not say Pepsi paid him personally anything or that he witnessed such a transaction with anyone else. Indeed, the owner of that same Foodland denies receiving any such fee. Because the Court cannot determine whether Curtis' statements are based on personal knowledge or hearsay, the Court cannot

Mills, received camping equipment and other valuable merchandise from Pepsi. They [*813] also claim that Mills gives Pepsi [**26] very favorable treatment. Mills denied any wrongdoing and insists any gifts he received were issued pursuant to an authorized dealer loader program. He further insists his favorable treatment of Pepsi was motivated by legitimate business concerns. Burke and Banks offer no opinion or evidence to contradict this. Thus, the Kentucky claim rests entirely on Peggy Wallace's affidavit.

[**27] Wallace claims she and her manager received gifts from the Pepsi driver. Wallace says she told the driver she could not receive such items and that he then began leaving them in her car. Pepsi has provided affidavits indicating that it gave all of the gifts Wallace mentioned pursuant to formal, written dealer loaders with Wallace's employer. Though the Pepsi driver's "covert" conduct in delivering these gifts is suspicious, neither Wallace nor anyone else denies that this is true. More importantly, Wallace does not claim that she or her manager had any authority to effect how her employer treated Coke or Pepsi. Because there is no evidence that any gift to Wallace was likely to destroy competition, Plaintiff's Kentucky Unfair Trade Practice Claim fails as well.

D. Antitrust Claims

Counts I, IV, V, XI, XII, and XIII accuse Pepsi-Metro of various West Virginia and federal antitrust law violations including monopolization, attempted monopolization, and entering into unlawful contracts in restraint of trade. West Virginia construes its state antitrust laws in conformity with its parallel federal counterparts. [Gray v. Marshall Cty. Bd. of Educ., 179 W. Va. 282, 367 S.E.2d 751 \(W.Va. 1988\)](#); [**28] [W.Va. Code § 47-18-16](#). Accordingly, the Court shall consider the state and federal antitrust claims together.

1. Antitrust Injury

HN7 Before Plaintiff can succeed on any antitrust claim, it must first demonstrate an antitrust injury as opposed to a mere economic injury. [Campus Ctr. Discount Den v. Univ. of Miami, 1997 U.S. App. LEXIS 12017, 1997-1 Trade Cas. \(CCH\) P71,826 \(6th Cir. 1997\)](#). Actionable antitrust injury is an injury to competition rather than just competitors. [Valley Prods. Co. v. Landmark, 128 F.3d 398, 402 \(6th Cir. 1997\)](#). It requires proof "(1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the Defendant's actions." [Tennesseean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 88 \(6th Cir. 1989\)](#) quoting Areeda & Hovenkamp, Antitrust Law P 334.1b at 299 (1988 Supp.). The Court does not believe Plaintiff has met this burden.

Plaintiff does not argue that all dealer loaders and CMA programs are anticompetitive. Indeed, there is no evidence to support such a position. These are formal, [**29] written programs which retailers are free to accept, reject, or cancel at any time. Pepsi, Coke USA, and every other Coke bottler agree that these programs are valuable, pro-competitive tools which increase sales volume and decrease consumer costs. This position is bolstered by the fact that Plaintiff derives almost half of its sales from these programs in what it describes as a monopolized, locked market. It is further bolstered by the fact that Plaintiff does not seek to enjoin Coke USA or any other bottler from participating in the same. Rather, Plaintiff argues that only Pepsi-Metro should be so enjoined because it already has enough of a market share in Louisa Coke's franchise territory.

Plaintiff's complaint, reduced to its most basic terms, is that it cannot charge more for its products. Louisa Coke claims Pepsi's alleged exclusionary practices have artificially deflated consumer soft drink prices in Louisa Coke's market. Louisa Coke currently competes with Pepsi by cutting its wholesale price. Apparently, Louis Coke cannot raise its wholesale prices and remain competitive under current circumstances. Though Louisa Coke has operated at a significant profit in this [*814] deflated [**30] market, it believes it could increase its profit margins even more if Pepsi's current competitive practices were enjoined because it could sell its products at a higher price. There is apparently no question that consumer prices would rise if the Court were to grant the relief Plaintiff seeks.

Though the parties agree that current prices are unusually low, there is no complaint of predatory pricing here. [HN8](#)[¹] Low prices which remain above predatory levels do not constitute an antitrust injury because they benefit consumers regardless of how they are set. [*Atlantic Richfield Co. \(ARCO\) v. USA Petroleum Co.*, 495 U.S. 328, 338, 110 S. Ct. 1884, 1892, 109 L. Ed. 2d 333 \(1990\)](#). The whole purpose behind the antitrust laws is to protect consumer interests. *Id.* That the low prices may be "ruinous" to one or more competitors, then, does not matter. [*Id. at 337 n. 7*](#). Furthermore, it is not for Courts to decide whether the competition that produces these low prices is good or bad. *Id.* As explained by the Supreme Court,

[HN9](#)[¹] when a firm or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the [**31] business lost by rivals cannot be viewed as an "anticompetitive" consequence of the claimed violation. A firm complaining about the harm it suffers "is really claiming that it [is] unable to raise prices." *Blair v. Harrison, Rethinking Antitrust Injury*, [*42 Vand.L.Rev. 1539, 1554 \(1989\)*](#). This is not antitrust injury; indeed, "cutting prices in order to increase business often is the very essence of competition." [*Matsushita, supra, at 594, 106 S. Ct. at 1359*](#). The antitrust laws were enacted for "the protection of competition, not competitors." [*Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 \(1962\)](#) (emphasis in original). To hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share."

[*Id. at 337-38.*](#)

Plaintiff, of course, insists there is more than low prices at stake here. It claims the low prices are simply a by-product of its inability to obtain adequate shelf, storage and display space -- the real injury in this case. [**32] Because it has less retail space to work with, Louisa Coke says it is forced to operate inefficiently. Its drivers must make more trips to fill less shelf space which costs more. Thus, Louisa Coke is selling for less than which costs more. Louisa Coke argues that it is entitled to more shelf space under the antitrust laws because such would balance the parties' positions with customers.

Plaintiff offers nothing other than its own projected lost profits to prove that Pepsi's actions have foreclosed a substantial share of the soft drink market. [HN10](#)[¹] A single competitor's lost profits does not demonstrate a market wide competitive detriment. [*Baum Research and Development Co., Inc. v. Hillerich & Bradsby Co., Inc.*, 31 F. Supp. 2d 1016, 1021 \(E.D. Mich. 1998\)](#). Louisa Coke apparently expects the Court to assume that the many fringe brands which control 20% of the market have suffered a similar fate. This is an assumption the Court cannot make. Even if the assumption were made, though, it would not save Plaintiff's case.

There is probably no question that Pepsi's promotions influence retailers to give more space to Pepsi products. When Pepsi gets more space, others will obviously [**33] get less. There is no evidence, however, that Pepsi can control that retailers' decisions or has the power to exclude its rivals' products outright. Rather, all of the evidence indicates that the store owners within the Louisa Coke market allot shelf, storage and display space at their sole discretion based on such factors as the market's demand for a product and the supplier's ability to keep such products in stock. Common sense dictates that retailers will give more space to those [*815] products which are more popular with consumers and available for sale. See, e.g., [*Bayou Bottling, Inc. v. Dr. Pepper Co.*, 543 F. Supp. 1255 \(W.D. La. 1982\)](#) aff'd [*725 F.2d 300 \(5th Cir. 1984\)*](#). Pepsi's uncontraverted evidence indicates that it is superior within Louisa Coke's territory in both respects. Not only are Pepsi products more popular among consumers, Pepsi presented ample evidence that Louisa Coke has an inadequate service record franchise-wide.¹¹

¹¹ Affidavits from 15 large, important customers indicate that they denied Coke more shelf space because they could not count on having enough Coke products to sell. They say they often ran out of Coke products because Louisa Coke did not keep its shelves fully stocked and was slow to respond, if it responded at all, to their requests for additional products. While Pepsi drivers made deliveries several times a day including weekends, stocked the shelves themselves and set up their own displays and advertising, Louisa Coke only came once or twice a week, often left the products on the floor, and never brought any signs or

Indeed, Coke USA's own investigation confirmed that Louisa Coke was fairly represented among its retailers given its operational shortcomings.

[**34] To refute Pepsi's evidence, Louisa Coke offered neither claim nor evidence that Pepsi's allotted shelf space is inconsistent with its market share. Nor did it provide any proof that either it or any other soft drink competitor received less retail shelf space than either market demand or their service history justified. Under these circumstances, this Court has no business in engaging in "affirmative action" among retail outlets by telling retailers to give Coke and Pepsi equal retail space. *Id.* The Court would be protecting a competitor rather than competition if it were to do so. *Id.* Since Louisa Coke has failed to justify its demand for more retail space, it has failed to state an antitrust injury premised upon the same. See, [Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 304 \(5th Cir. 1984\)](#) (suggestion that bottler was entitled to more shelf space than market share justified did not state an antitrust injury).

As a final thought, the Court notes that Louisa Coke's complaint seems to be of too much competition rather than anticompetitive conduct. Louisa Coke does not want to compete as vigorously as its opponents. Its owner, Harold Britton, simply [**35] refuses to compete at that level. Its pessimism that its efforts would be fruitless is no excuse for its refusal to try. [Out Front Productions, Inc. v. Magid, 748 F.2d 166 \(3rd Cir. 1984\)](#). Rather than rise to the challenges set by its chief rival, it asks the Court to restrain that rival from competing. This is something the Court cannot and will not do. Louisa Coke may indeed be a David facing a Goliath but the law affords it no special favor in meeting its foe in battle. For even monopolists have a right to engage in vigorous competition. [Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 304 \(5th Cir. 1984\)](#). HN11[] Dominant firms can lawfully try to drive out their inefficient rivals through above cost price cuts even if they intend to raise prices later once the competition is eliminated. [Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 527 \(1st Cir. 1989\)](#). The Court can find no antitrust injury in practices that are themselves competitive regardless of whether the practices were enabled by antitrust violations. [Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1418 \(7th Cir. 1989\); Bayou Bottling, Inc., v. Dr. Pepper Co., 543 F. Supp. 1255, 1269 \(W.D. La. 1982\)](#) [**36] aff'd [725 F.2d 300 \(5th Cir. 1984\)](#). For all of the foregoing reasons, then, Defendants are therefore entitled to summary judgment on Counts I, IV, V, XI, XII and XIII of Plaintiff's complaint.

2. Contracts in restraint of trade

Even if Plaintiff had stated an actionable antitrust injury, counts I and XIII would still fail. These claims allege that Pepsi violated [15 U.S.C. § 1](#) and [W.Va. \[**816\] Code § 47-18-3](#) by entering into unlawful contracts in restraint of trade. Specifically, Plaintiff claims Pepsi-Metro offered certain preferred retailers contracts with "discounts" and "advertising subsidies or rebates" in exchange for the retailers' promises not to sell Louisa Coke's products at prices lower than Pepsi or to advertise, promote, display or offer shelf space for Louisa Coke products.

Louisa Coke's allegations apparently refer to the CMAs. The Court has carefully considered Pepsi's CMAs and finds nothing illicit in them. Just as it found in the challenge to EKB's CMAs, the Court finds Pepsi-Metro's "practices of using calendar marketing agreements and discounting to obtain secondary displays would appear to be similar to the practices upheld [**37] in other cases." *Louisa Coca-Cola Bottling Co. v. East Kentucky Beverage Co., Inc.*, Lex. Civ. No. 87-240, Memorandum Opinion & Order of April 19, 1999 at P.11; [AAA Liquors, Inc. v. Joseph E. Seagram & Sons, 705 F.2d 1203, 1206 \(10th Cir. 1982\)](#), cert. denied, 461 U.S. 919, 77 L. Ed. 2d 290, 103 S. Ct. 1903 (1983); & [Beverage Management Inc v. Coca-Cola Bottling Corp., 653 F. Supp. 1144, 1146 \(S.D. Ohio 1986\)](#).

As an additional problem with Plaintiff's case, Plaintiff failed to show that Pepsi-Metro's use of CMAs "foreclose[s] competition in a substantial share of the line of commerce affected", [Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 \(1960\)](#), as assessed under a "rule of reason". [Omega Envt'l, Inc. v.](#)

advertising. At least one customer reported that he ejected a Coke driver from his store because the driver's appearance was "nasty, unpresentable and repulsive to customers". Another customer banned Louisa Coke from its store for some time after a Coke driver punched the manager in the face.

Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997), cert denied, 525 U.S. 812, 119 S. Ct. 46, 142 L. Ed. 2d 36 (1998). Retailers are free to accept or reject Pepsi-metro's CMAs, can enter into more than one, and will suffer only a loss of the discount if they opt not to comply. The CMAs typically last one year or less and can be terminated [**38] any time by either party. Their short duration and easy terminability substantially negate their potential for foreclosing competition. *Id.* While Louisa Coke complains that Pepsi's CMAs have secured the best promotional opportunities, it presumably need offer only a more attractive CMA package to get the retailer to terminate Pepsi-Metro's CMA in favor of a Coke CMA. See, Omega, 127 F.3d at 1164. The fact that it does not want to offer such packages is of no concern to the Court. The Court would be hard pressed to find Louisa Coke foreclosed from the market when it can still reach the ultimate consumers by "employing existing or potential alternative channels of distribution" if it so chose. *Id. at 1163*.

Finally, the Court cannot find market closure when "fringe" brands like "Ale-8-One", "Jolt Cola", and "7-UP", which presumably lack the backing of a worldwide conglomerate of Coke USA's or Pepsi's magnitude, can still capture a combined 23% market share. Furthermore, other, stronger Coke bottlers are apparently waiting on the sidelines should Louisa Coke fold. Louisa Coke, a single competitor, may face market foreclosure in its territory but there [**39] is no evidence that competition as a whole or even coke products, themselves, risk elimination from the Louisa Coke franchise territory. Without such evidence, Plaintiff's claims fail.

III. Pepsi-Metro's Counterclaims

Pepsi-Metro also seeks partial summary judgment on Counts II and III of its counterclaims. These counts accuse Louisa Coke of defaming Pepsi-Metro and filing frivolous lawsuits in attempt to stifle competition. Louisa Coke, of course, insists the allegedly defamatory statements it made were true and that its litigation efforts have been legitimate even if unsuccessful. The Court finds there are genuine issues of material fact with respect to each claim. Accordingly, Defendant's motion for summary judgment shall be overruled.

In passing, the Court notes it's skepticism that Pepsi-Metro is pursuing a legitimate grievance through its counterclaims. The Court believes these counterclaims are just "fluff" filed in retaliation for Louisa Coke's lawsuit. Nevertheless, the Court is not in a position to resolve these [*817] counterclaims at this point. Their merit is something a jury will have to decide.

IV. Conclusion

For all of the foregoing reasons, **IT [**40] IS HEREBY ORDERED AND ADJUDGED:**

- (1) that Defendant's motion for summary judgment on Plaintiff's claims is **GRANTED**;
- (2) that Defendant's motion for partial summary judgment on Counts II and III of its counterclaims is **DENIED**;
- (3) that Plaintiff's complaint is **DISMISSED WITH PREJUDICE**; and
- (4) that Defendant's counterclaims shall come on for trial on Tuesday, **SEPTEMBER 7, 1999**, at 9:00 a.m. in **COURTROOM A** at the U.S. Courthouse, **ASHLAND, KENTUCKY**.

This 11 day of June, 1999.

Henry R. Wilhoit, Jr., Chief Judge

Endsley v. City of Chicago

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

June 16, 1999, Decided ; June 18, 1999, Docketed

Case Number: 98 C 8094

Reporter

1999 U.S. Dist. LEXIS 9481 *; 1999-2 Trade Cas. (CCH) P72,602

ROY L. ENDSLEY, III and STEPHEN GRAHAM, individually and on behalf of those similarly situated, Plaintiffs, v. THE CITY OF CHICAGO, a municipal corporation, Defendant.

Disposition: [*1] Class certification denied and the claims of the putative class dismissed without prejudice. Defendant's motion to dismiss [3-1] granted and defendant's motion to stay Count IV [3-2] denied as moot. Judgment entered in favor of the defendant, The City of Chicago and against the plaintiffs' Roy L. Endsley, III, et al.: dismissing individual plaintiffs' federal cause of action with prejudice; dismissing individual plaintiffs' state law cause of action without prejudice; and dismissing the claims of the putative class without prejudice.

Core Terms

tolls, plaintiffs', Bonds, cause of action, Interstate, Route, market participant, private right of action, defendant argues, funds, relevant market, Sherman Act, transportation, allegations, proprietary, transportation improvement, provisions, violations, purposes, bridges, private right, finance, travel

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

[HN1](#) [down arrow] **Defenses, Demurrsers & Objections, Motions to Dismiss**

On a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss, a plaintiff's well-pleaded allegations of fact are taken as true and all reasonable inferences are drawn in the plaintiff's favor. A complaint need not set forth all relevant facts or recite the law; all that is required is a short and plain statement showing that the party is entitled to relief. [Fed. R. Civ. P. 8\(a\)](#). A plaintiff in a suit in federal court need not plead facts; conclusions may be pleaded as long as the defendant has at least minimal notice of the claim. [Fed. R. Civ. P. 8\(a\)\(2\)](#). It is unnecessary to specifically identify the legal basis for a claim. A party can plead him or herself out of court by alleging facts showing he or she has no viable claim.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

[HN2](#) [down arrow] **Defenses, Demurrsers & Objections, Motions to Dismiss**

As long as they are consistent with the allegations of the complaint, a plaintiff may assert additional facts in his or her response to a motion to dismiss. Although the complaint itself need not specifically or correctly identify the legal basis for any claim, in response to a motion to dismiss that raises issues as to a claim, the plaintiff must identify the legal basis for the claim and make adequate legal arguments in support of it.

Governments > Public Improvements > Financing

Transportation Law > Bridges & Roads > Toll Bridges

HN3  **Public Improvements, Financing**

See [23 U.S.C.S. § 301](#).

Governments > Public Improvements > Financing

HN4  **Public Improvements, Financing**

See [23 U.S.C.S. § 129\(a\)\(1\)](#).

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

HN5  **Justiciability, Standing**

It must be a "provision in question," not the undifferentiated whole of a federal act that gives rise to a plaintiff's right to sue.

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

Governments > Federal Government > Claims By & Against

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN6  **Justiciability, Standing**

Four factors that courts should consider in determining whether an implied cause of action exists are: whether a plaintiff is a member of the class for whose benefit the statute was enacted; whether there is any indication of legislative intent to create or deny such a remedy; whether an implied remedy is consistent with the underlying purposes of the statutory scheme; and whether the cause of action is one traditionally relegated to the state so that it would be inappropriate to infer a federal remedy. *Id.* Where inferences of Congressional intent to create a private right of action are not present, it must be adduced that a private remedy does not exist. A plaintiff must assert the violation of a federal right, not merely a violation of federal law.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

[Sherman Act, Claims](#)

To make out a claim under the Sherman Act, [15 U.S.C.S. § 1](#) for unreasonable restraint of trade, a party must show a contract combination, or conspiracy, a resultant unreasonable restraint of trade in the relevant market, and an accompanying injury. To satisfy the first element of [15 U.S.C.S. § 1](#) claim a party must establish concerted efforts between at least two legally distinct entities.

Antitrust & Trade Law > Sherman Act > General Overview

[Antitrust & Trade Law, Sherman Act](#)

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

[Antitrust & Trade Law, Sherman Act](#)

See [15 U.S.C.S. § 2](#).

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

Mergers & Acquisitions Law > Antitrust > General Overview

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

[Monopolies & Monopolization, Actual Monopolization](#)

To prove monopolization, a plaintiff must show the possession of monopoly power in the relevant market, the willful acquisition or maintenance of the power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. A plaintiff must allege and define the relevant market in which the defendant has the power to control prices or exclude competitors. A relevant market is comprised of those commodities reasonably interchangeable by consumers for the same purposes. In making this determination, a court must decide whether the product is unique or has close substitutes, as to which there are substantial cross-elasticities of demand.

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

[Pleadings, Rule Application & Interpretation](#)

A plaintiff can plead himself out of court by alleging facts which if true would legally preclude a claim.

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss

[Defenses, Demurrs & Objections, Motions to Dismiss](#)

A plaintiff's complaint should not be dismissed merely because it includes invalid claims along with a valid one.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Market Participant Doctrine

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

HN13 [blue icon] **Congressional Duties & Powers, Commerce Clause**

The *Commerce Clause* restricts state and local taxes or regulatory measures that impede free trade in the national marketplace. A state may not regulate in a way that favors its own citizens at the economic disadvantage of citizens of other states. There is an exception to this general rule. The market participant exception. For *Commerce Clause* purposes, a basic distinction exists between states as market participants and states as market regulators. If a state is acting as a market participant, rather than a market regulator, the *Commerce Clause* does not limit its activities. Both state and local governments can be market participants. A government acts as a market participant when it operates in a proprietary capacity as a party to the transaction, charging others for the uses of its services, facilities or products. A government is a market regulator if it imposes conditions that have a substantial regulatory effect outside of that particular market.

Counsel: For ROY L ENDSLEY, III, STEPHEN GRAHAM, plaintiffs: Arthur Mark Lalongo, Lalongo & Meyer, James G. Meyer, Attorney at Law, Lee J. Schwartz, Attorney, Chicago, IL.

For CITY OF CHICAGO, THE, defendant: Weston Wayne Hanscom, Karen M. Dorff, City of Chicago, Department of Law, Chicago, IL.

Judges: William T. Hart, UNITED STATES DISTRICT JUDGE.

Opinion by: William T. Hart

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiffs Roy Endsley and Stephen Graham bring this action against defendant City of Chicago to contest the City's alleged 1996 decision to use tolls collected on a portion of Interstate Route 90 as a source of general revenue to pay for other [*2] city transportation expenses. Plaintiffs seek injunctive relief to reduce the toll rates and to prevent the diversion of toll revenue to fund other transportation projects.¹ Plaintiffs label Count I as violations of [23 U.S.C. § 129](#); Count II as violations of the Sherman Act, [15 U.S.C. §§ 1 and 2](#); and Count III as violations of the [Interstate Commerce Clause of the United States Constitution](#). Count IV alleges violations of Illinois law. Presently before the court is defendant's [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss Counts I through III and its motion to stay Count IV.

¹ Plaintiffs denominate their complaint as a class action. However, neither party has sought certification of the class. Since class certification has not been promptly sought by either plaintiffs or defendant, class certification will be denied. See [Mira v. Nuclear Measurements Corp., 107 F.3d 466, 474-75 \(7th Cir. 1997\)](#) (class certification should be decided early in a case before any rulings on dispositive motions). The class allegations are dismissed without prejudice because the parties have failed to promptly pursue certification. See [Anderson v. Cornejo, 1999 U.S. Dist. LEXIS 519, 1999 WL 35307](#), at *1 (N.D. Ill. Jan. 11, 1999).

[*3] STANDARD OF REVIEW

HN1 [↑] On a [Rule 12\(b\)\(6\)](#) motion to dismiss, a plaintiff's well-pleaded allegations of fact are taken as true and all reasonable inferences are drawn in the plaintiff's favor. See [Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163, 164-65, 122 L. Ed. 2d 517, 113 S. Ct. 1160 \(1993\)](#); [Swofford v. Mandrell, 969 F.2d 547, 549 \(7th Cir. 1992\)](#). A complaint need not set forth all relevant facts or recite the law; all that is required is a short and plain statement showing that the party is entitled to relief. [Fed. R. Civ. P. 8\(a\)](#); [Doherty v. City of Chicago, 75 F.3d 318, 322 \(7th Cir. 1996\)](#). A plaintiff in a suit in federal court need not plead facts; conclusions may be pleaded as long as the defendant has at least minimal notice of the claim. [Fed. R. Civ. P. 8\(a\)\(2\)](#); [Albiero v. City of Kankakee, 122 F.3d 417, 419 \(7th Cir. 1997\)](#). It is unnecessary to specifically identify the legal basis for a claim. *Id.* It is also true, however, that a party can plead him or herself out of court by alleging facts showing he or she has no viable claim. See [Tregenza v. Great American Communications Co., 12 F.3d 717, 718 \(7th Cir. 1993\)](#); [Early v. Bankers Life & Casualty Co., 959 F.2d 75, 79 \(7th Cir. 1992\)](#). Further, **HN2** [↑] as long as they are consistent with the allegations of the complaint, a plaintiff may assert additional facts in his or her response to a motion to dismiss. [Albiero, 122 F.3d at 419](#); [Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1428 \(7th Cir. 1996\)](#); [Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 439-40 \(7th Cir. 1994\)](#). Although the complaint itself need not specifically or correctly identify the legal basis for any claim, in response to a motion to dismiss that raises issues as to a claim, the plaintiff must identify the legal basis for the claim and make adequate legal arguments in support of it. [Stransky v. Cummins Engine Co., 51 F.3d 1329, 1335 \(7th Cir. 1995\)](#); [Carpenter v. City of Northlake, 948 F. Supp. 759, 765 \(N.D. Ill. 1996\)](#).

FACTS

According to the complaint, which must be taken as true, the facts are as follows. Defendant maintains and controls the Chicago Skyway Toll Bridge System (the "Skyway") which is a part of the Interstate Highway System. The Skyway is a toll bridge which forms approximately 7.8 miles of Interstate Route 90 extending between [*5] the terminus of the Indiana Tollway at the Indiana-Illinois border and the Dan Ryan Expressway, Interstate Route 90/94, in Chicago, Illinois.

The City of Chicago constructed the Skyway in the late 1950's and financed the construction with revenue bonds (the "Original Skyway Bond Issue"). The City continues to operate and maintain the Skyway. Currently, the costs of operating the Skyway are paid solely by vehicle tolls and concessions charged to Skyway users; costs are not supported by City revenues.

The Original Skyway Bond Issue, which paid for initial construction, was refinanced through a series of refunding bonds issued in 1994 (the "Series 1994 Bonds"). The tolls charged on the Skyway have increased several times over the years, largely pursuant to federal court orders in a case brought by bond-holders. The Skyway toll was increased to generate revenue to pay the costs of its operation and maintenance, including debt service on the bonds, and to make the Skyway self-sufficient. These toll increases coupled with increased traffic have resulted in revenues in excess of the total expenses of the Skyway, including debt service.

In 1996, the City issued another series of bonds to [*6] refinance the Series 1994 Bonds (the "Series 1996 Bonds"). The sale of the Series 1996 Bonds, in addition to providing funds to repay the aggregate principal of the outstanding Series 1994 Bonds, also provided \$ 52,000,000 to be used for non-Skyway purposes, other transportation related capital projects of the City deemed "City Transportation Improvements."

Plaintiffs' complaint arises from the City's issuance of the Series 1996 bonds repayable from revenues generated by the Skyway tolls. The sole source of revenue pledged by the City for repayment of the Series 1996 Bonds, including the City Transportation Improvements, are tolls and concessions paid by travelers on the Skyway.

Plaintiffs pay tolls to drive on the Skyway and object to the use of toll revenue to repay bonds, the proceeds of which were used, in part, to finance improvements to parts of the City's transportation system other than the

Skyway. Plaintiffs further object to any future use of Skyway toll revenues to pay for additional non-Skyway transportation improvements. It is plaintiffs' position that the City's decision to finance the City Transportation Improvements from toll revenues charged to Skyway travelers improperly [*7] increases the costs of interstate travel.

DISCUSSION

Count I

Plaintiffs allege that the Skyway is a part of the National Highway System as defined in [23 U.S.C. § 129](#), and as such is subject to the provisions of Title 23. Plaintiffs claim that the City's use of Skyway toll revenues violates Title 23 because the revenues are being used for purposes other than financing the costs of construction, operation, reconstruction, resurfacing, restoration, or rehabilitation of the toll facility.

Defendant argues that Count I fails to state any claim under [23 U.S.C. § 129\(a\)\(3\)](#) because the federal funds received by the Skyway were not subject to the provisions of that section. Defendant argues [§ 129\(a\)\(3\)](#) is inapplicable for two reasons: (1) federal funding was authorized pursuant to the Intermodal Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. 102-240, § 1106(b), 105 Stat. 1914; and (2) federal funds were not devoted to initial construction but rather were used for reconstruction, resurfacing, restoring, and rehabilitating the Skyway or ("4R work"). In the alternative, defendant argues that plaintiffs have no right to enforce compliance with the provisions of [§ 129\(a\)\(3\)](#) should it apply.

Whether [§ 129](#) grants plaintiffs a private right of action to enforce compliance with its provisions will be determined first. There are no published opinions that have decided whether a private right of action exists under [§ 129\(a\)\(3\)](#). However, in [Clallam v. Department of Transportation](#), 849 F.2d 424, 427 (9th Cir. 1988), the court recognized a private right of action to enforce a different portion of [23 U.S.C. § 301](#).² It is plaintiffs' position that *Clallam* dictates that a private right of action must be recognized for [§ 129](#).³ [9] Defendant argues that nothing in [§ 129](#) or §

² [HN3](#)[] [Section 301](#) provides, in pertinent part:

Except as provided in [section 129](#) of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds.

³ [HN4](#)[] [Section 129\(a\)\(1\)](#) authorizes federal participation in toll highway projects, providing in pertinent part:

Notwithstanding [section 301](#) of this title and subject to the provisions of this section, the Secretary shall permit Federal participation in--

* * *

(B) reconstructing, resurfacing, restoring, and rehabilitating a toll highway, bridge, or tunnel . . . or approach thereto;

[Section 129\(a\)\(3\)](#) places limitations on the use of revenues from toll highway projects, providing in pertinent part:

Before the Secretary may permit Federal participation under this subsection in construction of a highway, bridge, or tunnel located in a State, the public authority (including the State transportation department), having jurisdiction over the highway, bridge, or tunnel must enter into an agreement with the Secretary which provides that all toll revenues received from operation of the toll facility will be used first for debt service, for reasonable return on investment of any private person financing the project, and for the costs necessary for the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation. If the State certifies annually that the tolled facility is being adequately maintained, the State may use any toll revenues in excess amounts required under the preceding sentence for any purpose for which Federal funds may be obligated by a State under this title.

1106(b) indicates that Congress intended private persons to be able to enforce the obligations imposed in those sections.⁴

In *Clallam*, the court held that [42 U.S.C. § 1983](#) provided an express right of action to enforce [§ 301](#). [Section 301](#) is a general prohibition on federal funding of toll facilities because "users of federally funded bridges have an obvious financial interest in toll free bridges and are the primary beneficiaries of [Section 301](#)." *Id.* at 428. The *Clallam* plaintiffs argued that they were entitled to be free from tolls under the general proscription of [§ 301](#). [Section 129\(a\)](#) creates an exception to [§ 301](#) and can be raised as a defense to an action claiming a violation of [§ 301](#). In the *Clallam* court's view, [§ 301](#) provided the "predicate right, if any, giving rise to an action under [section 1983](#)." *Id.* at 428. *Clallam* is silent as to whether [Section 129](#) either confers or gives rise to any enforceable private rights. Plaintiffs here are not claiming any rights that arise from [§ 1*101 301](#), rather plaintiffs' claim is based on [§ 129](#).

Plaintiffs cannot point to [§ 301](#) and expect that all of Title 23 similarly creates private enforcement rights. Indeed, [HN5](#) it must be the "provision in question," not the undifferentiated whole of a federal act that gives rise to a plaintiff's right to sue. See *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353, 1362, 137 L. Ed. 2d 569 (1997). Thus, because a private right of action is not apparent in either [§ 129](#) or § 1106, whether an implied cause of action exists under the statute must be considered.

In *Cort v. Ash*, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975), the Supreme Court identified [HN6](#) four factors that courts should consider in determining whether an implied cause of action exists: (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny such a remedy; (3) whether an implied remedy is consistent with the underlying purposes of the statutory scheme; and (4) whether the cause of action is one traditionally relegated to the state so that it would be inappropriate to infer a federal remedy. *Id.*

In recent years, the Supreme Court [*11] has focused primarily on the second factor, legislative intent. See *Suter v. Artist M*, 503 U.S. 347, 364, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992) ("The most important inquiry here . . . is whether Congress intended to create the private right sought by the plaintiffs"); *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 532, 103 L. Ed. 2d 539, 109 S. Ct. 1282 (1989) ("The 'ultimate issue is whether Congress intended to create a private cause of action'"); *Thompson v. Thompson*, 484 U.S. 174, 189, 98 L. Ed. 2d 512, 108 S. Ct. 513 (1988) ("In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute"); see also *Mallett v. Wisconsin Div. of Vocational Rehabilitation*, 130 F.3d 1245, 1249 (7th Cir. 1997) (collecting cases).

Thus, the primary inquiry is whether Congress intended an implied right of action under [§ 129\(a\)\(3\)](#) and/or § 1106(b) given the language, structure, and legislative history. Where inferences of Congressional intent to create a private right of action are not present, it must be adduced that a private remedy does not exist. See *Mallett*, 130 F.3d at 1249; *Statland* [*12] v. *American Airlines, Inc.*, 998 F.2d 539, 540 (7th Cir. 1993) ("courts seldom imply a private right of action where none appears in the statute, for a 'strong presumption exists against their creation'"). Moreover, a plaintiff must assert the violation of a federal right, not merely a violation of federal law. *Blessing*, 117 S. Ct. at 1362.

Plaintiff has not identified any portion of the legislative history to support the existence of a private right to enforce the sections in question, nor has this court's own examination revealed any. Nothing in the language, structure or legislative history of the provisions suggests that either provision confers a federal right to plaintiffs.

Defendant characterizes the two sections as being parts of a "massive funding statute," that is "phrased as a general directive to a federal agency engaged in the disbursement of public funds, its language provides no support for the implication of a private remedy." It is defendant's position that there is no private right created. See *Lloyd v. Illinois Regional Transportation Authority*, 548 F. Supp. 575, 585 (N.D. Ill. 1982) (the Supreme Court has noted that

⁴ Section 1106(b) was enacted to provide funds for projects that enhance urban access and urban mobility. The Section lists the dollar amounts allocated for 76 different projects across the nation.

there "would be far less reason to [*13] infer a private remedy in favor of individual persons" where Congress, rather than drafting the legislation "with an unmistakable focus on the benefitted class", instead has framed the statute simply as a general prohibition or a command to a federal agency).

Defendant relies on [*Wallace v. City of Rock Island*, 303 F.2d 637, 639 \(7th Cir. 1962\)](#), to support the position that § 129 does not create a private right of action. In *Wallace*, the court held there was no private right to enforce the terms of a federal statute authorizing construction of toll bridges. See [33 U.S.C. § 529](#). The court found the statute indicated that "Congress has given no right to private persons, as distinguished from the United States and its appropriate agencies, to seek federal court aid to enforce [bridge statutes]." [*Wallace*, 303 F.2d at 639](#). As the district court in *Wallace* explained, "if defendant has violated the federal statutes, that violation may be redressed upon complaint by the United States or an appropriate agency thereof. Any detriment to the motoring public would thereby be alleviated." [*Wallace v. City of Rock Island*, 198 F. Supp. 73, 75 \(S.D. Ill. 1961\)](#).

If the City [*14] has violated § 129, any violation may be properly redressed by the Secretary of Transportation (although it is not alleged that any restructure agreement between the Secretary and the City exists). Further, § 129 can be distinguished from § 301. [Section 301](#) provides that roads be free of tolls, while § 129(a)(3) governs the use of revenues raised from roads where tolls are collected. Arguably, § 129 is less concerned with creating rights for motorists than § 301, as § 129 generally seeks to structure relations between state highway departments and the Secretary of Transportation when federal funds are devoted to a state project. There is no compelling reason why private persons such as plaintiffs, as distinct from the United States and its appropriate agencies, should have the right to seek federal court action to aid in enforcement of this portion of the statute. Accordingly, Count I will be dismissed.

COUNT II: Sherman Act Claims

Plaintiffs allege that "the City has operated the Skyway as a proprietary enterprise, and not in its governmental capacity." (Complaint at P 28) Thus, plaintiffs aver that the City is subject to the requirements of various provisions [*15] of federal [antitrust law](#) with respect to its proprietary operation of the Skyway. Plaintiffs claim the City's operation of the Skyway violates §§ 1 and 2 of the Sherman Act, [15 U.S.C. §§ 1, 2](#). Plaintiffs contend that the Skyway is an essential facility which the City maintains as a monopoly and by conditioning access to that facility on the payment of tolls used to finance other transportation improvements the City is also engaged in an illegal tying agreement.

Sherman Act [Section 1](#)

Defendant argues that plaintiffs have failed to state a claim under § 1 of the Sherman Act because plaintiffs have not alleged a contract or combination between the City and another entity.⁵ [HN7](#) To make out a claim under § 1 for unreasonable restraint of trade, a party must show: (1) a contract, combination, or conspiracy, (2) a resultant unreasonable restraint of trade in the relevant market, and (3) an accompanying injury. [*MCM Partners, Inc. v. Andrews-Bartlett & Assoc. Inc.*, 161 F.3d 443, 448 \(7th Cir. 1998\)](#).

[*16] To satisfy the first element of a [Section 1](#) claim a party must establish concerted efforts between at least two legally distinct entities. [*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#). Unilateral conduct by a single entity falls outside the scope of [Section 1](#). [*Monsanto Corp. v. Spray*](#)

⁵ [HN8](#) [15 U.S.C. § 1](#) provides:

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, 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 at the discretion of the court.

Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); see also *Fisher v. City of Berkeley*, 475 U.S. 260, 267, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986).

Here, plaintiffs allege no contract, combination, or conspiracy of any kind between the City and some other entity or person. The allegations are clear that only the city is claimed to be involved in the alleged misconduct. Because Section 1 does not reach conduct which is unilateral, plaintiffs have not stated a claim under § 1 of the Sherman Act.

Sherman Act Section 2

Defendant argues that plaintiffs have failed to state a claim under Section 2 of the Act because plaintiffs have failed to allege any relevant market.⁶ Plaintiffs' complaint contains no relevant market allegation. However, plaintiffs respond to defendant's motion by contending [*17] that the Skyway is "the only high-speed, limited access connection between [the Indiana Toll Road and the Dan Ryan Expressway in Chicago]." These circumstances, plaintiffs maintain, place the City in control of a monopoly. Plaintiffs further argue that the Skyway is "unique," having "no reasonable substitute for the Interstate Route it covers."

HN10[ To prove monopolization, a plaintiff must show: (1) the possession of monopoly power in the relevant market, the (2) the willful acquisition or maintenance of the power as distinguished from growth or development as a consequence of a superior [*18] product, business acumen, or historic accident. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 373 (7th Cir. 1986). Defining the relevant market is a threshold inquiry. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455-56, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993). A plaintiff must allege and define the relevant market in which the defendant has the power to control prices or exclude competitors. *Banks v. NCAA*, 977 F.2d 1081, 1095 (7th Cir. 1992); *Fishman v. Wirtz*, 807 F.2d 520, 531 (7th Cir. 1986).

A relevant market is comprised of those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). In making this determination, a court must decide whether the product is unique or has close substitutes, as to which there are substantial cross-elasticities of demand. *Fishman*, 807 F.2d at 531.

Aside from the Skyway, there are substitute routes between Chicago and Indiana. Judicial notice is taken of the location [*19] map attached to plaintiffs' responsive pleadings as exhibit A.⁷ That map shows that there are other primary competing routes connecting the Indiana Toll Road and the Dan Ryan Expressway located in the Skyway's service area, including Interstate 80/94, consisting of the Borman, Kingery and Bishop Ford Expressways. Other routes include Indianapolis Boulevard/Lake Shore Drive and to a lesser extent, the Tri-State Tollway. Granted, the Skyway may be a shorter route, depending on where the driver's trip begins and ends, but it is not the only route. Thus, defendant does not have a monopoly over travel routes between Chicago and Indiana.

Accordingly Count II will be dismissed.

[*20] COUNT III

⁶ **HN9**[ 15 U.S.C. § 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize and 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 three years, or by both said punishments, in the discretion of the court.

⁷ Judicial notes may be taken of geographical locations, including the locations of streets and highways. See *Deutch v. United States*, 367 U.S. 456, 470, 6 L. Ed. 2d 963, 81 S. Ct. 1587 (1961); *Lowrance v. Pflueger*, 878 F.2d 1014, 1018 (7th Cir. 1989); *State v. Seigel*, 163 Wis. 2d 871, 472 N.W.2d 584, 591 n.15 (1991).

Plaintiffs claim that the City has discriminated against them and unreasonably burdened interstate commerce in violation of the [Commerce Clause, U.S. Const. art. I, § 8, cl. 3](#), by maintaining arbitrary tolls to raise revenue for non-Skyway purposes which increases the cost of interstate travel on the Skyway. Plaintiffs argue that the tolls burden only persons involved in interstate commerce on the Skyway, but not persons engaged in commerce on other streets and highways of the City who stand to benefit from the other transportation improvements.

Defendant argues that the Skyway toll does not violate the [Commerce Clause](#) or discriminate against Skyway users because the tolls are fairly related to benefits conferred by them. In addition, defendant notes that plaintiffs' allegations and arguments in support of its antitrust count suggest that the City is a market participant, rather than a government regulator in its operation of the Skyway. Under this view, defendant argues the City is immune from liability under the [Commerce Clause](#) when acting as a market participant.

HN11[] A plaintiff can "plead himself out of court" by alleging facts which if true would legally preclude [*21] a claim. [American Nurses' Ass'n v. Illinois, 783 F.2d 716, 724 \(7th Cir. 1986\)](#); see also [Tregenza, 12 F.3d at 718; Early, 959 F.2d at 79](#). Here, plaintiffs have done so.

In Count II plaintiffs, among other things, allege:

Since its inception, the City has operated the Skyway as a proprietary enterprise, and not in its governmental capacity.

Plaintiffs' allegations in its antitrust count characterize the City's operation of the Skyway as proprietary. The City's proprietary operation of the Skyway makes the City a market participant, exempt from the [Commerce Clause](#) as are other private market participants. Plaintiffs allege that the City charges a toll for use of the Skyway - a proprietary act. There is no allegation that the City charges any other fees or in any way tries to tax all motor vehicles entering into Chicago or crossing the Illinois-Indiana border.⁸ **HN12**[] While a plaintiff's complaint should not be dismissed merely because it includes invalid claims along with a valid one, [American Nurses, 783 F.2d at 725](#), here, the validity of plaintiffs' allegations in the antitrust claim render plaintiffs' [Commerce Clause](#) claim invalid by definition.

[*22] **HN13**[

The [Commerce Clause](#) restricts state and local taxes or regulatory measures that impede free trade in the national marketplace. [Reeves, Inc. v. Stake, 447 U.S. 429, 436-37, 65 L. Ed. 2d 244, 100 S. Ct. 2271 \(1980\)](#). Generally, a state may not regulate in a way that favors its own citizens at the economic disadvantage of citizens of other states. [J.F. Shea Co., Inc. v. Chicago, 992 F.2d 745, 747 \(7th Cir. 1993\)](#). However, there is an exception to this general rule. The market participant exception. For [Commerce Clause](#) purposes, a basic distinction exists between states as market participants and states as market regulators. [Reeves, 447 U.S. at 436](#). "If a state is acting as a market participant, rather than a market regulator," the [Commerce Clause](#) does not limit its activities. [South-Central Timber Development v. Wunnicke, 467 U.S. 82, 93, 81 L. Ed. 2d 71, 104 S. Ct. 2237 \(1984\)](#). Both state and local governments can be market participants. See [SSC Corp. V. Town of Smithtown, 66 F.3d 502, 510 \(2d Cir. 1995\)](#).

A government acts as a market participant when it operates in a proprietary capacity as a party to the transaction, charging others for the uses of its services, [*23] facilities or products. See, e.g., [Four T's, Inc. v. Little Rock Mun. Airport Comm'n, 108 F.3d 909, 912 \(8th Cir. 1997\)](#); [J.F. Shea, 992 F.2d at 749](#) ("when acting as a proprietor, a government shares the same freedom from the [Commerce Clause](#) that private parties enjoy"). In contrast, a government is a market regulator if it imposes conditions "that have a substantial regulatory effect outside of that particular market." [South-Central Timer, 467 U.S. at 97](#); see also [J.F. Shea, 992 F.2d at 748](#).

The allegations pled in plaintiffs' complaint run directly counter to establishing a violation of the [Commerce Clause](#). Plaintiffs' complaint alleges that defendant operated the Skyway as a market participant. Defendant maintains that the tolls are contractual in nature, thus in fact making the City a market participant. See [People ex Rel. County of](#)

⁸ The parties disagree as to whether the fees charged Skyway users are properly categorized as tolls or as taxes. However plaintiffs' complaint repeatedly characterizes the fees as "tolls."

DuPage v. Smith, 21 Ill. 2d 572, 173 N.E.2d 485, 491 (1961) (under Illinois law "service charges, tolls, water rates and the like are . . . contractual in nature, either express or implied, and are compensation for the use of another's property"). Drivers pay tolls to use the City's property and the City is a party to each transaction. [*24] Plaintiffs do not expressly allege any substantial regulatory effect that the Skyway tolls have outside the market in which the City operates and none can reasonably be inferred. Since the only fact consistent with plaintiffs' allegations is that the City acted as a market participant, plaintiffs' claim cannot succeed. Accordingly, Count III will be dismissed.

COUNT IV

Because the federal causes of action are all being dismissed, supplemental jurisdiction over the remaining state law claims will not be exercised. See [28 U.S.C. § 1337\(c\)\(3\)](#).⁹

IT IS THEREFORE ORDERED that class certification is denied and the claims of the putative class are dismissed without prejudice. Defendant's motion to dismiss [3-1] is granted and defendant's motion to stay Count IV [3-2] is denied as moot. The Clerk of the Court is directed to enter judgment in favor of defendant and against plaintiffs: [*25] (1) dismissing individual plaintiffs' federal cause of action with prejudice; (2) dismissing individual plaintiffs' state law cause of action without prejudice; and, (3) dismissing the claims of the putative class without prejudice.

ENTER:

William T. Hart

UNITED STATES DISTRICT JUDGE

DATED: JUNE 16, 1999

JUDGMENT IN A CIVIL CASE - FILED 16 1999

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to the court's Memorandum Opinion and Order, judgment is entered in favor of the defendant, The City of Chicago and against the plaintiffs' Roy L. Endsley, III, et al.: (1) dismissing individual plaintiffs' federal cause of action with prejudice; (2) dismissing individual plaintiffs' state law cause of action without prejudice; and (3) dismissing the claims of the putative class without prejudice.

Date: 6/16/1999

End of Document

⁹ Plaintiffs are parties to a prior state court action filed in the Circuit Court of Cook County, No. 98 CH 2012.



AD/SAT v. AP

United States Court of Appeals for the Second Circuit

December 5, 1996, Argued ; June 23, 1999, Decided

Docket No. 96-7304

Reporter

181 F.3d 216 *; 1999 U.S. App. LEXIS 13760 **; 1999-1 Trade Cas. (CCH) P72,561; 1999 WL 415326

AD/SAT, a division of Skylight, Inc., Plaintiff-Appellant, v. ASSOCIATED PRESS, NEWSPAPER ASSOCIATION OF AMERICA, NATIONAL NEWSPAPER NETWORK, THE NEWARK STAR LEDGER, THE BIRMINGHAM NEWS COMPANY, ADVANCE PUBLICATIONS, INC., DONALD E. NEWHOUSE, THE OAKLAND PRESS CO., THE NEWS & OBSERVER PUBLISHING COMPANY, OKLAHOMA PUBLISHING COMPANY, THE LEXINGTON HERALD-LEADER, DAYTON NEWSPAPERS, INC., and COX ENTERPRISES, INC., Defendants-Appellees.

Prior History: [\[**1\]](#) Appeal from the March 6, 1996, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, District Judge), granting summary judgment in favor of all defendants and dismissing an antitrust complaint alleging anticompetitive practices in the field of delivering advertising to newspapers.

Disposition: Affirmed.

Core Terms

newspapers, advertising, affiliation, delivery, electronic, terminate, conspiracy, monopolize, transmission, monopoly, leveraging, delivery service, markets, prices, network, monopoly power, Sherman Act, summary judgment, boycott, competitors, conspiracy claim, satellite, concerted action, conspire, join, anti trust law, market share, announced, tending, trade association

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

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

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > Oral Arguments

[HN1](#) [blue icon] Standards of Review, Abuse of Discretion

A district court's decision whether to permit oral argument rests within its discretion.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

HN2 **Monopolies & Monopolization, Attempts to Monopolize**

To survive a motion for summary judgment dismissing an attempted monopolization claim, plaintiff is required to demonstrate triable issues of fact as to whether defendant (1) engaged in anticompetitive or predatory 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

HN3 **Monopolies & Monopolization, Attempts to Monopolize**

A threshold showing for a successful attempted monopolization claim is sufficient market share by the defendant because a defendant's market share is the primary indicator of the existence of a dangerous probability of success. The existence of monopoly power ordinarily may be inferred from the predominant share of the market.

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 > Geographic Market Definition

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

HN4 **Monopolies & Monopolization, Attempts to Monopolize**

In order to ascertain the market share of defendant, the court first must define the relevant product and geographic markets. Once the relevant market is determined, the court considers a variety of factors in addition to the defendant's market share, including the strength of competition, barriers to entry, and the probable development of the market in order to determine whether there is a dangerous probability that, left unchecked, the defendant will attain monopoly power, i.e., the ability (1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN5 **Regulated Practices, Market Definition**

The relevant market for purposes of antitrust litigation is the area of effective competition within which the defendant operates. The market which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use, and qualities considered.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6 **Regulated Practices, Market Definition**

Products or services need not be identical to be part of the same market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN7 **Regulated Practices, Market Definition**

Significant price differences do not always indicate distinct markets. Products can be near-perfect substitutes even when their prices or qualities differ.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Computer & Internet Law > Civil Actions > Damages

Mergers & Acquisitions Law > Antitrust > General Overview

HN8 **Regulated Practices, Market Definition**

A market is any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level. If the sales of other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN9 **Monopolies & Monopolization, Attempts to Monopolize**

A 33 percent market share does not approach the level required for a showing of dangerous probability of monopoly power.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN10 **Actual Monopolization, Anticompetitive & Predatory Practices**

A successful claim of monopoly leveraging requires proof of at least three factors: 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 distinct market; and injury caused by the challenged conduct.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN11 **Actual Monopolization, Anticompetitive & Predatory Practices**

Although a plaintiff alleging monopoly leveraging is not required to demonstrate a substantial market share by the defendant, application of the doctrine is limited to those circumstances where the challenged conduct actually injures competition, not just competitors, in the second, non-monopolized market.

181 F.3d 216, *216L999 U.S. App. LEXIS 13760, **1

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN12 [blue download icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

It is not unlawful for an existing firm, entering a new product market, to promote its product by touting the benefits afforded by that product's association with the firm. Nor is it unlawful for employees of one division of a firm to promote products produced by another division.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN13 [blue download icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

Pre-announcement of a new product constitutes predatory conduct only when it is knowingly false.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN14 [blue download icon] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Contracts Law > Defenses > Illegal Bargains

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

HN15 [blue download icon] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A Sherman Act [section 1](#), [15 U.S.C.S. § 1](#), boycotting claim requires evidence of an illegal agreement that constitutes an unreasonable restraint of trade, either per se or under the rule of reason. Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN16 [blue download icon] **Monopolies & Monopolization, Conspiracy to Monopolize**

See [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

181 F.3d 216, *216LÁ1999 U.S. App. LEXIS 13760, **1

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN17 [blue icon] **Monopolies & Monopolization, Attempts to Monopolize**

A successful conspiracy claim under [section 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), requires (1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN18 [blue icon] **Summary Judgment, Motions for Summary Judgment**

The inference of concerted action can be drawn only where the plaintiff presents direct or circumstantial evidence that reasonably tends to prove each defendant had a conscious commitment to a common scheme designed to achieve an unlawful objective. [Antitrust law](#) limits the range of permissible inferences from ambiguous evidence. Thus, 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 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. The absence of a rational motive to engage in the alleged conspiracy is highly relevant to whether a genuine issue for trial exists within the meaning of [Fed. R. Civ. P. 56\(e\)](#); if the defendants have 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.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN19 [blue icon] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

An antitrust plaintiff must present evidence tending to show that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective.

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

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

[**HN20**](#) [blue icon] **Summary Judgment, Supporting Materials**

A party cannot rely on inadmissible hearsay in opposing a motion for summary judgment.

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

[**HN21**](#) [blue icon] **Private Actions, Remedies**

Introducing a new competitor to a market's customers is conduct which the antitrust laws are designed to protect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

[**HN22**](#) [blue icon] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A trade association's seal of approval for a particular product, without constraining others to follow the recommendation, does not violate antitrust laws.

Counsel: Daniel R. Shulman, Minneapolis, Minn., Joseph M. Alioto, San Francisco, Cal. (Terry M. Walcott, Shulman, Walcott & Shulman, Minneapolis, Minn.; David E. Nachman, Solomon, Zauderer, Ellenhorn, Frischer & Sharp, New York, N.Y., on the brief), for plaintiff-appellant.

Dennis J. Drebsky, New York, N.Y. (Richard N. Winfield, Hilary Lane, John A. Nathanson, Gregory G. Marshall, Rogers & Wells, New York, N.Y., on the brief), for defendant-appellee Associated Press.

Yvonne S. Quinn, New York, N.Y. (Timothy J. Helwick, Andrew Rotstein, Sullivan & Cromwell, New York, N.Y., on the brief), for defendants-appellees Newark Morning Ledger Co., The Birmingham News Company, Advance Publications, Inc., and Donald E. Newhouse.

Conrad M. Shumadine, Norfolk, Va. (Frank A. Edgar, Jr., Willcox & Savage, Norfolk, Va., on the brief), for defendant-appellee **[**2]** The News & Observer Publishing Company.

Patricia Farren, Matthew S. Wild, Cahill Gordon & Reindel, New York, N.Y., submitted a brief for defendants-appellees Newspaper Association of America and National Newspaper Network.

James A. Treanor, III, Timothy J. O'Rourke, Scott D. Dillard, Dow, Lohnes & Albertson, Washington, D.C., submitted a brief for defendants-appellees Dayton Newspapers, Inc. and Cox Enterprises, Inc.

A. Douglas Melamed, James W. Lowe, Wilmer, Cutler & Pickering, Washington, D.C., submitted a brief for defendant-appellee The Oakland Press Company.

Robert P. Reznick, James B. Kobak, Jr., Hughes Hubbard & Reed, New York, N.Y., submitted a brief for defendant-appellee Lexington Herald-Leader.

Thomas J. Lilly, Lilly & Bienstock, Garden City, N.Y., submitted a brief for defendant-appellee Oklahoma Publishing Company.

Judges: Before: WINTER, Chief Judge, NEWMAN, and WALKER, Circuit Judges.

Opinion

[*220] PER CURIAM:

This case involves allegations of anticompetitive conduct in the market for delivery of advertisements to newspapers. The plaintiff-appellant, AD/SAT, was engaged in the business of electronically transmitting advertisements to newspapers from [*3] the mid-1980s until 1996. After the Associated Press ("AP") launched a similar service in 1994, AD/SAT accused the AP of violating [section 2](#) of the Sherman Act, [15 U.S.C. § 2](#), by (i) attempting to monopolize the alleged market for the electronic transmission of advertisements to newspapers; (ii) engaging in monopoly leveraging; and (iii) monopolizing the wire services news and photo transmission markets. In addition, AD/SAT alleged that all the defendants in this case (i) conspired to boycott AD/SAT, in violation of [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#); and (ii) conspired to monopolize the alleged [*221] market of electronic transmission of advertisements to newspapers, in violation of [section 2](#) of the Sherman Act. AD/SAT appeals from the March 6, 1996, judgment of the District Court for the Southern District of New York (Peter K. Leisure, District Judge), to the extent it (i) dismissed AD/SAT's attempted monopolization and monopoly leveraging claims against the AP and its conspiracy claims against the AP and the other defendants, and (ii) declined to reconsider the District Court's April 24, 1995, decision dismissing AD/SAT's claims against the *Lexington Herald-Leader*. See [*4] [AD/SAT v. Associated Press, 920 F. Supp. 1287 \(S.D.N.Y. 1996\)](#) ("AD/SAT II").

We affirm the judgment of the District Court in all respects. AD/SAT's claim that the AP attempted to monopolize the market of advertising delivery cannot survive summary judgment because there is insufficient evidence to create a genuine issue of material fact as to the existence of a dangerous probability that the AP will achieve monopoly power in the relevant product market. Likewise, AD/SAT's monopoly leveraging claim was properly dismissed because AD/SAT has not presented evidence that could support a finding of tangible harm to competition in the advertising delivery market, an essential element of that claim. Finally, we conclude that AD/SAT's allegations of conspiracy are insufficient to withstand the scrutiny prescribed by the Supreme Court in [Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#), and [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#).

Background

Overview. Historically, advertisers and advertising agencies have sent their ads to newspapers by means of physical [*5] delivery, such as the postal service, messengers, or overnight delivery services. With these services, advertisers typically bear the cost of delivery. In 1996, when the defendants' motions for summary judgment were decided, over 80 percent of all newspaper ads were delivered by overnight couriers such as Federal Express.

An alternative to physical delivery available to advertisers is electronic delivery. This involves the transmission of copy to newspapers via satellite, land-based lines, or both. From 1986 until 1996, AD/SAT, a division of Skylight, Inc., was engaged exclusively in the electronic delivery of advertisements to newspapers. In providing its transmission services, AD/SAT delivered ads to newspapers over a satellite network owned and operated by the AP. The AP, a cooperative association whose members consist of more than 1,500 United States newspapers, is engaged primarily in the collection and distribution of news and photographs to newspapers. In 1994, the AP launched AdSEND, which delivers ads to newspapers via the AP's satellite network. Unlike physical carriers, such as Federal Express, which offer delivery services for a wide variety of goods, AD/SAT and AdSEND [*6] focused their services exclusively on the delivery of ads to newspapers. In this action, AD/SAT argues that the AP's conduct upon its entrance into the ad delivery business, as well as the allegedly unlawful assistance of the remaining defendants, violated [sections 1](#) and [2](#) of the Sherman Act.

The parties. In addition to the AP, the other defendants named by AD/SAT include the Newspaper Association of America ("NAA"), the Newspaper National Network (sued herein as the National Newspaper Network) ("NNN"), several newspapers or groups of newspapers that are member-owners of the AP and members of the NAA, and one individual, Donald Newhouse. The NAA is a non-profit trade association whose members consist primarily of

general circulation daily newspapers in the United States. Its mission is to promote the newspaper industry, in part by encouraging the development of technological and marketing innovations that will enhance the efficiency and profitability [*222] of newspapers. Formed in the spring of 1994, the NNN is a limited partnership organized by the NAA and forty-eight NAA member-newspapers to promote the use of newspapers as an effective medium for national advertising. The newspaper [*7] partners of the NNN consist of forty-eight of the fifty largest newspapers by circulation in the United States. In an attempt to overcome the perception that newspaper advertising is inefficient and cumbersome relative to advertising in other media, such as television and radio, the NNN established a clearinghouse for processing multi-newspaper insertion orders. That service, which is aimed at attracting new advertisers to the newspaper medium and making it as easy as possible for advertisers to place ads in numerous papers, is called the "one order/one bill" service.

Defendant Advance Publications, Inc. ("Advance") is owned by the Newhouse family. Defendant Donald Newhouse, the president of Advance, was, during times relevant to this litigation, a member of the board of directors of the AP and the volunteer chairman of the NAA. Through wholly owned subsidiaries, Advance owns defendants Newark Morning Ledger Co., which publishes the *Star-Ledger*, and Birmingham News Company, which publishes the *Birmingham News*.

Cox Newspapers, Inc., a wholly-owned subsidiary of defendant Cox Enterprises, Inc. ("CEI"), publishes fourteen newspapers of general circulation, including the *Dayton Daily News*, which is owned by defendant Dayton Newspapers, Inc. ("DNI"). David Easterly, the president of CEI, was a member of the AP board of directors and sat on an *ad hoc* committee of the AP board that assisted the AP's management in investigating and planning its entry into the ad delivery market.

Defendant Oklahoma Publishing Company publishes an independent daily newspaper called the *Daily Oklahoman*. Defendant News & Observer Publishing Company publishes the *News & Observer*. Defendant Oakland Press Company publishes *The Oakland Press*. Finally, defendant Lexington Herald-Leader, a wholly-owned subsidiary of Knight-Ridder, Inc., publishes *The Herald-Leader*.¹

The AD/SAT system. AD/SAT's electronic delivery system allowed the advertiser to deliver a single hard copy of its ad [*9] to one of AD/SAT's two transmittal stations, located in New York and Los Angeles. The ad would then be scanned into AD/SAT's system, and transmitted to designated newspapers via the AP-owned-and-operated satellite network. The ad would be received at each newspaper by an AP satellite dish, and then forwarded to a "recorder" installed and owned by AD/SAT. The recorder would then produce a hard copy of the ad. The recorders -- essentially high speed facsimile machines -- cost over \$ 60,000 each, and required an additional \$ 30,000 worth of equipment to be operational.

Under this system, AD/SAT generated revenue from annual affiliation fees paid by the newspapers and service fees charged to both the newspapers and the advertisers. Newspapers that joined the AD/SAT network before 1988 paid an annual affiliation fee of \$ 7,500, while newspapers joining after that date paid an annual fee of between \$ 4,500 and \$ 12,500. Depending on the newspaper's affiliation agreement, newspapers paid either a flat reception fee of \$ 28 per ad, or \$ 25 for national ads and \$ 20 for retail ads. Certain newspaper affiliates were not charged reception fees for retail ads. In 1994, forty-eight of the fifty [*10] largest papers in the United States were AD/SAT affiliates; of the next one hundred largest papers, sixty were AD/SAT affiliates.

In addition to the fees paid by newspapers, advertisers were charged a transmission [*223] fee, with the price decreasing as the number of sites to which the ad was being sent increased.² Because the cost of sending a distinct ad to a single location over the AD/SAT network was much higher than the cost of physical delivery, the

¹ *The Baltimore Sun* was also named as a defendant, but pursuant to a joint motion of *The Sun* and AD/SAT, the District Court dismissed AD/SAT's claims against *The Sun* with prejudice in May 1995.

² Under the rate card effective from August 1991 to 1994, the fee for an advertiser sending a single ad to a single paper on the same day was \$ 90. The lowest price per transmission was \$ 11.70, which applied if the advertiser sent the ad to 76 or more newspapers. In its last years of operation, however, AD/SAT often negotiated special rates for its larger customers.

system was cost-effective only for those advertisers who sent an identical ad to many different locations. For this reason, AD/SAT targeted national advertisers.

Though AD/SAT delivered more ads electronically [**11] than any other supplier of delivery services, it delivered only a small percentage of all ads placed in newspapers. AD/SAT found expansion of its network difficult, due in large part to the high fees necessary to cover the fixed costs associated with the recorders, as well as the annual fee of \$ 730,000 which AD/SAT paid to the AP for use of its satellite network. As early as 1990, AD/SAT recognized that the high costs associated with its system would preclude growth. At that time, AD/SAT's then-president, Richard Atkins, decided to stop acquiring recorders, and pursue converting the AD/SAT system into a digital network, which would allow newspapers to use much less expensive computers rather than the recorders to receive advertisements. However, as a result of financial difficulties, AD/SAT's transition to digital technology was extremely slow. Although it developed a digital delivery system sometime in 1991, it had installed digital reception equipment at less than fifteen newspapers by 1994.

In March of 1994, Skylight, Inc. purchased AD/SAT for approximately \$ 4.1 million dollars, including the assumption of certain liabilities. The new management recognized the existing problems [**12] with the business, and had plans to revitalize and expand AD/SAT's business, which, they assert, would have been successful but for the actions of the AP and the other defendants.

The AP's development of AdSEND. The AP began to consider entering the business of electronic delivery of ads to newspapers as early as 1991. At that point, the AP had recently introduced PhotoStream, a high speed, satellite-based delivery system for the transmission of photographs to newspapers. The AP saw electronic delivery of advertisements as a natural extension of this business. The AP's approach, however, was quite different from AD/SAT's. From the beginning, the AP believed that it needed to price its services at levels competitive with the prices charged by the overnight delivery services that dominated the delivery market. Furthermore, the AP installed reception equipment at the newspapers free of charge and allowed member-newspapers to receive advertisements without any charge. Thus, unlike AD/SAT's pricing structure, advertisers bear the entire cost of using AdSEND, just as they do when using traditional physical delivery services.

AdSEND allows advertisers to transmit ads from their own [**13] computers to newspapers' computers in digital form, via a hub in New Jersey. At the hub, a central computer checks to ensure that no transmission error has occurred and then sends the ad to the designated newspapers. No hard copy of the ad is created until the ad is downloaded to the newspapers' imaging equipment; thus, the ad arrives at the newspaper as a first generation image.

As the AP researched its new venture, it sought and received assistance from the NAA, which has extensive knowledge about the newspaper advertising market. Newhouse, volunteer chairman of the NAA, president of Advance, and also an AP board member, was the AP's primary contact at the NAA. Before AdSEND was announced publicly, NAA officials, at Newhouse's [*224] request, met with AP officials to discuss the project. These meetings led the NAA to support the AP's efforts. After AdSEND's announcement, the NAA allowed the AP to give presentations on AdSEND at NAA-sponsored conferences that focused on the "one order/one bill" project, and one NAA employee stated that it would have been reasonable for industry members to have the impression that the NAA endorsed AdSEND at these meetings. This relationship between the AP, [**14] Newhouse, and the NAA is at the heart of AD/SAT's conspiracy claims.

The AdSEND business plan was approved by the AP board and announced to the public in April 1994. During times relevant to this lawsuit, AD/SAT and the AP were not the only companies that offered electronic delivery services. Other companies offering similar services included DigiFlex, Ad eXpress, AdStar, AdLink, and Business Link.

District Court proceedings. In September 1994, AD/SAT filed its complaint. The Court denied AD/SAT's application for a preliminary injunction barring the AP and those in active concert with it from initiating or participating in the AdSEND program. The Court concluded that AD/SAT had failed to make the requisite showing of likelihood of success on the merits. See [AD/SAT II, 920 F. Supp. at 1295](#) (recounting 1994 preliminary injunction ruling).

In November 1994, AD/SAT filed an amended complaint, alleging that the AP had violated [section 2](#) of the Sherman Act by (i) attempting to monopolize the alleged market for the electronic transmission of advertisements to newspapers; (ii) engaging in monopoly leveraging; and (iii) monopolizing the wire services news and photo transmission markets. [\[**15\]](#) In addition, AD/SAT alleged that the AP, NAA, NNN, Newhouse, and the newspaper defendants had engaged in conspiracies to boycott AD/SAT, in violation of [section 1](#) of the Sherman Act, and to monopolize the alleged market for the electronic transmission of advertisements to newspapers, in violation of [section 2](#) of the Sherman Act. The parties proceeded to conduct extensive discovery, taking more than 70 depositions and exchanging approximately 40,000 pages of documents.

In December 1994, one of the newspaper defendants, the *Lexington Herald-Leader*, moved for judgment on the pleadings or, in the alternative, summary judgment. The District Court granted the motion in April 1995, dismissing AD/SAT's conspiracy claims against the *Lexington Herald-Leader*. See [AD/SAT v. Associated Press, 885 F. Supp. 511 \(S.D.N.Y. 1995\)](#) ("AD/SAT I"). The District Court held that AD/SAT failed to state a claim against the *Lexington Herald-Leader* for conspiracy to monopolize because it had not alleged facts from which the necessary element of a specific intent to monopolize could be inferred. Accordingly, the Court dismissed the [section 2](#) claim against the *Herald-Leader* on the pleadings. [\[**16\]](#) See [id. at 516](#).

With respect to AD/SAT's claim that the *Herald-Leader* violated [section 1](#) by conspiring with the other defendants to boycott AD/SAT, the Court ruled that AD/SAT's pleadings were sufficient to withstand a motion to dismiss. Applying the standard articulated by the Supreme Court in [Matsushita, 475 U.S. at 588](#), however, the Court held that summary judgment was appropriate because AD/SAT had failed to present evidence that tended to exclude the possibility that the *Lexington Herald-Leader* was acting independently when it terminated its relationship with AD/SAT. See [AD/SAT I, 885 F. Supp. at 519-21](#). Specifically, the Court found that there was no evidence suggesting that the *Lexington Herald-Leader* had ever agreed with any other newspaper or the AP on any course of conduct with regard to AD/SAT; furthermore, the Court concluded that AD/SAT had not presented any evidence to undermine the *Lexington Herald-Leader*'s explanation that "economic compulsions . . . constrained it to suspend its association with AD/SAT." [Id. at 519](#). [\[**225\]](#) Accordingly, the Court granted summary judgment, dismissing AD/SAT's remaining claim against the *Lexington Herald-Leader* [\[**17\]](#).

In May 1995, the AP and the other remaining defendants moved for summary judgment. The District Court granted the motion and dismissed the rest of AD/SAT's claims in their entirety. See [AD/SAT II, 920 F. Supp. 1287](#). In considering AD/SAT's attempted monopolization claim against the AP, the Court concluded that the relevant product market was the delivery of advertising to newspapers by any means, including physical delivery. See [id. at 1296-99](#). As is frequently the case in antitrust litigation, the Court's definition of the relevant market was dispositive. Defining the market so broadly meant that AD/SAT could not show that there was a dangerous probability that the AP would achieve monopoly power -- one of the essential elements of an attempted monopolization claim. See [id. at 1299-1300](#). The Court also found that AD/SAT's claims that AdSEND was prematurely announced and that it was predatorily priced were not supported by any evidence in the record. See [id. at 1301-04](#). Accordingly, the Court dismissed AD/SAT's claim of attempted monopolization.

The District Court also found that AD/SAT's monopoly leveraging claim could not survive summary judgment. The Court expressed [\[**18\]](#) skepticism about the applicability of such a claim in the absence of allegations of product "tying." See [id. at 1304-05](#). Furthermore, the Court found that AD/SAT's allegations of leveraging were either not supported by any evidence in the record or that the challenged conduct did not depend on the AP's having a monopoly in either the wire services news or photo transmission markets. See [id. at 1305-06](#). Rather, the Court concluded that the challenged conduct demonstrated that the AP was taking advantage of its resources and good will in a manner wholly consistent with lawful business development. See [id.](#) Accordingly, the Court granted summary judgment in favor of the AP on this claim.

With respect to AD/SAT's claim of unlawful monopolization of the wire services news and photo transmission markets, the District Court found that AD/SAT lacked standing to assert this claim because it was neither a customer nor a competitor of the AP in either of these markets. See [id. at 1306-07](#).

The Court then considered AD/SAT's conspiracy claims. Turning first to AD/SAT's threshold arguments regarding concerted action, the Court rejected AD/SAT's argument that the AP was collaterally [**19] estopped by the Supreme Court's decision in *Associated Press v. United States*, 326 U.S. 1, 89 L. Ed. 2d 2013, 65 S. Ct. 1416 (1945), from denying that every action it takes is the concerted action of its members. The District Court was also not persuaded by AD/SAT's argument that trade associations, such as AP, are continuing conspiracies of their members as a matter of law, reasoning that the cases cited by AD/SAT were inapposite and that the caselaw of this Circuit requires that "AD/SAT must establish a conspiracy . . . by proving the existence of an agreement." *AD/SAT II*, 920 F. Supp. at 1308.

The District Court then examined the evidence submitted by AD/SAT pertaining to each defendant to determine whether a reasonable juror could find that there was concerted action between two or more legally distinct defendants. Guided by the Supreme Court's holding in *Matsushita*, the District Court considered whether the defendants, other than the AP, had any rational motive to join a conspiracy to destroy competition in the market for delivery of advertisements. See *id. at 1309-10*; 1315-16. Finding that they did not, the Court proceeded to determine whether a reasonable inference [**20] of conspiracy could be drawn from the conduct challenged by AD/SAT. The Court concluded that the defendants' conduct was as consistent with their independent business interests as [*226] with an unlawful conspiracy and, therefore, granted summary judgment in favor of the defendants (other than the AP) because AD/SAT had failed to proffer any evidence tending to exclude the possibility that they had acted independently. See *id. at 1309-18*. Having granted summary judgment on the conspiracy claims to all other defendants, the Court also dismissed AD/SAT's conspiracy claims against the AP. See *id. at 1318*.

AD/SAT appeals from the District Court's rulings dismissing its conspiracy claims against all defendants and its claims of attempted monopolization and monopoly leveraging by the AP.

Discussion

I. Denial of Oral Argument on Summary Judgment Motion

As a threshold matter, AD/SAT argues that it was reversible error for the District Court to grant summary judgment in favor of the defendants without permitting oral argument. We have held that *HN1*[↑] a district court's decision whether to permit oral argument rests within its discretion. See *Katz v. Morgenthau*, 892 F.2d 20, 22 (2d Cir. [**21] 1989). Although AD/SAT argues that oral argument should have been permitted given the complexity of the issues, it presents no basis for concluding that resolving the summary judgment motion solely on the basis of the extensive record and the elaborate motion papers exceeded the District Court's discretion.

In support of its argument, AD/SAT relies on the decision of the Ninth Circuit Court of Appeals in *Dredge Corp. v. Penny*, 338 F.2d 456, 461-2 (9th Cir. 1964), which held that a court may not deny a request for oral argument on a motion for summary judgment unless the court intends to rule in favor of the party requesting argument. This Court, however, has never adopted such a rule. Moreover, even the Ninth Circuit requires that a party seeking to reverse a summary judgment order must demonstrate that it was prejudiced by the court's refusal to hear argument. See *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998). AD/SAT has made no showing of prejudice.

II. Attempted Monopolization Claim

We turn first to AD/SAT's claim that the AP attempted to monopolize the market for delivery of advertisements to newspapers. *HN2*[↑] To survive a motion for summary judgment dismissing [**22] this claim, AD/SAT was required to demonstrate triable issues of fact as to whether the AP (1) engaged in anticompetitive or predatory conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993); *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990). As we have previously noted, "*HN3*[↑] A threshold showing for a successful attempted monopolization claim is sufficient market share by the defendant" because a defendant's market share is "the primary indicator of the existence of a dangerous probability of success." *Twin Laboratories*, 900 F.2d at 570 (citation omitted); see also *United States v. Grinnell Corp.*, 384

[U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#) ("The existence of [monopoly power] ordinarily may be inferred from the predominant share of the market.").

HN4[] In order to ascertain the market share of AP's AdSEND, we first must define the relevant product and geographic markets. See [Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 15 L. Ed. 1^{**231} 2d 247, 86 S. Ct. 347 \(1965\)](#). Once the relevant market is determined, we consider a variety of factors in addition to the defendant's market share, including the strength of competition, barriers to entry, and the probable development of the market, see [International Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 792 \(2d Cir. 1987\)](#), in order to determine whether there is a dangerous probability that, left unchecked, [*227] the defendant will attain monopoly power, i.e., the ability "(1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion." 2A Phillip E. Areeda et al., [Antitrust Law](#) P 501, at 86 (emphasis in original) [hereinafter "Areeda"].

The parties agree that the relevant geographic market is the United States. Based on its finding that physical and electronic delivery services are reasonably interchangeable, the District Court concluded that the relevant product market is the market for delivery of advertisements to newspapers by any means. See [AD/SAT II, 920 F. Supp. at 1297-1300](#). AD/SAT asserts that this definition of the market is too broad and [*24] urges us to limit the relevant market to the market for electronic delivery of advertisements, in particular the "rush," three-hour electronic delivery market. At the very least, AD/SAT argues, a triable issue of fact regarding the definition of the relevant product market exists.

HN5[] The relevant market for purposes of antitrust litigation is the "area of effective competition" within which the defendant operates. [Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-28, 5 L. Ed. 2d 580, 81 S. Ct. 623 \(1961\)](#). As the Court explained in [United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#):

The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered.

Id. at 404. Thus, **HN6**[] products or services need not be identical to be part of the same market. See *id. at 394* ("Where there are market alternatives that buyers may readily use for their purposes, illegal [*25] monopoly does not exist merely because the product said to be monopolized differs from others."). In economists' terms, two products or services are reasonably interchangeable where there is sufficient cross-elasticity of demand. Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product. Cf. [Grinnell, 384 U.S. at 571](#). Also relevant to the delineation of a relevant product market is cross-elasticity of supply, which depends on the extent to which producers of one product would be willing to shift their resources to producing another product in response to an increase in the price of the other product. See 2A Areeda P 536, at 195. Where there is cross-elasticity of supply, a would-be monopolist's attempt to charge supracompetitive prices will be thwarted by the existence of firms willing to shift resources to producing the product, thereby increasing supply and driving prices back to competitive levels. See *id.*; see also [id. P 423, at 77-78](#).

In its First Amended Complaint, AD/SAT stated that "the transmission of advertising to newspapers" was a "relevant product market for purposes of [*26] this action." First Amended Complaint P 21. Although it predicted that electronic transmission of advertisements -- via satellite, land links, or both -- would become the predominant mode of transmission in the future, AD/SAT noted that "at present, advertisers use several means to transmit their ads to newspapers[.]" citing, as the most common, "delivery through the mail, courier service, overnight delivery service, such as Federal Express, and similar physical delivery services." *Id.* AD/SAT's president, David Hilton, stated in deposition testimony that AD/SAT's competitors included companies that offer physical delivery services, as well as companies that offer electronic transmission services. Likewise, Bain & Company, a management consulting firm retained by AD/SAT, concluded that because most deliveries [*228] of ads to newspapers are not urgent, AD/SAT needed to price its service at levels competitive with overnight delivery services, which accounted for approximately 80 percent of all deliveries to newspapers.

Recognition of the broad scope of the market within which AD/SAT competed helps to explain why the company was not highly successful. Due to the high cost of its service, **[**27]** AD/SAT captured only a small segment of the relevant market: certain advertisers who periodically required emergency rush service. Unlike AD/SAT, the AP understood from the beginning that it needed to price AdSEND's services to compete with physical carriers. Indeed, it listed as a "key success factor" that AdSEND "must be *cost-effective*, even to advertisers that mail their ads to newspapers." Plaintiff's Ex. 7 at 15 (emphasis in original). Thus, it is beyond dispute that both AD/SAT and the AP considered physical carriers, such as Federal Express, to be their competitors.

Despite the abundance of evidence demonstrating that physical carriers competed with electronic delivery services for advertisers' business, AD/SAT argues that electronic delivery services -- especially rush, three-hour, services -- constitute a distinct product market. AD/SAT points out that, despite the greater expense, advertisers continued to use its service for rush deliveries and that AP's AdSEND has a dual pricing structure (\$ 8 for overnight transmission; \$ 40 for one-hour transmission). Based on these facts, AD/SAT argues that persisting demand for the higher-priced electronic transmission service, **[**28]** despite the availability of lower-priced alternatives, demonstrates that the two services are not reasonably interchangeable and, thus, do not compete in the same market.

It is true that one hallmark of reasonable interchangeability between two particular goods is uniformity in price. See 2A Areeda P 530a, at 150. The Supreme Court recognized the relevance of price differences to the definition of a relevant market in [Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#). However, **HN7**[[↑]] significant price differences do not always indicate distinct markets. See 2A Areeda P 562c, at 262 ("Products can be near-perfect substitutes even when their prices or qualities differ."). In this case, we are not persuaded that the difference in prices for rush electronic and non-rush delivery services indicates that distinct markets for these services exist. As the Areeda treatise notes, **antitrust law** is concerned only with "substantial" market power. Thus, where a "market" itself is insubstantial, made up of only a few buyers with extremely strong preferences, **antitrust law** is not implicated. See *id.* P 530e, at 155 ("Most courts implicitly insist that **[**29]** a market be 'substantial' in scope by ignoring smaller ones.").

Moreover, AD/SAT's experience reveals that the market for rush electronic delivery of advertisements to newspapers is not a viable one. According to AD/SAT's own marketing consultants, the rush delivery market was a "very narrow segment" of the newspaper advertising delivery market. These same consultants concluded that AD/SAT needed to reposition itself by moving away from its image as a last-resort emergency service in order to survive. The evidence showed, beyond reasonable dispute, that the few customers AD/SAT was able to attract for its rush services indicated not the existence of a distinct market but the constraint AD/SAT encountered in expanding its business because of the availability of physical carriers.

It is important to remember that "**[HN8**[[↑]] a] 'market' is any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, *could profitably raise prices* significantly above the competitive level. If the sales of other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market." 2A Areeda P 533, at 169 (emphasis added). Here, **[**30]** the evidence before the District Court indicated **[*229]** that if the providers of electronic delivery services formed a cartel and charged supracompetitive prices for their "rush" services, a sufficient number of their customers would shift to other carriers or to non-rush electronic delivery, that the hypothetical cartel's price increase would not prove profitable. Under such circumstances, there is significant cross-elasticity of demand for rush and non-rush delivery services, and the two services are part of the same market. Accordingly, the District Court properly found the relevant product market to be the market for delivery of advertisements to newspapers by any means.

With the relevant product market thus defined, it is clear that AdSend's market share is not sufficient to support an attempted monopolization claim. As AD/SAT's own research revealed, during the time relevant to this action, over 80 percent of all ads were delivered to newspapers by overnight carriers. Even if AdSEND managed to capture the rest of the market, such a market share would not be cause for concern. Indeed, we have held that **HN9**[[↑]] a 33 percent market share does not approach the level required for a showing of dangerous **[**31]** probability of monopoly power. See [Nifty Foods Corp. v. Great Atlantic and Pacific Tea Co., 614 F.2d 832, 841 \(2d Cir. 1980\)](#); see also Thomas V. Vakerics, *Antitrust Basics*, § 5.03, at 5-23 ("It would appear rather difficult to establish the

dangerous probability element where a defendant holds less than a 40% share of a market, unless other factors indicate the market share figures understate the market power held by the defendant.").

Furthermore, we agree with the District Court that "it is simply implausible to think that the development and implementation of AP['s] AdSEND could drive these competitors [the overnight delivery services] out of the ad delivery business." [AD/SAT II, 920 F. Supp. at 1299](#). As the District Court noted, even if AdSEND became the dominant method of delivering ads to newspapers, overnight carriers could quickly and easily reenter the market in the event that AdSEND attempted to charge supracompetitive prices. See *id.*; see also 2A Areeda P 506d, at 103 ("Transitory power may safely be ignored by **antitrust law**. The social costs of antitrust intervention (including its error potential) are likely to exceed the gains when market **[**32]** forces themselves would bring the defendant's power to an end fairly quickly.").

Even if we were to recognize a relevant product sub-market limited to the electronic transmission of advertisements, that sub-market would be characterized by rapid technological development and low barriers to entry. See [Walsh Trucking, 812 F.2d at 792](#) (noting that, among other things, barriers to entry and probable development of the market are relevant to determination of whether there is a dangerous probability that the defendant will achieve monopoly power). Indeed, AD/SAT itself noted that "at present, the market for the transmission of newspaper advertising, as well as the electronic transmission submarket thereof, is characterized by low concentration, vigorous competition, rapid technological development, and ease of entry" Amended Complaint P 23. AD/SAT's marketing consultants likewise were aware of the threat of new entrants. See Deposition of Sam Rovit at 133 ("Because of the technology, eventually you would probably find other people coming in."). Indeed, from its inception, AdSEND faced competition from several companies, in addition to AD/SAT, that provided electronic transmission **[**33]** services.

In summary, AP's AdSEND enjoys only a small share of the relevant product market. Competition within that market is substantial. Rapidly developing technology for the transmission of data and low barriers to market entry suggest that the AP will face significant competition from new entrants. In the face of these facts, AD/SAT cannot prove an essential element of its attempted monopolization claim -- **[*230]** that there is a dangerous probability that AP's AdSEND will achieve monopoly power. We need not consider whether AD/SAT presented triable issues of fact with respect to the remaining elements of an attempted monopolization claim -- predatory conduct and specific intent to monopolize. The District Court properly granted summary judgment in favor of the AP on this claim.

III. Monopoly Leveraging Claim

AD/SAT also contends that the AP leveraged its monopoly power in the wire services news and photograph transmission markets to gain an unlawful advantage in the market for delivery of newspaper advertisements, in violation of [section 2](#) of the Sherman Act. Whatever the continued scope of monopoly leveraging claims as independent causes of action, cf. [Spectrum Sports, 506 F.2d at 459](#) ("[Section 2](#) makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so.") (citation omitted), it is clear that AD/SAT has not presented evidence to support such a claim in this case.

We have said that [HN10](#)[↑] a "successful claim of monopoly leveraging requires proof of at least three factors: 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 distinct market, and injury caused by the challenged conduct." [Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 681 \(2d Cir. 1985\)](#) (internal citations and quotation marks omitted). This Court first recognized monopoly leveraging as a distinct cause of action under [section 2](#) of the Sherman Act in [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 \(2d Cir. 1979\)](#), where we stated, in dictum, that "the use of monopoly power attained in one 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." [Id. at 276](#).

[HN11](#)[↑] Although a plaintiff alleging monopoly **[**35]** leveraging is not required to demonstrate a substantial market share by the defendant, application of the doctrine is limited to those circumstances where the challenged conduct actually injures competition, not just competitors, in the second, non-monopolized market. See [Twin Laboratories, 900 F.2d at 571](#) (noting that a monopoly leveraging claim requires "tangible harm to competition"); cf.

Spectrum Sports, 506 U.S. at 459 ("The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics."). As Professors Areeda and Hovenkamp explain, a claim for monopoly leveraging is properly stated only where the plaintiff can demonstrate that the challenged conduct "threatens the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share." 3 Areeda P 652, at 90. Thus,

a large firm does not violate § 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments [**36] benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity -- more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.

Berkey Photo, 603 F.2d at 276.

Here, the AP conceded for purposes of its motion for summary judgment that it has monopoly power in the market for wire services, and that PhotoStream, [*231] AP's service for the electronic transmission of photographs to newspapers, enjoys monopoly power in the market for that service. AD/SAT contends that the AP caused tangible harm to competition in the ad delivery market by leveraging these monopolies in the following ways: (i) subsidizing the cost of AdSEND reception equipment through member-owner assessments; (ii) charging AD/SAT monopoly prices for the use of AP's satellite network; (iii) prematurely announcing AdSEND in order to deter potential competitors; [**37] (iv) premising its marketing approach to advertisers on AdSEND's ability to offer access to all United States newspapers via AP's preexisting satellite network; (v) using its bureau and communications chiefs and news and photo division employees to solicit customers for AdSEND; (vi) marketing AdSEND to member newspapers by trading on their interest as owners of the AP and, ultimately, AdSEND; (vii) combining with member-owner newspapers to solicit advertisers and encourage them not to use competitors' services; and (viii) soliciting and obtaining agreements from member-owner newspapers not to deal with competitors. These last three examples of allegedly predatory conduct are merely restatements of AD/SAT's conspiracy claims and are considered below in our discussion of those claims.

Turning to AD/SAT's other leveraging allegations, we note that there is no evidence that the AP conditioned the use of PhotoStream or its wire service on the use of AdSEND. In *Twin Laboratories*, we expressed some skepticism about the viability of a monopoly leveraging claim in the absence of an allegation of tying. See 900 F.2d at 570-71. Furthermore, much of the conduct AD/SAT challenges is the [**38] very sort of activity *Berkey Photo* cautions against deterring, much less punishing. See 603 F.2d at 276. That is, HN12[ it is not unlawful for an existing firm, entering a new product market, to promote its product by touting the benefits afforded by that product's association with the firm. Nor is it unlawful for employees of one division of a firm to promote products produced by another division. As the District Court found, such conduct is the sort of "normal business development which is to be expected by any competitor entering a new business." AD/SAT II, 920 F. Supp. at 1305-06.

Furthermore, AD/SAT has not presented any evidence to support its claim that the AP announced AdSEND prematurely. When publicly announcing AdSEND in April 1994, the AP stated that the program would be tested over the summer and launched in September. Testing was done over the summer and, while some glitches remained in the system throughout the fall of 1994, it was operational shortly after the time the AP had projected. Moreover, "HN13[ pre-announcement" of a new product constitutes predatory conduct only when it is knowingly false. See MCI Communications Corp. v. American Telephone & Telegraph Co., I^{**39} 708 F.2d 1081, 1128 (7th Cir. 1983). There is no suggestion that the AP's announcement of AdSEND was knowingly false.

With respect to AD/SAT's claim that the AP subsidized the cost of reception equipment with member-owner assessments, we note that AdSEND retains title to the reception equipment it places with newspapers. Furthermore, the costs of launching AdSEND, including the costs associated with reception equipment, were

accounted for in AdSEND's financial projections. Thus, AD/SAT has not submitted evidence that could support a finding of cross-subsidization from other AP activities. Moreover, this allegation has little, if anything, to do with AP's purported monopoly power in the wire services and photo transmission markets. A monopoly leveraging claim is established only where a defendant uses its monopoly power in one market to injure competition in a second market. See *Berkey Photo, 603 F.2d at 284*.

AD/SAT's remaining allegation of predatory conduct is that the AP charged AD/SAT [*232] monopoly prices for its use of the AP satellite network. AD/SAT paid an annual use fee of \$ 730,000, while the AP charged AdSEND only \$ 75,000. Despite this significant disparity in prices, [**40] AD/SAT's argument fails for several reasons. First, AD/SAT has not even alleged, much less submitted evidence demonstrating, that the AP has a monopoly in the market for satellite services. Second, the contracts governing AD/SAT's use of the AP satellite network were first entered into in 1986 -- long before the advent of AdSEND -- and favorably renegotiated in 1991. Third, there is no evidence that could support the finding that it was necessary for AD/SAT to use the AP satellite network to compete in the market for delivery of advertisements to newspapers. This is not surprising since the relevant product market is the delivery of advertisements to newspapers by any means. And, even if the market were limited to electronic transmission of advertisements, AD/SAT could not demonstrate that use of the AP network was essential to its ability to compete in the market. Other firms offer satellite services, and other modes of electronic transmission, such as land lines, are available.³

[**41] In any event, the District Court's dismissal of AD/SAT's monopoly leveraging claim was appropriate because AD/SAT did not present evidence that could support a finding of tangible harm to competition, an essential element of the claim. See *Twin Laboratories, 900 F.2d at 571*. Indeed, the evidence submitted reveals that AdSEND's services are priced lower than those of AD/SAT, and that the technology used by AdSEND offers certain advantages over physical delivery and some electronic transmission services. Cf. 3 Areeda P 652, at 90 (arguing that monopoly leveraging claims should be limited to instances where the challenged conduct "threatens the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share").

The District Court properly granted summary judgment dismissing AD/SAT's monopoly leveraging claim against the AP.

IV. Sherman Act Conspiracy Claims

AD/SAT claims that the AP and the remaining defendants -- the newspaper defendants, Newhouse, the NAA, and the NNN -- unlawfully conspired to boycott AD/SAT, in violation of section 1 of the Sherman Act, and to monopolize [**42] the market for delivery of newspaper advertisements, in violation of section 2 of the Sherman Act.

HN14 [↑] Section 1 states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal." 15 U.S.C. § 1. **HN15** [↑] A section 1 boycotting claim requires evidence of an illegal agreement that constitutes an unreasonable restraint of trade, either *per se* or under the rule of reason. See *Capital Imaging Associates v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537, 542 (2d Cir. 1993)*. Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade. See *id.*

HN16 [↑] Section 2 of the Sherman Act prohibits individuals from "combining or conspiring with any other person or persons, to monopolize any part of the trade or commerce among the several [*233] States . . ." 15 U.S.C. § 2.

³ AD/SAT's claim of overcharging is very similar to an "essential facilities" antitrust claim. Thus, it is relevant to note that an "essential facilities" plaintiff must raise a triable issue of fact with respect to whether it is economically infeasible for the facility to be duplicated, and whether the denial of use inflicts a severe handicap. See *Twin Laboratories, 900 F.2d at 568-69*. Assuming that overcharging for the use of a facility is tantamount to denial of use, AD/SAT's claim nevertheless would fail because it has not raised a genuine issue of material fact with respect to whether it was overcharged so as to be effectively denied use or at least severely handicapped.

HN17 [+] A successful conspiracy claim under [section 2](#) requires "(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy." [Walsh Trucking, 812 F.2d at 795](#) (internal quotation marks and citations omitted).

Critical to surviving a motion for summary judgment on these claims is the threshold showing that a reasonable jury could find that the defendants' actions were concerted rather than independent. In *Monsanto*, the Supreme Court held that **HN18** [+] the inference of concerted action can be drawn only where the plaintiff presents "direct or circumstantial evidence that reasonably tends to prove that [each defendant] had a conscious commitment to a common scheme designed to achieve an unlawful objective." [465 U.S. at 764](#) (internal quotation marks and citation omitted). Furthermore, "[antitrust law](#) limits the range of permissible inferences from ambiguous evidence." [Matsushita, 475 U.S. at 588](#). Thus, "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 . . . must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (citations omitted). Moreover, the absence of a rational motive to engage in the [**44] alleged conspiracy is "highly relevant to whether a 'genuine issue for trial' exists within the meaning of [Rule 56\(e\)](#)," *id. at 596*; if the defendants have "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 596-97* (citation omitted).

Before examining AD/SAT's allegations against the various defendants, it is necessary to consider two threshold arguments that AD/SAT makes in support of its allegation of concerted action. First, AD/SAT argues that the AP is collaterally estopped from denying that any action taken by it is concerted action by its members, citing the Supreme Court's 1945 decision in [Associated Press, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416](#). In that case, the Supreme Court found that two AP bylaws, which had the effect of preventing non-AP member newspapers from buying news from the AP or its members and granting each AP member the power to block non-member competitors from becoming members, violated [sections 1](#) and [2](#) of the Sherman Act. We agree with the District Court that the principle of collateral estoppel does not [**45] mandate a finding of concerted action in this case. The issue decided by the Court in *Associated Press* was whether two particular bylaws of the AP constituted a conspiratorial agreement in violation of the antitrust laws. Neither of those bylaws is at issue in this case. *Associated Press* did not determine that AP members are engaged in a conspiratorial agreement with respect to all actions of the AP. The defendants are not precluded from denying concerted action with respect to the allegations levied by AD/SAT.

Second, AD/SAT contends that, as a matter of *stare decisis*, *Associated Press* and other decisions finding the conduct of trade associations to be joint action of the association's members dispense with the need to inquire into the existence of a conspiratorial agreement among the members of such associations. In support of this argument, AD/SAT cites this Court's opinion in [Phelps Dodge Refining Corp. v. Federal Trade Commission, 139 F.2d 393 \(2d Cir. 1943\)](#). There, we stated that "a member [of a trade association] who knows or should know that his association is engaged in an unlawful enterprise [restraining competition] and continues his membership [**46] without protest may be charged with complicity as a confederate." *Id. at 396*. The Supreme Court's decisions in *Monsanto* and *Matsushita* call into doubt [*234] the continued viability of *Phelps*' membership-ratification theory as a basis for antitrust conspirator liability. Other courts have held that this doctrine does not retain the force of law. See *Wilk v. American Medical Ass'n, 671 F. Supp. 1465, 1492 (N.D. Ill. 1987)*, aff'd, [895 F.2d 352 \(7th Cir. 1990\)](#). Furthermore, recent decisions of this Court demonstrate that we require a factual showing that each defendant conspired in violation of the antitrust laws, and have not adopted a "walking conspiracy" theory in place of such a showing. See [Capital Imaging, 996 F.2d at 544-45](#) (holding that members of a physicians' practice association had the capacity to conspire among themselves but that "the mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred"); see also *Vakerics, supra*, § 6.13, at 6-37 to -38 ("In situations where a trade association, its officers, employees or members are found to have violated the antitrust laws, membership in [**47] the association will not automatically involve all members in the violation. There must, instead, be some evidence of actual knowledge of, and participation in, the illegal scheme in order to establish a violation of the antitrust laws by a particular association member.") (emphasis added).

Thus, although the nature of trade associations is such that they are frequently the object of antitrust scrutiny, see *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988), every action by a trade association is not concerted action by the association's members. Indeed, the varying roles played by trade associations such as the AP call for careful consideration by courts faced with allegations of antitrust conspiracy. As has been properly noted,

there seems no conceptual difficulty in treating organizations created to serve their member-competitors or to regulate their market behavior as continuing conspiracies of the members. Nor is there any practical problem when we focus on those improprieties reducing competition among the members or with their competitors. But what about the day-to-day operations of the organization? **[**48]** Must we also see the trade association's buying, selling, hiring, renting, or investing decisions as continuing conspiracies among the members? . . . All of these decisions become subject to Sherman Act § 1 litigation if [trade associations] are conspiracies. . . . One might respond to this concern in three ways: ignore it, adjust the necessary allegations or proofs, or hold such organizations continuing conspiracies for some purposes but single entities for other purposes.

7 Areeda P 1477, at 347. To avoid unwarranted regulation of legitimate conduct, Professor Areeda suggested that "to the extent that [trade associations] are buying and selling [products or services] in their own right, they can fairly be regarded as single entities whose selling decisions are not 'price-fixing conspiracies' and whose buying decisions are not 'boycott conspiracies' of rejected suppliers." *Id. at 348*.

Regardless of whether trade associations are ever "continuing conspiracies" of their members, we think it clear in this case that a finding of concerted action based on the defendants' status as members of the AP would seriously undermine the standards articulated by the Supreme **[**49]** Court in *Matsushita* and *Monsanto*. Consistent with those decisions, HN19 an antitrust plaintiff must present evidence tending to show that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective. Accordingly, we must examine the evidence submitted by AD/SAT pertaining to each defendant to determine whether, viewed in the light most favorable to AD/SAT, this evidence could give rise to a reasonable inference of concerted action by the defendants.

[*235] The District Court granted the defendants' motions for summary judgment dismissing the conspiracy claims because it found that (i) the other defendants had no rational motive to conspire with the AP to reduce competition in the market for delivery of newspaper advertisements to newspapers and (ii) their conduct was as consistent with the defendants' legitimate business interests as with a conspiracy to monopolize the advertising delivery market or to boycott AD/SAT.

A. The Newspaper Defendants

AD/SAT contends that the newspaper defendants were motivated to join the AP in a concerted refusal to deal with AD/SAT, and in a conspiracy to monopolize the **[**50]** market for delivery of advertisements, by the desire to benefit from AdSEND's monopoly profits in the form of lower annual dues for AP membership.

Like the District Court, we are not persuaded that the hope for lower AP dues can be said to be a rational motive for joining the conspiracies alleged in this case. We do not doubt that the newspaper defendants would be pleased to have their AP membership fees reduced, or that they may have seen lower fees as a possible fringe benefit of AdSEND. Nevertheless, in view of the importance of advertising revenue to the newspaper industry, we think it highly unlikely that the newspaper defendants would jeopardize that revenue by overcharging advertisers for delivery services in the hope that monopoly profits for such services eventually would lead to lower AP dues. Indeed, it is more likely that the newspaper defendants hoped that AdSEND would increase competition in the advertising delivery market, thereby lowering prices and making the newspaper medium more attractive to advertisers.

Allegedly anticompetitive conduct must be considered in its factual context. Where that context reveals that the conspiracy claim is one "that simply makes no **[**51]** economic sense -- [the plaintiff] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587. In this

case, the factual context of each defendant's decision to terminate, or attempt to terminate, its relationship with AD/SAT strongly suggests that the newspaper defendants had no rational economic motive to join the alleged conspiracies. Furthermore, the challenged conduct of each newspaper defendant is as consistent with the defendant's legitimate, independent business interests as with an illegal combination in restraint of trade. Under these circumstances, AD/SAT was required to submit evidence tending to exclude the possibility that the defendants acted independently. See *Matsushita, 475 U.S. at 588*; see also *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 923 (2d Cir. 1985)* ("An antitrust plaintiff may not, therefore, in opposing a motion for summary judgment, rest on conclusory assertions of conspiracy when the defendants have proffered substantial evidence supporting a plausible and legitimate explanation of their conduct.") (citation omitted). As discussed in [**52] detail below, AD/SAT failed to submit such evidence.

(1) Lexington Herald-Leader

The *Lexington Herald-Leader* started doing business with AD/SAT in 1987, when it entered into a five-year AD/SAT affiliation agreement. Under the terms of this agreement, the *Lexington Herald-Leader* paid a \$ 7,500 affiliation fee, as well as a minimum usage charge of \$ 12,500 each year. In the first years of its relationship with AD/SAT, the volume of ads transmitted via AD/SAT fell far below the paper's expectations. As a result, the *Herald-Leader* renegotiated its contract in 1989 to eliminate the \$ 12,500 minimum usage fee. Nevertheless, the per-ad cost of the service remained extremely expensive for the paper. With the end of its contract approaching, the paper's national advertising manager prepared an analysis [*236] of the service in late 1991. His report recommended that the contract be terminated. Formal notice of termination was sent in May of 1992. In response, AD/SAT offered to halve the affiliation fee, and the *Lexington Herald-Leader* decided to continue using AD/SAT's service. Nevertheless, the service remained extremely expensive on a per-ad basis. On June 10, 1994, the [**53] *Lexington Herald-Leader* terminated its relationship with AD/SAT.

Despite this history, AD/SAT maintains that the *Lexington Herald Leader* terminated its relationship with AD/SAT not because of economic concerns but, instead, as part of a concerted refusal to deal with AD/SAT. In support of this argument, AD/SAT cites several circumstances that it contends reveal that the *Lexington Herald-Leader* was not acting independently in refusing to deal with AD/SAT. First, it points to the timing of the *Lexington Herald-Leader*'s termination of its affiliation agreement with AD/SAT, which occurred approximately a month and a half after AdSEND was announced publicly. AD/SAT also points out that representatives of the *Lexington Herald-Leader* attended the NAA meeting where Newhouse purportedly invited newspaper executives to join in collective action to boycott AD/SAT. Finally, AD/SAT cites to a memorandum purporting to describe a conversation during which a representative of the Knight-Ridder group, the *Lexington Herald-Leader*'s parent company, pledged its support for AdSEND.

This evidence does not tend to exclude the possibility that the *Lexington Herald-Leader* acted [**54] independently. First, AD/SAT may not rely on the memorandum describing Knight-Ridder's pledge of support because it is inadmissible hearsay. See *Burlington Coat Factory, 769 F.2d at 924* (noting that it is well-settled that HN20[↑]] a party "cannot rely on inadmissible hearsay in opposing a motion for summary judgment"). Furthermore, AD/SAT's other evidence demonstrates, at most, parallel conduct following an invitation to conspire. Such evidence, without more, does not give rise to an inference of conspiracy. See *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987)*. Accordingly, summary judgment in favor of this defendant was appropriate.

(2) Oakland Press

Similarly, AD/SAT failed to adduce any evidence tending to show that the *Oakland Press* was not acting independently when it decided to terminate its affiliation agreement with AD/SAT. The *Oakland Press* signed an affiliation agreement with AD/SAT in October 1993; under the terms of that agreement, AD/SAT was required to install reception equipment at the paper's offices. The affiliation agreement also provided that either party could terminate the agreement without penalty if the other was in material default [**55] of its obligations under the agreement. During negotiations, Atkins, AD/SAT's then-president, promised to install the reception equipment within thirty days from the date of the agreement. And, in an October 20, 1993, letter to Alfred Derusha, the advertising director of the *Oakland Press*, Atkins said that AD/SAT would "get to work right away on installation of

the equipment." Seven months later, in May 1994, the equipment still had not been installed, and AD/SAT informed the *Oakland Press* for the first time that the Macintosh interface it had promised to install was not available. At that point, Derusha wrote to AD/SAT, informing it that the *Oakland Press* was exercising its right to terminate the affiliation agreement because AD/SAT was in material default. AD/SAT responded that the *Oakland Press* had no right to terminate and that the equipment was being delivered.

AD/SAT contends that the *Oakland Press*'s stated reasons for its termination of the affiliation agreement were pretextual, and that the paper's real motivation was its desire to boycott AD/SAT and support AdSEND. This inference cannot reasonably be drawn from the evidence. At [*237] the time the *Oakland Press* [**56] terminated its affiliation with AD/SAT, AdSEND was not even operational. The *Oakland Press* did not test AdSEND at its site until January of 1995, when an advertiser requested the service. Furthermore, AD/SAT has not produced any evidence tending to show that Derusha or anyone at the *Oakland Press* discussed the paper's relationship with AD/SAT with anyone from the AP or another paper. Finally, the facts belie AD/SAT's claim that the *Oakland Press* refused to deal with it; up to the time this action was commenced, the *Oakland Press* was attempting to negotiate a new affiliation agreement with AD/SAT. This conduct is clearly as consistent with legitimate business activity as with an unlawful conspiracy in restraint of trade. AD/SAT's claim against the *Oakland Press* cannot survive summary judgment.

(3) *News & Observer*

The *News & Observer* entered into its affiliation agreement with AD/SAT on August 15, 1986; in February 1993, the paper decided to temporarily unplug its AD/SAT recorder due to renovations at the paper that caused space constraints. After disconnecting the equipment, Richard Lee Henderson, the vice-president in charge of sales and marketing, noticed [**57] that the paper had received no complaints from advertisers regarding the unavailability of AD/SAT's delivery service. In the fall of 1993, Henderson learned that AD/SAT's corporate parent was filing for bankruptcy. Believing that this prospect was grounds for terminating the *News & Observer*'s affiliation agreement with AD/SAT, Henderson, advertising director James McClure, and W.L. "Mack" McCormick, the local sales manager, decided to terminate the agreement. This decision was communicated to AD/SAT by letter dated November 24, 1993.

AD/SAT's then-president, Atkins, told the paper that AD/SAT did not consider bankruptcy a valid grounds for termination under the contract; nevertheless, the paper reiterated its intention to exercise its right to terminate the agreement in a letter dated January 20, 1994. This letter was written five days after Lawrence Blasko of the AP visited the paper and introduced AdSEND. AD/SAT continued to contest the *News & Observer*'s right to terminate the affiliation agreement and, after consulting with its lawyers, the paper decided that paying the \$ 7,500 annual affiliation fee would be less costly than a legal battle. Upon AD/SAT's insistence that [**58] the affiliation agreement so required, the paper re-installed the AD/SAT recorder at its offices.

AD/SAT points to the following facts in its attempt to implicate the *News & Observer* in the alleged conspiracies: (i) the paper's president, Frank Daniels, Jr., was chairman of the board of the AP during the development, approval, and implementation of AdSEND; (ii) five days after Blasko's visit, the paper reconfirmed its intention to terminate its relationship with AD/SAT; and (iii) during a conversation between AD/SAT president Hilton and Daniels on June 15, 1994, Daniels purportedly stated, "I don't think that we will be doing business together, we're a beta [test] site for Ad/Send."

Contrary to AD/SAT's arguments, this evidence does not support the inference that the *News & Observer* joined in a concerted refusal to deal with AD/SAT. Rather, the evidence shows that the paper -- because it was dissatisfied with AD/SAT's service -- expressed its desire to terminate its affiliation agreement well before anyone at the paper had heard of AdSEND and before the conspiracies alleged by AD/SAT supposedly came into existence. Furthermore, the outcome would be no different even if [**59] the paper had decided to terminate its AD/SAT affiliation after the paper's employees learned of AdSEND; the decision to terminate a service that was both costing the paper money and not bringing in additional revenue, and to install an alternative, cost-free service, [*238] does not give rise to an inference of an unlawful conspiracy in restraint of trade.

The District Court properly granted summary judgment in favor of this defendant.

(4) *DNI and CEI*

CEI and its subsidiary, Cox Newspapers, own over fifteen newspapers; of those papers, only four entered into affiliation agreements with AD/SAT. These include the *Dayton Daily News* (owned by DNI), the *Atlanta Journal/Constitution*, the *Palm Beach Post*, and the *Austin-American Statesman*. The *Atlanta Journal-Constitution* and the *Palm Beach Post* remained AD/SAT affiliates until AD/SAT ceased operations, and AD/SAT acknowledges that the *Austin-American Statesman*'s decision to terminate its agreement with AD/SAT was not the product of any conspiratorial agreement. However, AD/SAT does contend that the *Dayton Daily News*'s decision to terminate its relationship with AD/SAT in August of 1994 was the result of **[**60]** its participation in the alleged conspiracy to boycott AD/SAT and secure a monopoly position for AP's AdSEND.

In support of this argument, AD/SAT points to the following facts: (i) Cox's president, David Easterly, was a member of the *ad hoc* committee overseeing the AdSEND program for the AP; (ii) on June 16, 1994, AP officers met with Cox advertising executives and, at the conclusion of the meeting, Cathleen Coffey of Cox directed the Cox newspapers affiliated with AD/SAT to "review their contracts"; (iii) the *Dayton Daily News* gave AD/SAT notice of its intent to terminate its contract two months later, in August 1994; and (iv) notes taken by AD/SAT president Hilton indicate that the paper's advertising director, Pat Keil, told him that the paper's decision to use AdSEND was a corporate one.

This evidence does not tend to exclude the possibility that the *Dayton Daily News* was acting independently in terminating its relationship with AD/SAT. First, the record reveals that Keil, the person who made the decision not to renew the paper's affiliation agreement, did not attend the June 16 session on AdSEND. Furthermore, the fact that two Cox papers continued to use AD/SAT **[**61]** undermines AD/SAT's claim that the Cox papers made a corporate decision to boycott AD/SAT. Refusing to renew a contract that had proved very costly and opting to use a similar, free service is at least as consistent with a paper's legitimate business interests as with an unlawful conspiracy. Summary judgment in favor of the Cox defendants was appropriate.

(5) *Daily Oklahoman*

The Oklahoma Publishing Company publishes the *Daily Oklahoman*, which entered into an affiliation agreement with AD/SAT in 1986. In 1993, the *Daily Oklahoman* received approximately 159 ads over the AD/SAT system; the affiliation and per-transmission fees resulted in a per-ad cost to the paper of approximately \$ 68. That same year, the paper received approximately 400 ads over its own internal electronic "bulletin board." The *Daily Oklahoman*'s advertising department conducts an annual budget review each October. After the October 1993 review, the paper's advertising director, David Thompson, decided to terminate the paper's relationship with AD/SAT as a way to reduce operational costs. Thompson consulted with other members of the department to ascertain whether terminating the paper's AD/SAT service **[**62]** would harm operations; they reported it would not. On November 1, 1993, the *Daily Oklahoman* notified AD/SAT in writing that it was terminating its affiliation agreement with AD/SAT. AD/SAT did not respond to this notice of termination until September 28, 1994, when it wrote to the *Daily Oklahoman* asking it to reconsider its decision. There is no evidence that Thompson had even heard of the AdSEND program until several weeks after the AP's formal announcement **[*239]** of the program in April 1994 -- six months after the *Daily Oklahoman* terminated its relationship with AD/SAT.

Nevertheless, AD/SAT contends that the *Daily Oklahoman*'s decision was the product of its involvement in the alleged conspiracy to boycott AD/SAT. In support of this argument, AD/SAT points to the fact that in the summer and fall of 1994, the paper informed some of its larger advertisers that it had both terminated its relationship with AD/SAT and installed AdSEND at its offices. AD/SAT also contends that the paper's failure to renegotiate its agreement with AD/SAT is evidence of its involvement in the conspiracy. Finally, AD/SAT reports that one employee at the *Daily Oklahoman* told an AD/SAT executive **[**63]** that she would prefer that the paper stay on the AD/SAT network because of the speed of the service.

As the District Court ruled, none of these facts would allow a reasonable juror to conclude that the *Daily Oklahoman* was a member of a conspiracy to boycott AD/SAT. **Antitrust law** is not violated when a newspaper informs its advertisers that it has terminated its relationship with one delivery service and subsequently informs them that it has elected to use another service. The alleged statement of one employee who preferred AD/SAT is not sufficient to support an inference of conspiracy. Finally, the paper's refusal to renegotiate its contract with AD/SAT is not evidence of conspiratorial conduct, especially since AD/SAT's offer to renegotiate came more than ten months after the *Daily Oklahoman* terminated its relationship with AD/SAT and the offer did not include a marked reduction in cost. The grant of summary judgment in favor of the Oklahoma Publishing Co. was proper.

(6) Newark Star-Ledger and Birmingham News

Advance Publications, Inc. owns, through subsidiaries, Newark Morning Ledger Co., which publishes the *Newark Star-Ledger*, and Birmingham News Company, **[**64]** which publishes the *Birmingham News*. AD/SAT's attempt to implicate these three companies -- which are part of the Newhouse group -- is also unsuccessful.

The *Star-Ledger* became AD/SAT's first affiliate in 1986. The paper is published in Newark, New Jersey, within close proximity of New York City's strong advertising base. Thus, although receiving some ads from overnight couriers and electronic delivery systems, the *Star-Ledger* also receives many of its ads via messenger services. While the prices paid for these services vary, all are substantially less expensive for the paper than receiving ads over AD/SAT's network. After receiving an invoice for the \$ 7,500 annual affiliation fee in January 1993, Mark Herrick, the *Star-Ledger*'s director of marketing and advertising, decided not to pay the fee. In his deposition, Herrick stated that he felt the fee was too expensive and wanted to renegotiate with AD/SAT. In a meeting with AD/SAT representatives in August 1993, Herrick stated that he believed the service was too expensive, and asked that the affiliation agreement be renegotiated and the unpaid 1993 fee waived. In response, AD/SAT's then-president Atkins stated that **[**65]** AD/SAT intended to increase the *Star-Ledger*'s annual affiliation fee to \$ 12,500.

At the same meeting, however, Atkins proposed a group discount for all the Newhouse newspapers. Herrick stated that he did not have the authority to consider such proposals but that he would pass the proposal on to his superiors. The proposal was ultimately rejected by the Newhouse group.

No further discussions took place until the summer of 1994, when Hilton and the new owners of AD/SAT realized that the *Star-Ledger* had not paid its 1993 or 1994 affiliation fees. After an exchange of letters, Herrick submitted proposed amendments to the affiliation agreement to Hilton on August 19, 1994. Herrick proposed **[**240]** that the unpaid fees be forgiven, future affiliation fees be eliminated, and the notice period for termination be reduced from nine months to seven days. On December 28, 1994, after this lawsuit was filed, AD/SAT rejected the proposal and demanded that the outstanding fees be paid, but also promised to provide a new proposal to the paper in the near future. At the time the *Star-Ledger* filed its motion for summary judgment, no proposal had been made. The *Star-Ledger* eventually paid the **[**66]** outstanding fees and remained an AD/SAT affiliate until AD/SAT ceased operations.

The only evidence AD/SAT offers to support its claim that the *Star-Ledger* was a member of the alleged conspiracy is that Newhouse, the president of the company that indirectly owns the *Star-Ledger*, knew about the AP's plan to enter the ad delivery business several months before Herrick's August 1993 meeting with AD/SAT representatives. AD/SAT contends that this fact explains why the *Star-Ledger* refused to deal with AD/SAT and why its group discount offer to the Newhouse papers was rejected.

This evidence does not give rise to an inference of a concerted refusal to deal on the part of the *Star-Ledger*. To the contrary, the evidence shows that the *Star-Ledger* sought not to terminate its relationship with AD/SAT, but rather to renegotiate the terms of that relationship. Although Herrick's refusal to pay the affiliation fees owed under the contract may have been an unreasonable negotiating tactic, it is not evidence of a conscious commitment to an unlawful scheme in restraint of trade. Moreover, even if the actions taken by Herrick had constituted a refusal to deal with AD/SAT, the paper **[**67]** had valid business reasons for ending its relationship with AD/SAT because of the availability of other, more cost-effective means of receiving ads. The fact that Newhouse knew about the AP's plans to develop AdSEND before the August 1993 meeting does not tend to exclude the possibility that Herrick's

decision on behalf of the *Star-Ledger* was an independent one. Indeed, AD/SAT has submitted no evidence tending to show that Herrick discussed his actions with Newhouse.

Nor can a concerted refusal to deal be inferred from the Newhouse papers' rejection of AD/SAT's group proposal; AD/SAT has not contradicted the evidence indicating that the Newhouse papers do not enter into such group arrangements. Furthermore, the allegation of a group boycott by the Newhouse papers is undermined by the fact that other Newhouse papers continued to use AD/SAT. Conspiracy claims cannot be based on speculation. The District Court properly granted summary judgment in favor of the Newark Morning Ledger Company.

Likewise, the evidence pertaining to the Birmingham News Company, which publishes the *Birmingham News*, does not support the inference that this paper joined in an unlawful conspiracy in violation [**68] of the Sherman Act. In 1990, the *Birmingham News* entered into a five-year AD/SAT affiliation agreement. On April 11, 1994, AD/SAT sent the paper an invoice for its annual \$ 10,000 affiliation fee. In the third or fourth week of May, Tom Lager, the director of sales and marketing at the *Birmingham News*, reviewed this invoice. Lager had joined the paper in January 1994 and was responsible for approving expenditures such as the affiliation fee.

Lager was familiar with AD/SAT because his former employer, the *Omaha World Herald*, had been affiliated with AD/SAT until Lager made the decision not to renew that paper's affiliation at the end of 1991. That decision was made after Lager and others at the *World Herald* reviewed the paper's level of usage in relation to the cost of the service and after Office Depot, the primary user of AD/SAT's delivery service, agreed to shift its deliveries to the *World Herald* to other carriers such as Federal Express. From [*241] his earlier experience, Lager thought to check whether the *Birmingham News*'s use of AD/SAT justified its cost. A review of the log of ads received over AD/SAT revealed that the volume of ads delivered by AD/SAT was [**69] low and that most of the ads received via AD/SAT were from Office Depot. Concluding that the paper's continued affiliation with AD/SAT was not financially prudent, Lager consulted with his supervisor, Victor Hanson, who accepted Lager's recommendation not to renew the contract. On June 6, 1994, Lager sent a letter notifying AD/SAT that the *Birmingham News* would not be renewing its AD/SAT contract. Lager concedes that he had seen documents discussing AdSEND before he sent the termination letter.

In its appellate brief, AD/SAT asserts that Donald Newhouse's ownership of the paper and the paper's termination of its affiliation after the announcement of AdSEND give rise to the inference that the *Birmingham News* participated in the alleged conspiracies. As discussed above, the fact that Newhouse owned the newspaper, in the absence of any evidence tending to show that he was involved in its decision to terminate its AD/SAT affiliation, does not support an inference of conspiracy. Likewise, the fact that the paper terminated its relationship after the introduction of AdSEND does not give rise to an inference of concerted action. Rather, it shows, at best, parallel conduct following [**70] an invitation to conspire. Since the *Birmingham News*'s conduct was at least as -- if not more -- consistent with legitimate business concerns as with unlawful conspiracy, AD/SAT was required to submit evidence tending to exclude the possibility that the *Birmingham News* acted independently. Because it failed to do so, summary judgment was appropriate.⁴

B. Donald Newhouse

AD/SAT alleges that Donald Newhouse -- as a member of the AP board of directors and chairman of the NAA board of directors during the planning, approval, and implementation of AdSEND -- was at the center of the alleged conspiracies to boycott AD/SAT and allow AdSEND to monopolize the ad delivery market. Though it is true that Newhouse, who is also the president and part owner of Advance, had the [**71] opportunity to join in a conspiracy with the AP to destroy competition in the ad delivery market, it is also true that, like the newspaper defendants, the NAA, and the NNN, Newhouse had no rational motive to do so. As both a newspaper owner and chairman of the NAA, a primary interest for Newhouse is making newspapers a more attractive medium for advertisers. As the District Court noted, "Encouraging and assisting AP in its effort to enter the delivery market is certainly consistent

⁴ In addition, summary judgment in favor of Advance was warranted since AD/SAT made no specific allegations against this defendant other than those levied against its president, Newhouse, and the newspaper publishing companies that it owns.

with this interest[,] while "joining a conspiracy to refuse to deal with AD/SAT in an effort to drive it out of business is not." [AD/SAT II, 920 F. Supp. at 1316.](#)

Furthermore, none of the evidence submitted by AD/SAT tends to exclude the possibility that Newhouse was acting in an independent effort to further the interests of his own newspapers and the organization he represented, the NAA. AD/SAT points to a letter, dated August 2, 1993, to AP president Louis Boccardi, in which Newhouse stated that the AP should move quickly if it planned to get into the ad delivery business because "there is a window of opportunity now which AdSat [sic] might close if too much time goes by." Far from demonstrating [**72](#) the existence of a conscious commitment to an unlawful scheme, this statement encourages competition by urging the AP to act quickly before AD/SAT forecloses competition. AD/SAT also asserts that Newhouse was instrumental in securing the NAA's exclusive support for AP's AdSEND. As discussed [*242](#) below, the NAA never endorsed AdSEND to the exclusion of other firms involved in the electronic ad delivery market.

Nor is the fact that Newhouse introduced the AdSEND service to several major advertisers indicative of an unlawful conspiracy. With a position on the board of the AP and holding the view that AdSEND was a good product of general benefit to the newspaper industry, Newhouse had entirely legitimate reasons for promoting AdSEND. Moreover, "[HN21](#)[ introducing a new competitor to a market's customers is conduct which the antitrust laws are designed to protect." [AD/SAT II, 920 F. Supp. at 1317.](#)

AD/SAT relies heavily on Newhouse's retirement speech at the April 1994 NAA convention, which it contends constituted an invitation to boycott AD/SAT and to assist AdSEND's effort to monopolize the market for ad delivery. In the speech, Newhouse encouraged NAA members to "work with the Associated Press [**73](#) and help our cooperative perfect its ability to transmit ads digitally from the advertisers' computer to our computer." Newhouse also stated that "NAA is working with the Associated Press as AP develops a computer to computer advertising transmission system which will . . . remove a barrier to the use of newspapers." Newhouse stressed the importance of "collective action" within the newspaper industry.

Newhouse's statements simply do not support the inference that AD/SAT proposes. Perhaps most telling is the fact that AD/SAT was never mentioned during the speech. AD/SAT's attempt to construe the statement, "We must not let our competitors have the advantage of creating the playing field and controlling the gateway," as a reference to AD/SAT is unavailing. The context of this statement strongly suggests that Newhouse was not referring to any deliverers of ads, much less AD/SAT in particular, but to the array of entities vying to develop new technologies to gather and deliver news.

In sum, the evidence provided by AD/SAT would not permit a reasonable juror to infer that the actions of Newhouse in support of the AP's development and marketing of AdSEND constituted participation in a [**74](#) concerted refusal to deal with AD/SAT in restraint of trade.

C. NAA and NNN

Unlike the other defendants, the NAA and NNN are not direct participants in the advertising delivery business. Rather, the NAA was established with the goal of encouraging technological development in the newspaper industry in order to increase the profitability of newspapers; the NNN has the more specific goal of increasing the newspaper industry's declining share of advertising dollars. Thus, neither organization -- as long as they were acting in accordance with these goals -- had a rational motivation to join the conspiracies alleged by AD/SAT. Indeed, it would be counter to the goals of both organizations to eliminate a competitor in the market for delivery of ads in order to facilitate an attempt to monopolize the market by a newcomer that was not yet operational, especially since competition among delivery mechanisms would promote both technological innovation and fair pricing.

AD/SAT concedes that the NAA, after an initial meeting with AP executives in August 1993, made it clear that, while it would cooperate with the AP in its efforts to develop an electronic ad delivery system, it could not exclude [**75](#) other groups providing this service. Nevertheless, AD/SAT contends that the NAA reversed its position and, along with the NNN, began to boycott AD/SAT after certain meetings arranged by Newhouse between top AP executives and NAA president Cathie Black.

It is not seriously disputed that the NAA and NNN encouraged and assisted the AP when it was developing AdSEND. Indeed, after the AP's public announcement of AdSEND, these organizations allowed [*243] the AP to give presentations about AdSEND at NNN regional meetings. Despite this, and other evidence of the NAA's and the NNN's encouragement, AD/SAT's claim against these defendants cannot survive summary judgment because AD/SAT has failed to submit evidence tending to show that the NAA and the NNN participated in an anticompetitive refusal to deal with it. To the contrary, the evidence reveals that the NAA and NNN continued to promote other electronic delivery services beyond AP's AdSEND, including AD/SAT itself. Furthermore, even if the NAA and NNN endorsed AP's service, a conspiracy could not be inferred from such an endorsement. See *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284, 292 (5th Cir. 1988) (holding [**76] that HN22↑ trade association's seal of approval for particular product, without constraining others to follow the recommendation, does not violate antitrust laws). Under these circumstances, summary judgment in favor of the NAA and NNN was appropriate.

Having ruled that summary judgment in favor of all other defendants with respect to AD/SAT's conspiracy claims was appropriate, we conclude that summary judgment in favor of the AP was also appropriate.

Conclusion

For the reasons stated above, the judgment of the District Court is affirmed.

End of Document



AlliedSignal, Inc. v. B.F. Goodrich Co.

United States Court of Appeals for the Seventh Circuit

June 11, 1999, Argued ; June 23, 1999, * Decided

No. 99-2098

Reporter

183 F.3d 568 *; 1999 U.S. App. LEXIS 13993 **; 1999-2 Trade Cas. (CCH) P72,564; 44 Fed. R. Serv. 3d (Callaghan) 689; 1999 WL 437578

AlliedSignal, Inc., Crane Co., Eldec Corp., and Hydro-Aire, Inc., Plaintiffs-Appellees, v. B.F. Goodrich Co., Coltec Industries, Inc., and Menasco Aerospace, Ltd., Defendants-Appellants.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 3:99 CV 0116 AS. Allen Sharp, Judge.

Disposition: District court's grant of a preliminary injunction AFFIRMED. Case REMANDED for further proceedings consistent with this opinion.

Core Terms

landing gear, merger, preliminary injunction, arbitration, antitrust claim, district court, antitrust, manufacturers, brakes, jets, worldwide, wheels, landing, district judge, argues, airplane, notice, anti trust law, irreparable, merits, prices, harms, arbitration clause, purchaser, contends, military, effects, parties, seal

LexisNexis® Headnotes

Civil Procedure > Appeals > Notice of Appeal

HN1 [blue icon] Appeals, Notice of Appeal

Fed. R. App. P. 3(c)(1)(B) requires that the notice of appeal designate the judgment, order, or part thereof appealed from. The requirements of *Fed. R. App. P. 3(c)* are jurisdictional and their satisfaction is a prerequisite to appellate review. Nevertheless, "mere technicalities" should not stand in the way of an appellate court's consideration of the merits, and the appellate court will find a notice of appeal sufficient so long as it is the functional equivalent of what the rule requires. The rule in the Seventh Circuit is that an error designating the judgment or a part thereof will not result in a loss of appeal if the intent to appeal from the judgment complained of may be inferred from the notice and if an appellee has not been misled by the defect.

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

* The opinion was originally issued in typescript.

183 F.3d 568, *568LÁ 999 U.S. App. LEXIS 13993, **1

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN2 [down] Alternative Dispute Resolution, Arbitration

[28 U.S.C.S. § 1292\(a\)\(1\)](#) makes a district court's issuance of a preliminary injunction an immediately appealable interlocutory order, but does not confer jurisdiction over a district court's refusal to refer an antitrust claim to arbitration or an alleged denial of a stay pending arbitration. Jurisdiction over these latter two claims is conferred by [9 U.S.C.S. §§ 16\(a\)\(1\)\(C\), 16\(a\)\(1\)\(A\)](#), respectively.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

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

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN3 [down] Arbitration, Arbitrability

A district court must refer a dispute to an arbitrator unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. A reviewing court resolves any doubts concerning the scope of arbitrable issues in favor of arbitration.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4 [down] Standards of Review, Abuse of Discretion

The purpose of a preliminary injunction is to minimize the hardship to the parties pending the ultimate resolution of a lawsuit. To prevail on a motion for preliminary injunction, a moving party must meet the threshold burden of establishing (1) some likelihood of prevailing on the merits, and (2) that in the absence of the injunction, he will suffer irreparable harm for which there is no adequate remedy at law. If a moving party clears both of these prerequisites, a district court engages in a "sliding scale" analysis by balancing the harms to the parties and the public interest. Because preliminary injunctions are by their very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by their for-the-timebeingness, an appellate court reviews a district court's decision to issue a preliminary injunction for an abuse of discretion.

Antitrust & Trade Law > Clayton Act > Scope

183 F.3d 568, *568LÁ999 U.S. App. LEXIS 13993, **1

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Mergers & Acquisitions Law > Antitrust > General Overview

HN5 [down] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act prohibits mergers the effect of which may be to substantially lessen competition, or to tend to create a monopoly. [15 U.S.C.S. § 18](#).

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

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

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN6 [down] **Regulated Practices, Private Actions**

Courts do not generally defer to an agency's decision not to challenge a merger. To the contrary, federal regulators will not necessarily challenge every potentially troublesome merger, which is why Congress made private enforcement an integral part of the congressional plan for protecting competition.

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

HN7 [down] **Standing, Clayton Act**

Section 4 of the Clayton Act sets forth the group of persons who may maintain private damages actions under the antitrust law. It provides 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. [15 U.S.C.S. § 15.](#)

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

[HN8](#) Private Actions, Standing

The antitrust laws do not provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. The doctrine of antitrust standing therefore limits the class of plaintiffs under § 4 to those who can show a direct link between the antitrust violation and the antitrust injury. Several factors to be considered in determining whether a plaintiff is the proper party to bring a private action under the antitrust laws: (1) the causal connection between an antitrust violation and a plaintiff's injury; (2) the nature of a plaintiff's injury and the relationship between the plaintiff's injury and the type of activity sought to be redressed under the antitrust laws, and (3) the speculative nature of a plaintiff's claim for damages and the potential for duplicative recovery or complex apportionment of damages.

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

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > General Overview

[HN9](#) Private Actions, Standing

A competitor in the merging industry ordinarily lacks antitrust standing because that competitor would generally only stand to gain from the increase in prices.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN10](#) Judicial Officers, Judges

There is no general requirement that a district judge hear live testimony or conduct a hearing at all before issuing a preliminary injunction. The burden is on the party seeking such a hearing to establish that it has and intends to introduce evidence that if believed will so weaken the moving party's case as to affect the judge's decision on whether to issue the injunction.

Counsel: For ALLIEDSIGNAL, INCORPORATED, Plaintiff - Appellee: Thomas D. Yannucci, KIRKLAND & ELLIS, Washington, DC USA. Joseph Fullenkamp, BARNES & THORNBURG, South Bend, IN USA.

For CRANE CO., ELDEC CORPORATION, HYDRO-AIRE, INCORPORATED, Plaintiffs - Appellees: Michael T. Hannafan, HANNAFAN & ASSOCIATES, Chicago, IL USA. Thomas H. Singer, South Bend, IN USA. Garret G. Rasmussen, PATTON & BOGGS, Washington, DC.

For B F GOODRICH CO, Defendant - Appellant: Robert J. Palmer, MAY, OBERFELL & LORBER, South Bend, IL USA. Thomas F. Cullen, Jr., JONES, DAY, REAVIS & POGUE, Washington, DC USA. Robert J. Konopa, KONOPA & MURPHAY, South Bend, IN USA.

For COLTEC INDUSTRIES, INCORPORATED, MENASCO AEROSPACE. LIMITED, Defendants - Appellants: Robert D. Joffe, Rory O. Millson, CRAVATH, SWAINE & MOORE, New York, NY USA. Robert J. Konopa, KONOPA & MURPHY, South Bend, IN USA.

For STATE OF INDIANA, Amicus Curiae: Jeffery A. Modisett, OFFICE OF THE ATTORNEY GENERAL, Indiana Government Center South, Indianapolis, IN USA.

For STATE OF CONNECTICUT, Amicus Curiae: Richard Blumenthal, OFFICE OF THE ATTORNEY GENERAL, Hartford, CT USA.

For STATE OF IOWA, Amicus Curiae: Thomas J. Miller, IOWA ATTORNEY GENERAL'S OFFICE, Des Moines, IA USA.

Judges: Before Bauer, Flaum and Kanne, Circuit Judges.

Opinion by: FLAUM

Opinion

[*570] Flaum, *Circuit Judge*. Plaintiffs AlliedSignal, Crane Co., Eldec Corp. and Hydro-Aire, Inc. filed suit in federal district court alleging that the proposed merger between defendants B.F. Goodrich, Coltec Industries, and Menasco Aerospace, Ltd. violated Section 7 of the Clayton Act, [15 U.S.C. § 18](#). AlliedSignal separately alleged that the proposed merger would violate a joint agreement between it and Coltec. The district court granted a preliminary injunction for a stay of the merger pending arbitration of the contract claim and pending a bench trial on the antitrust claim scheduled for July 12, 1999. B.F. Goodrich, Coltec, and Menasco took an interlocutory appeal which we have considered on an expedited basis. We now affirm.

Background

An aircraft landing system is composed of three component parts: the landing gear, the wheels and brakes [**2] (sold together as a package), and the brake control system. The industry is currently dominated by a few large firms. AlliedSignal manufactures wheels and brakes. B.F. Goodrich manufactures landing gear and wheels and brakes. Coltec manufactures landing gear through its subsidiary Menasco Aerospace, Ltd. The only other major player in this industry is a French company which manufactures landing gear under the name Messier-Dowty, and wheels and brakes under the name Messier-Bugatti.

AlliedSignal and Coltec currently operate under a Strategic Alliance Agreement ("SAA") which provides for cooperation between AlliedSignal and Coltec in the preparation [*571] of joint bids on landing systems. Their principal competitor in these bids is B.F. Goodrich, which generally pairs its wheels and brakes with its own landing gear. The proposed merger between B.F. Goodrich and Coltec would bring Coltec's aircraft landing gear division under the control of B.F. Goodrich and result in a single large domestic manufacturer of aircraft landing gear. If the merger were to proceed, B.F. Goodrich-Coltec would control approximately 64% of the worldwide market for landing gear for wide-body jets, 44% of the worldwide [**3] market for landing gear for narrow-body jets, and 59% of the worldwide market for landing gear for U.S. military jets.

AlliedSignal alleges several harms resulting from the proposed merger. First, in preparing joint bids and the integrated landing systems which result, AlliedSignal and Coltec have shared confidential proprietary information. AlliedSignal is concerned that B.F. Goodrich would have access to this information once Coltec is under B.F. Goodrich's control. In its capacity as a landing gear purchaser, AlliedSignal alleges that B.F. Goodrich could use its

market power to charge it uncompetitive prices for landing gear. Last, AlliedSignal fears that B.F. Goodrich could leverage its dominant post-merger position in domestic landing gear production to favor B.F. Goodrich's own wheels and brakes over those of AlliedSignal in the formation of integrated landing systems.

Crane Co., Eldec Corp. and Hydro-Aire, Inc. ("the Crane Plaintiffs") are sellers of component parts for landing gear systems to both Coltec and B.F. Goodrich. They join AlliedSignal's Clayton Act claim out of a concern that the merger will allow B.F. Goodrich monopoly buying power (monopsony) for their goods.

[4]** Neither the Federal Trade Commission nor the Department of Defense (which reviewed the merger because of the parties' status as defense contractors) has objected to the merger. As noted above, the district judge granted a preliminary injunction for a stay of the merger pending arbitration of the contract claim and pending a bench trial on the antitrust claim scheduled for July 12, 1999.

Discussion

I. Arbitration Issues

B.F. Goodrich first raises a set of arguments predicated on the arbitration clause in the AlliedSignal-Coltec SAA. It asserts that the antitrust claim should be arbitrated with the contract claim and that the preliminary injunction should therefore last only as long as it takes to convene an arbitral panel. Assuming that the antitrust claim is not subject to arbitration, B.F. Goodrich argues that the district court improperly failed to stay consideration of the antitrust claim pending the results of the AlliedSignal-Coltec contract arbitration. Before we may consider the merits of B.F. Goodrich's argument, however, we must first consider two related jurisdictional obstacles to these aspects of the appeal.

A. Jurisdiction

HN1 [↑] Fed. R. App. P. 3(c)(1)(B) requires **[**5]** that the notice of appeal "designate the judgment, order or part thereof appealed from." The requirements of Rule 3(c) are jurisdictional and "their satisfaction is a prerequisite to appellate review." *Smith v. Barry*, 502 U.S. 244, 248, 116 L. Ed. 2d 678, 112 S. Ct. 678 (1992); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L. Ed. 2d 285, 108 S. Ct. 2405 (1988). Nevertheless, "mere technicalities" should not stand in the way of our consideration of the merits, and we will find a notice of appeal sufficient so long as it "is the functional equivalent of what the rule requires." See *Torres*, 487 U.S. at 316-17. The rule in this Circuit is that "an error designating the judgment or a part thereof will not result in a loss of appeal if the intent to appeal from the judgment complained of may be inferred from the notice and if the appellee [***572**] has not been misled by the defect." *Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1546 (7th Cir. 1985); see also *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1125 (7th Cir. 1996), *Badger Pharmacal, Inc. v. Colgate-Palmolive Co.*, 1 F.3d 621, 625 (7th Cir. 1985); but see *Garcia v. City of Chicago*, 24 F.3d 966, 969 n.4 (7th Cir. 1994); **[**6]** *Brandt v. Schal Assocs., Inc.*, 854 F.2d 948, 954 (7th Cir. 1988).

B.F. Goodrich's notice of appeal gave notice only of an appeal "from an order entered on April 30, 1999 granting AlliedSignal's motion for preliminary injunction." In an attached docketing statement, B.F. Goodrich alleged jurisdiction over this appeal solely under **28 U.S.C. § 1292(a)(1)**. **HN2** [↑] **Section 1292(a)(1)** makes the district court's issuance of a preliminary injunction an immediately appealable interlocutory order, but does not confer jurisdiction over the district court's refusal to refer the antitrust claim to arbitration or its alleged denial of a stay pending arbitration. (Jurisdiction over these latter two claims is conferred by **9 U.S.C. § 16(a)(1)(C)** and **§ 16(a)(1)(A)**, respectively.) AlliedSignal therefore contends that B.F. Goodrich failed to adequately indicate its intent to appeal the district court's arbitration rulings.

Before we may consider this question, we must consider another one: whether the district court actually made any rulings regarding arbitration. The record reveals that the parties to the litigation did fully brief the arbitration issues raised by B.F. Goodrich on appeal, though the written **[**7]** order issued by the district judge discussed only the

propriety of a preliminary injunction on the antitrust claim. B.F. Goodrich argues that this order, granting a preliminary injunction pending a trial on the merits of the antitrust claim, necessarily encompasses a refusal to refer the antitrust claim to arbitration. We agree. However, an order granting a preliminary injunction and setting a trial date does not necessarily constitute a refusal to stay the antitrust claim pending a resolution of the contract arbitration. Setting a July 12th trial date does not in and of itself indicate that the district judge will refuse to stay the trial if the contract arbitration is not completed by that date. Since we cannot conclude that the district court actually denied B.F. Goodrich a stay of the antitrust proceedings, no appellate jurisdiction lies over this issue.

Consideration of this second jurisdictional question leads us back to our original one, whether B.F. Goodrich gave adequate notice of its intent to appeal the refusal to refer the antitrust claim to arbitration. Since we agree with B.F. Goodrich that the order granting the preliminary injunction necessarily encompassed a denial [**8] of a referral to arbitration, we believe that B.F. Goodrich's identification of the "order entered on April 30, 1999 granting AlliedSignal's motion for preliminary injunction" sufficiently noticed its intent to appeal the denial of the referral to arbitration. We therefore have jurisdiction over the district court's refusal to refer the antitrust issue to arbitration.

B. Arbitrability of Antitrust Claim

In the SAA, AllliedSignal and Coltec agreed to cooperate in the production of integrated landing systems through joint projects involving AlliedSignal's brakes and wheels and Coltec's landing gear. B.F. Goodrich claims that the antitrust claims fall within the arbitration clause of the SAA, which provides for arbitration of "any claim or controversy arising out of or relating to [the] Agreement," because any future anticompetitive effects produced by the merger would occur only if B.F. Goodrich-Coltec fails to abide by the terms of the SAA.

HN3 A district court must refer a dispute to an arbitrator "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Matthews v. Rollins Hudig Hall* [*573] Co., [*91] 72 F.3d 50, 53 (7th Cir. 1995). We resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). In this case, however, it is clear that AlliedSignal's and the Crane Plaintiffs' antitrust claims do not arise under the SAA.

The Crane Plaintiffs' antitrust claim is not subject to arbitration because the Crane Plaintiffs are not parties to the SAA and therefore cannot be bound by its arbitration clause. See, e.g., *IDS Life Insurance Co. v. SunAmerica Inc.*, 103 F.3d 524, 528 (7th Cir. 1996). With regard to AlliedSignal, B.F. Goodrich argues that AlliedSignal's antitrust claim arises under the SAA because AlliedSignal would suffer antitrust injury only if B.F. Goodrich-Coltec fails to abide by the terms of the SAA. B.F. Goodrich provides no legal support for its argument that a Section 7 claim that has its "origin or genesis" in a contract containing an arbitration clause must also be arbitrated. This absence of legal authority need not trouble us, however, because the factual predicate underlying B.F. Goodrich's claim is without basis.

As [**10] explored more fully below, AlliedSignal claims antitrust injury in part from an increase in the price of landing gear it purchases as a landing systems integrator. The SAA, though it does provide for shared information and cooperation, does not regulate the price Coltec may charge for its landing gear. Therefore, B.F. Goodrich-Coltec could fully comply with the SAA and still cause AlliedSignal antitrust injury by charging uncompetitive prices. AlliedSignal's antitrust claims do not arise under the SAA and hence are not subject to arbitration.¹

II. Propriety of Preliminary Injunction

We turn now to the other aspect of B.F. Goodrich's appeal, a challenge to the district court's [**11] issuance of the preliminary injunction pending arbitration of the contract claims and pending a bench trial on the antitrust claim. B.F.

¹ This conclusion moots B.F. Goodrich's contention that the preliminary injunction on the contract claim should last only as long as it takes to convene an arbitral panel. The need to preserve the status quo prior to a trial on the merits of the antitrust claim provides a sufficient basis for the duration of the preliminary injunction.

Goodrich argues that neither of these two claims has a sufficient likelihood of success to warrant the issuance of a preliminary injunction. We first examine the antitrust claim and conclude that the district court's preliminary injunction was proper. This determination provides a sufficient basis to sustain the preliminary injunction and therefore moots any consideration of the contract claim.²

"HN4[] The purpose of a preliminary injunction is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit."*Kellas I**121 v. Lane*, 923 F.2d 492, 493 (7th Cir. 1990) (quoting *Faheem-El v. Klincar*, 841 F.2d 712, 716 (7th Cir. 1988) (en banc)). To prevail on a motion for preliminary injunction, the moving party must meet the threshold burden of establishing (1) some likelihood of prevailing on the merits; and (2) that in the absence of the injunction, he will suffer irreparable harm for which there is no adequate remedy at law. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1453 (7th Cir. 1995). If the moving party clears both of these prerequisites, a district court engages in a "sliding scale" analysis by balancing the harms to the parties and the public interest. *Roth*, 57 F.3d at 1453; *Storck U.S.A., L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir. 1994). Because preliminary injunctions [*574] are "by [their] very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by [their] for-the-timebeingness," *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1435 (7th Cir. 1986) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 739, 742 (2d ^{**131} Cir. 1953))), we review the district court's decision to issue a preliminary injunction for an abuse of discretion. *Duct-o-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 508 (7th Cir. 1994).

To show some likelihood of success on the merits of its Section 7 claim, AlliedSignal had to demonstrate (1) that the effect of the merger had some likelihood of substantially lessening competition or tending to create a monopoly, 15 U.S.C. § 18; and (2) that AlliedSignal had some likelihood of being within the class of plaintiffs with standing to assert the likely antitrust injuries. See, e.g., *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). The district court found that AlliedSignal had made the requisite showing of likely anticompetitive effects and found two possible bases for AlliedSignal's antitrust standing. After concluding that AlliedSignal would suffer irreparable injury in the absence of a preliminary injunction and then balancing the relative harms to the respective parties along with the public interest, the district court concluded that a preliminary injunction was warranted. As noted above, [*574] we review the district court's decision for an abuse of discretion.

A. Market Concentration

HN5[] Section 7 of the Clayton Act prohibits mergers the effect of which "may be to substantially lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. AlliedSignal defines three product markets in which the B.F. Goodrich-Coltec merger may lessen competition: (1) the worldwide market for wide body landing gear; (2) the worldwide market for narrow body landing gear; and (3) the worldwide market for military landing gear. AlliedSignal observes that the merger would reduce the worldwide number of firms that design and manufacture landing gear for each of these three markets from three to two and that after the merger, B.F. Goodrich-Coltec would control approximately 64% of the worldwide market for landing gear for wide-body jets, 44% of the worldwide market for narrow-body jets, and 59% of the worldwide market for landing gear for U.S. military jets. The merger would therefore result in large increases in the HerfindahlHirschman Index (HHI) for these markets: from 3230 to 5272 in the market for landing gear for wide-body jets, from 4496 to 4947 in the market for landing gear for narrow-body [*575] jets, and from 3157 to 4372 in the market for landing gear for U.S. military jets.³ Based on this

² In supplemental filings, the parties have made us aware of the ongoing arbitration of the contract claim. Since we rely solely on the antitrust claim to sustain the preliminary injunction, we have no need to consider what effect these ongoing proceedings might have on our view of the likelihood of success on the merits of the contract claim.

³ The HHI estimates market concentration by summing the squares of the market shares of every firm in the market. Areeda, Hovenkamp, & Solow, *Antitrust Law*, P 930(a) (rev. ed. 1998). Federal antitrust regulators define as "highly concentrated" any market in which the HHI exceed 1800, and presume that mergers in that range "producing an increase in the HHI of more than

evidence, the district court found that AlliedSignal had made a sufficient showing of a likely Section 7 violation to warrant a preliminary injunction.

B.F. Goodrich raises two objections to the district court's finding that the merger would likely have anticompetitive effects. First, B.F. Goodrich argues that although B.F. GoodrichColtec might possess market power in landing [**16] gear, the airplane manufacturers will continue to possess overwhelming buying power and will be able to squelch any monopoly rents B.F. Goodrich attempts to extract. Second, B.F. Goodrich relies on the failure of either the FTC or the Department of Defense to object to the merger as evidence [**575] that post-merger competition in the landing gear market will remain robust.

Neither of these objections convinces us that the district court abused its discretion in concluding that AlliedSignal had shown a sufficient likelihood of a Section 7 violation. The buying power of the large airplane manufacturers might in fact be sufficient to prevent B.F.Goodrich-Coltec from charging uncompetitive prices. However, if airplane manufacturers have market power relative to the purchasers of the fully-assembled airplanes, the airplane manufacturers would simply pass along the increased landing gear costs and hence would have no incentive to prevent B.F. Goodrich-Coltec from charging uncompetitive prices. AlliedSignal presents evidence that airplane manufacturers do possess such market power and that a number of airlines object to the merger, which suggests that AlliedSignal's prediction of the likely market [**17] effects of the merger is worthy of some credence. The district court did not abuse its discretion in concluding that this factual dispute could not be resolved at the preliminary injunction stage.

Similarly, B.F. Goodrich gives us no reason to believe that the failure of either the FTC or the Department of Defense to object to the merger should be regarded as conclusive of its legality. [HN6](#)[] Courts do not generally defer to an agency's decision not to challenge a merger. See, e.g., [Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1254 \(E.D. Pa. 1987\)](#); [Laidlaw Acquisition Corp. v. Mayflower Group, Inc., 636 F. Supp. 1513, 1521 \(S.D. Ind. 1986\)](#). To the contrary, federal regulators will not necessarily challenge every potentially troublesome merger, which is why Congress made private enforcement "an integral part of the congressional plan for protecting competition," [California v. American Stores Co., 495 U.S. 271, 284-85, 109 L. Ed. 2d 240, 110 S. Ct. 1853 \(1990\)](#). The district court did not abuse its discretion in concluding that the failure of the FTC or DOD to object to the merger does not bar AlliedSignal's private enforcement action.

B. Antitrust Standing

Having concluded [**18] that the district court did not abuse its discretion in finding a sufficient likelihood of a Section 7 violation, we turn to AlliedSignal's antitrust standing. [HN7](#)[] Section 4 of the Clayton Act sets forth the group of persons who may maintain private damages actions under the **antitrust law**. It 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 in the district in which the defendant resides.

[15 U.S.C. § 15](#). Despite this broad language, it is well-settled that "Congress did not intend [HN8](#)[] the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an anti-trust violation." [Associated Gen. Contractors, 459 U.S. at 534](#); see also [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#). The doctrine of antitrust standing therefore limits the class of plaintiffs under § 4 to those who can show "a direct link between the antitrust violation and the antitrust injury." [Greater Rockford Energy & Technology Corp. v. Shell Oil Co., 998 F.2d 391, 395 \(7th Cir. 1993\)](#). The Supreme

Court [**19] has identified several factors to be considered in determining whether a plaintiff is the proper party to bring a private action under the antitrust laws: (1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the nature of the plaintiff's injury and the relationship between the plaintiff's injury and the type of activity sought to be redressed under the antitrust laws; and (3) the speculative nature of the plaintiff's claim for damages and the potential for duplicative recovery or complex apportionment of damages. [Associated Gen. Contractors, 459 U.S. at 537-46](#); see also [Serfecz v. I-5761 Jewel Food Stores, 67 F.3d 591, 595-96 \(7th Cir. 1995\)](#).

HN9 A competitor in the merging industry ordinarily lacks antitrust standing because that competitor would generally only stand to gain from the increase in prices. See, e.g., [Cargill v. Monfort of Colo., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#); [Alberta Gas Chems., Ltd. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235 \(3d Cir. 1987\)](#); Areeda, Hovenkamp, & Solow, [Antitrust Law](#), P 373(b) (rev. ed. 1998). B.F. Goodrich argues that AlliedSignal's claim is founded only on its rivalry with B.F. Goodrich for the [**20] sale of wheels and brakes and hence lacks antitrust standing. AlliedSignal, however, initially alleges standing not as a competitor for sales of wheels and brakes, but as a purchaser of landing gear.

AlliedSignal presents evidence that in the airplane manufacturing industry, the wheels and brakes manufacturer is responsible for integrating its wheels and brakes together with landing gear and brake control systems to produce a complete landing system. B.F. Goodrich does not argue that AlliedSignal does not act as a purchaser in its capacity as a landing systems integrator. Rather, B.F. Goodrich claims that AlliedSignal has not identified any current aircraft program in which it is an ongoing customer for landing gear. Although the record is unclear as to whether AlliedSignal is currently serving as a landing systems integrator on any ongoing project, AlliedSignal does continue to submit bids (at least one of which has been accepted) to serve as a landing systems integrator. Given the early procedural stage of this case and the necessarily tentative nature of the district court's conclusions, we do not believe that the district judge abused his discretion in concluding that AlliedSignal [**21] has some likelihood of showing antitrust standing.⁴

C. Irreparable Harm

B.F. Goodrich argues that a preliminary injunction should not have issued because it has promised to hold separate the landing gear division of Coltec from B.F. Goodrich's landing gear facility until at least the end of August 1999 and hence any harm to AlliedSignal and the Crane Plaintiffs resulting from the merger would not be irreparable. B.F. Goodrich [**22] contends that if a court were to find an antitrust violation, divestiture of the Coltec landing gear division would be the likely remedy. B.F. Goodrich therefore argues that holding the Coltec division separate is sufficient to maintain the status quo pending trial and that a preliminary injunction was therefore unnecessary.

We believe that the district judge did not abuse his discretion in finding a sufficient likelihood of irreparable harm. On the basis of this record, we cannot definitively determine that the proposed separation between Coltec's landing gear division and the remainder of Coltec would adequately preserve the status quo pending a trial on the merits of the antitrust claim. In addition, if the merger were consummated with the Coltec landing gear division held separate, this might unduly prejudice the scope of a possible remedy should the merger ultimately be found to violate Section 7. The district court did not abuse its discretion in finding a sufficient likelihood of irreparable harm.

D. Balance of Harms and Public Interest

⁴ Since we have determined that AlliedSignal has demonstrated a sufficient likelihood of establishing standing as a consumer of landing gear, we do not reach AlliedSignal's alternative ground of antitrust standing based on the injury AlliedSignal would endure if B.F. Goodrich-Coltec were able to use its dominant position in landing gear to leverage its own wheel and brakes division unfairly over that of AlliedSignal. We similarly do not address the Crane Plaintiffs' injury based on B.F. Goodrich-Coltec's alleged monopoly buying power as it has not been made the subject of this appeal.

B.F. Goodrich last contends that the merger promises substantial efficiencies [*577] in the global aerospace market which will go unrealized while [*23] the injunction stands and hence that the balance of harms weighs against the preliminary injunction. The merger will significantly concentrate the worldwide market for landing gear for wide-body jets, for narrow-body jets, and for U.S. military jets. If the merger were to lead to noncompetitive prices for landing gear, this would be a significant harm to AlliedSignal, the Crane Plaintiffs, and the public. Whether the merger will have these effects is a subject for trial. At this stage, we find no abuse of discretion in the district court's determination that the balance of harms outweighed the potential benefits identified by B.F. Goodrich.

III. Procedures Adopted by District Court

In a catch-all objection, B.F. Goodrich contends that the manner in which the district judge reached his decision constituted an abuse of discretion. The district judge initially announced that he would allow each side to present argument and one live witness. After hearing argument from both sides, the district judge decided to issue the preliminary injunction without hearing from each side's live witness. B.F. Goodrich contends that the failure to conduct a more extensive evidentiary hearing was an [*24] abuse of discretion.

Under the circumstances of this case, we conclude that the procedures adopted by the district court were adequate. We note that B.F. Goodrich did not object to the district court's conduct of the hearing at the time. Moreover, B.F. Goodrich fails to indicate what, if anything, a live witness would have added in light of the voluminous exhibits, affidavits, and depositions each side provided. Finally, contrary to B.F. Goodrich's claim, [HN10](#)[] there is no general requirement that a district judge hear live testimony or conduct a hearing at all. The burden is on the party seeking such a hearing to establish that it "has and intends to introduce evidence that if believed will so weaken the moving party's case as to affect the judge's decision on whether to issue the injunction," [*Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 \(7th Cir. 1997\)*](#). B.F. Goodrich did not carry this burden.

IV. Sealed Appendices

One final issue concerns B.F. Goodrich's and AlliedSignal's motions to file confidential supplemental appendices and substantial portions of the record under seal. B.F. Goodrich has filed the motion in an attempt to comply with the protective order it and AlliedSignal [*25] stipulated to in the district court. AlliedSignal indicates in its motion that it believes the protective order overbroad, but nevertheless seeks to have the materials sealed. The information in the appendices and the proposed sealed portions of the record consists of a variety of strategic plans, economic forecasts, party and non-party depositions, and affidavits from expert witnesses.

In light of the expedited nature of this appeal and its inherent time constraints, we grant the motions. On remand, the district court shall conduct, with appropriate dispatch, a review of whether the submitted materials may remain under seal. This examination shall be carried out in accordance with our recent opinion in [*Citizens First National Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 1999 U.S. App. LEXIS 11121, 1999 WL 342772 \(7th Cir. 1999\)*](#).

Conclusion

The district court's grant of a preliminary injunction is AFFIRMED. The case is REMANDED for further proceedings consistent with this opinion.



Caldera, Inc. v. Microsoft Corp.

United States District Court for the District of Utah, Central Division

June 24, 1999, Decided ; June 28, 1999, Filed

Case No.: 2:96-CV-645 B

Reporter

87 F. Supp. 2d 1244 *; 1999 U.S. Dist. LEXIS 21652 **

CALDERA, INC., Plaintiff, vs. MICROSOFT CORPORATION, Defendant.

Disposition: [**1] Defendant's motions for partial summary judgment on "Product Preannouncement," "Product Disparagement," and "Licensing Practices" DENIED.

Core Terms

preannouncement, summary judgment, licenses, anticompetitive, operating system, disparagement, processor, alleges, knowingly false, release date, Antitrust, contends, motions, relevant market, manufacturers, Practices, announced, monopoly, license agreement, misleading, schedules, users

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN1 [blue download icon] **Regulated Practices, Price Fixing & Restraints of Trade**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2 [blue download icon] **Regulated Practices, Monopolies & Monopolization**

See [15 U.S.C.S. § 2](#).

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

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

87 F. Supp. 2d 1244, *1244 (1999 U.S. Dist. LEXIS 21652, **1

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

Summary judgment on a case is proper if the moving party can demonstrate that there is no genuine issue of material fact, and, therefore, is entitled to judgment as a matter of law. The court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party. In considering whether there exist genuine issues of material fact, the court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN4](#) [] Sherman Act, Claims

In order to establish a violation of [§ 2](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 2](#), a plaintiff must establish that: (1) the defendant possessed monopoly power in the relevant market and (2) the defendant willfully acquired or maintained that monopoly power through anticompetitive means as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

Ordinarily, the rule of reason is employed to determine whether particular concerted action violates [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#). 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.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Requirements Contracts

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

HN6 Exclusive & Reciprocal Dealing, Exclusive Dealing

An exclusive dealing arrangement violates **antitrust law** when: 1) the agreement at issue is exclusive; and 2) the agreement has an adverse effect on competition.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN7 Regulated Practices, Monopolies & Monopolization

A contract need not be denominated exclusive, nor must exclusivity be an express condition of a contract, in order for it to be exclusive under § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2. An agreement with the "practical effect" of exclusivity is covered.

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 > Monopolies & Monopolization > General Overview

HN8 Regulated Practices, Price Fixing & Restraints of Trade

For purposes of a claim under § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, determining whether competition has been foreclosed in a given market requires, first, defining the product market, and, second, identifying the geographic market by careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for supplies. Moreover, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

HN9 Regulated Practices, Monopolies & Monopolization

To determine whether competition has been significantly limited in a claim under § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein.

Counsel: For CALDERA, plaintiff: Stephen J. Hill, Ryan E. Tibbitts, Mr., Max D Wheeler, Mr., SNOW CHRISTENSEN & MARTINEAU, SALT LAKE CITY, UT.

87 F. Supp. 2d 1244, *1244 (1999 U.S. Dist. LEXIS 21652, **1

For CALDERA, plaintiff: Stephen D. Susman, Charles R. Eskridge, III, James T. Southwick, SUSMAN GODFREY LLP, HOUSTON, TX.

For CALDERA, plaintiff: Parker C. Folse, III, SUSMAN GODFREY LLP, SEATTLE, WA.

For CALDERA, plaintiff: Ralph H. Palumbo, Lynn M. Engel, Philip S. McCune, Lawrence C. Locker, SUMMIT LAW GROUP, SEATTLE, WA.

For SALT LAKE TRIBUNE, THE, SAN JOSE MERCURY NEWS, movants: Michael P O'Brien, Mr., JONES WALDO HOLBROOK & MCDONOUGH, SALT LAKE CITY, UT.

For MICROSOFT, defendant: James S. Jardine, Steven J. Aeschbacher, Mr., Mark M Bettilyon, Mr., John W. Mackay, Valerie A. Longmire, Mark W. Pugsley, SALT LAKE CITY, UT.

For MICROSOFT, defendant: Richard J. Urowsky, Steven L. Holley, Richard C. Pepperman, II, Jay Holtmeier, Richard H. Klapper, SULLIVAN & CROMWELL, NEW YORK, NY.

For MICROSOFT, defendant: William H. Neukom, Thomas W. Burt, David A. Heiner, MICROSOFT CORPORATION, [**2] REDMOND, WA.

For MICROSOFT, defendant: James R. Weiss, PRESTON GATES ELLIS & ROUVELAS MEEDS, WASHINGTON, DC.

For MICROSOFT, defendant: Michael H. Steinberg, Michael Tenenbaum, Brendan P. Cullen, SULLIVAN & CROMWELL, LOS ANGELES, CA.

For BRISTOL TECHNOLOGY, movant: Clark Waddoups, Mr., PARR WADDOUPS BROWN GEE & LOVELESS, SALT LAKE CITY, UT.

For BRISTOL TECHNOLOGY, movant: Robert G. Loewy, OMELVENY & MYERS, NEWPORT BEACH, CA.

For SAN JOSE MERCURY NEWS, movant: James Chadwick, Edward P. Davis, Jr., GRAY CARY WARE & FRIDENRICH, PALO ALTO, CA.

For BLOOMBERG L.P., movant: Gary F. Bendinger, Mr., Joy E. Onton, GIAUQUE CROCKETT BENDINGER & PETERSON, SALT LAKE CITY, UT.

For BLOOMBERG L.P., movant: Richard L. Klein, Marcia T. Maack, WILLKIE FARR & GALLAGHER, NEW YORK, NY.

Judges: Dee Benson, United States District.

Opinion by: Dee Benson

Opinion

[*1246] MEMORANDUM OPINION and ORDER

I. Introduction

This case concerns two manufacturers of operating systems for personal computers, plaintiff Caldera, Inc. and defendant Microsoft Corporation. Caldera alleges and Microsoft does not dispute for purposes of the instant motions, that by the mid-1980's Microsoft had monopoly [**3] control of the relevant market for computer operating systems with its product MS DOS. In an effort to compete with MS DOS, Digital Research Inc. (DRI) developed its

own computer operating system known as DR DOS.¹ Caldera alleges that because DR DOS was superior to MS DOS and posed a threat to Microsoft's operating systems, Microsoft engaged in anticompetitive conduct in violation of [Sections 1](#) and [2](#) of the Sherman Antitrust Act.² Among the predatory behavior alleged, Caldera complains of the following conduct related to the three motions currently before the Court: (1) Microsoft prematurely and falsely announced to the public plans to release an improved MS DOS product (MS DOS 5.0) at the same time DR DOS was gaining significant market acceptance - Caldera contends this was done with the intent to forestall computer manufacturers from buying DR DOS and with the knowledge that MS DOS 5.0 was not forthcoming as represented; (2) Microsoft improperly engaged in a campaign of disseminating information in the computer industry to create fear, uncertainty and doubt about the effectiveness of DR DOS and its compatibility with "Windows," Microsoft's popular graphical user interface (GUI) [[**4](#)] program; and (3) Microsoft employed licensing agreements relating to MS DOS among computer manufacturers that were designed to prevent the manufacturers from purchasing DR DOS by offering significant discounts to computer manufacturers who elected to enter into agreements that required them to pay a royalty to Microsoft on every computer sold, irrespective of whether MS DOS or another operating system was actually installed on the computer.

[[**5](#)] In response to these allegations Microsoft has moved for partial summary judgment on "Plaintiff's Product Preannouncement Claims," "Plaintiff's Product Disparagement ("FUD") Claims," and "Plaintiff's Claims Regarding Microsoft's Licensing Practices." The Court heard [[*1247](#)] oral argument on these motions on May 25, 1999 and May 27, 1999. After considering the written briefs and oral arguments of the parties, the Court denies defendant's motion for the following reasons.

II. Standard of Review

[HN3](#)[] Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact, and, therefore, is entitled to judgment as a matter of law. See [Fed. R. Civ. P. 56\(c\)](#). The court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party. [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); [Wright v. Southwestern Bell Tel. Co.](#), 925 F.2d 1288, 1292 (10th Cir. 1991). In considering whether there exist genuine issues of material fact, the court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence [[**6](#)] presented. See [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); [Clifton v. Craig](#), 924 F.2d 182, 183 (10th Cir. 1991).

III. Motions for Partial Summary Judgment

[HN4](#)[] In order to establish a violation of [Section 2](#) of the Sherman Antitrust Act, a plaintiff must establish that (1) the defendant possessed monopoly power in the relevant market and (2) the defendant willfully acquired or maintained that monopoly power through anticompetitive means "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, 480, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (quoting [United States v. Grinnell Corp.](#), 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)). Because Microsoft does not contest, for purposes of the instant motions, that it has monopoly power in the relevant market, the following motions address only whether Microsoft willfully maintained its monopoly power through anticompetitive means.

¹ In 1991 DRI merged with Novell Corporation. In 1996 Caldera acquired DR DOS and the right to pursue any claim DRI/Novell may have against Microsoft Corporation.

² [HN1](#)[] [Section 1](#) of the Sherman Act prohibits restraints on trade. It states 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](#). [HN2](#)[] [Section 2](#) of the Sherman Act makes guilty of a felony "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." [15 U.S.C. § 2](#).

A. Product Preannouncement

Caldera asserts that in an attempt to insulate its monopoly position in the DOS market, Microsoft engaged in a pattern [**7] of anticompetitive conduct by: (1) preannouncing a new version of MS DOS shortly after DRI announced a new version of DR DOS; (2) announcing a false release date for MS DOS 5.0 to curtail DOS users from buying DR DOS; (3) studying the new DR DOS version in order to add its improved features to the promised MS DOS version; and (4) moving MS DOS's release date back in small increments to keep MS DOS users awaiting the promised new MS DOS version, rather than purchasing DR DOS. Caldera points to several statements made to the public by Microsoft representatives that Microsoft would be releasing MS DOS 5.0 as early as September of 1990.³ Caldera further contends that Microsoft knew it was impossible to release MS DOS 5.0 by the proposed date. MS DOS 5.0 was in fact not released until June of 1991.

[**8] In response to Caldera's allegations that Microsoft improperly preannounced its plans to release MS-DOS 5.0, Microsoft argues that in order succeed on a product preannouncement claim Caldera must show that the announcements made by Microsoft were "knowingly false or misleading." See *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983) (finding that in order to succeed on a product preannouncement claim, a plaintiff must demonstrate that statements were knowingly false or misleading). However, much of Caldera's evidence centers around the fact that the Microsoft release dates [*1248] were objectively unreasonable rather knowingly false and that Microsoft was aware of the unreasonableness of their projected release dates for MS DOS 5.0, 6.0, and 7.0. Caldera submits a report from its own expert as well as deposition testimony from Microsoft management personnel stating that the scheduled release dates for MS DOS were unrealistic or impossible to meet. Microsoft complains that Caldera is asking the Court to abandon the test applied in *MCI* and its progeny (requiring that a preannouncement statement must be either knowingly false or misleading) and adopt a more [**9] relaxed standard requiring only a showing that statements relating to product preannouncement were not made in good faith or otherwise were objectively unreasonable.

The Court agrees as a general proposition that the question of reasonableness may not be the appropriate standard to determine whether product preannouncement is anticompetitive under Section 2, especially in a case where product preannouncement is the sole basis for the claim. However, regardless of the standard, an inquiry into reasonableness will most likely be relevant to assessing whether a statement was knowingly false or misleading. Proving state of mind is a difficult task. Rare indeed is the case where a plaintiff has direct evidence that a defendant knew he or she was making a false statement at the time they were preannouncing a product. Often whether a monopolist acted knowingly will be based on circumstantial evidence. It is appropriate that the reasonableness of the statement be considered. Had the product manager of MS DOS 5.0 announced that the product would be released the following week and it was subsequently discovered that there were not even specifications in existence at the time the statement was [**10] made, a logical inference could be drawn that the statement was knowingly false.

Caldera offers internal Microsoft documents in support of its allegations that Microsoft made false statements about the release date for MS DOS 5.0. In a Microsoft document entitled "DR DOS 5.0 Competitive Analysis" dated May 3, 1990, the document states, "On the PR side, we have begun an 'aggressive leak' campaign for MS-DOS 5.0. The goal is to build anticipation for MS-DOS 5.0 and diffuse potential excitement/momentum from the DR DOS 5.0 announcement." (Caldera Exhibit 49). Caldera asserts that the aggressive leak campaign consisted of disseminating information in the computer industry that MS DOS was forthcoming, when in fact it was not.

³ Specifically, Microsoft points to the following public statements: statements made by Microsoft representatives to three computer trade magazines in late April of 1990, statements made by Microsoft representatives to original equipment manufacturers (OEM) in May of 1990, and statements made by Microsoft representatives to a reporter in June of 1990,

As further evidence that Microsoft knew that the preannounced dates could not be met, Caldera cites to the minutes from a program management meeting attended by top Microsoft executives titled "Windows 3.0 Post Mortem." Under the heading "Schedule" the following language is found:

- * Set by BillG (upper management) before feature definitions are outlined.
- * Problem motivating people to achieve "fake" ship dates.

- * Need to be more realistic in our schedules. **[**11]**
- * Lying to people on the team about schedules. Morale hit to the team.
- * How to separate out development schedules and the schedules we give to other groups (USSMD or upper management) without appearing to "lie" to the product team.

(Caldera Exhibit 47).

Based on these documents and evidence that the publicly stated release dates for MS DOS were objectively unreasonable, a genuine question of fact has been raised as to whether Microsoft made knowingly false statements, or otherwise engaged in anticompetitive behavior with respect to its "product preannouncement" practices concerning the release of MS DOS. Such a question is appropriately considered by a fact-finder and is inappropriate for summary judgment. Having found that a material **[*1249]** issue of fact exists as to whether Microsoft's statements were knowingly false, the court need not determine with finality at this point of the proceedings whether *MCI*'s standard is controlling in this case. Caldera contends the *MCI* standard is not applicable here where its product preannouncement allegations against Microsoft are only part of a larger picture. This issue will be more fully explored by the Court in connection with **[**12]** Caldera's motion to strike and, of course, in the formulation of appropriate instructions to the jury. Defendant's motion for summary judgment on product preannouncement is denied.

B. Product Disparagement

Caldera also alleges that Microsoft engaged in a campaign of spreading fear, uncertainty and doubt (FUD) to create the perception that DR DOS and Windows were incompatible. Caldera alleges that Microsoft employed a variety of tactics to this end. Among other allegedly predatory conduct complained of, Caldera contends that: (1) Microsoft made false statements to computer makers about the compatibility of the two products; (2) Microsoft blacklisted DRI from participating in the Windows 3.1 beta program and then took advantage of resulting incompatibilities between DR DOS and Windows by blaming them on DR DOS; (3) Microsoft included code in Windows 3.1 during the beta program that was designed solely to display a false error message if a user tried to run Windows 3.1 on any operating system other than MS DOS; (4) Microsoft introduced "bugs" in Windows 3.1 that caused fatal errors when users tried to use Windows on DR DOS; and (5) Microsoft included code in Windows 3.1 that **[**13]** prevented DR DOS from running with Windows. Caldera contends that this and other anticompetitive behavior was in violation of Section 2 of the Sherman Antitrust Act.

In response, Microsoft has moved for partial summary judgment on Caldera's "Product Disparagement" claim relating to the false statements allegedly made by Microsoft. Microsoft asserts that in order to succeed on a product disparagement claim Caldera must demonstrate that the statements made by Microsoft about DR DOS 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 an extended time period, and (6) not readily susceptible to counter statement, explanation or other neutralizing effort or offset by the plaintiff." [David L. Aldridge Co. v. Microsoft Corp., 995 F. Supp. 728, 749 \(S.D. Tex. 1998\).](#)

However, unlike the plaintiff in *David L. Aldridge Co.*, Caldera has not alleged libel or business disparagement. Rather, as explained above, Caldera takes a broad approach to its Section 2 claim, arguing that based on an examination of all the predatory conduct Microsoft engaged **[**14]** in, Microsoft violated antitrust law. The misleading statements may not amount to a finding of Section 2 liability standing alone, but Caldera has not alleged a separate product disparagement claim. The statements viewed with other behavior may, however, support a Section 2 violation, as Caldera has alleged. Therefore, summary judgment on product disparagement is denied.

It is important to note that the denial of summary judgment on this claim does not necessarily allow for the admission of all the evidence presented by Caldera relating to Microsoft's motion for summary judgment on product disparagement. Questions as to the admissibility of specific evidence will be addressed as they arise.

C. Licensing Practices

Caldera also alleges that Microsoft's two and three-year per processor licensing agreements with minimum commitments provisions were anticompetitive and unlawful under antitrust laws. Under these agreements an original equipment manufacturer (OEM) was required to pay Microsoft a royalty on every machine the OEM shipped regardless of whether the machine contained MS DOS or another [*1250] operating system. The effect of such an arrangement was that an OEM who chose to [**15] install DR DOS would pay two royalties on the same machine. Moreover, Caldera asserts that Microsoft required OEMs to make large minimum commitments with up-front payments and that Microsoft's pricing structure rewarded OEMs that made overly-optimistic minimum commitments. Accordingly, OEMs regularly had large prepaid balances when the licenses expired. OEMs would forfeit these balances unless they renewed their licenses with Microsoft. Although Microsoft offered other licensing agreements, Caldera claims that Microsoft coerced OEMs into entering per-processor licenses by offering significant discounts on MS DOS licensed under a per processor agreement. Caldera contends that this conduct was anticompetitive and therefore in violation of both [Sections 1](#) and [2](#) of the Sherman Antitrust Act.⁴

[**16] [HN5](#)[↑]

Ordinarily, the Rule of Reason is employed to determine whether particular concerted action violates [Section 1](#) of the Sherman Act. 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, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). Here, the alleged facts that OEMs entered into per processor licensing agreements with Microsoft at Microsoft's suggestion and that Microsoft used economic pressure to give OEMs an incentive to enter into per processing agreements is enough evidence of restraint of trade to allow Caldera to proceed on its [Section 1](#) claim. Therefore, the Court denies Microsoft's motion for summary judgment on Caldera's [Section 1](#) claims relating to licensing practices.

Turning to the strength of Caldera's [Section 2](#) claim, the parties agree that the standard for determining whether Microsoft's licensing agreements constitute illegal exclusive dealings was established in [Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 5 L. Ed. 2d 580, 81 S. Ct. 623 \(1961\)](#). In *Tampa Electric* the United States Supreme Court [**17] addressed the validity of a requirements contract under the Clayton Act. [HN6](#)[↑] In evaluating whether an exclusive dealing arrangement violates [antitrust law](#), the Court developed a two-part test: first, the agreement at issue must be exclusive; and second, the agreement must have an adverse effect on competition. [Id. at 329](#).

Microsoft argues because per processor agreements did not require an OEM covered by such an agreement to purchase all operating systems from Microsoft it is not an exclusive agreement and Caldera cannot meet the first prong of the *Tampa Electric* test. [HN7](#)[↑] However, a contract need not be denominated exclusive nor must exclusivity be an express condition of a contract, in order for it to be exclusive under [Section 2](#). An agreement with the "practical effect" of exclusivity is covered. [Tampa Electric, 365 U.S. at 327](#) (quoting [United Shoe Machinery Corp. v. United States, 258 U.S. 451, 457, 66 L. Ed. 708, 42 S. Ct. 363 \(1922\)](#)). The effect of per processor licenses was that an OEM had to pay two royalties on a computer shipped with an operating system other than MS DOS. A fact-finder could reasonably conclude that this effect coupled with the significant [**18] discount offered OEMs who participated in per processor agreements resulted in an agreement with the practical effect of exclusivity.

⁴ Microsoft also offered "per copy" licenses which obligated an OEM to pay Microsoft a royalty on every computer shipped with a copy of MS DOS installed on a computer and "per system" licenses which required an OEM that wished to install a Microsoft operating system on computers that bore a particular model designation to pay Microsoft a royalty on every computer shipped that bore that designation.

Microsoft also contends that because new OEMs were always entering the market and a certain number of MS DOS licenses were expiring at any given time, [*1251] competition was not foreclosed. [HN8](#)[] However, determining whether competition has been foreclosed in a given market requires first, defining the product market, and second, identifying the geographic market "by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." [365 U.S. at 328](#). Moreover, "the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited." *Id.*

The Supreme Court further stated in *Tampa Electric* that [HN9](#)[] "to determine whether competition has been significantly limited "it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate [**19] volume of commerce involved in relation to the total volume of 10 commerce in the relevant market area, and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein." Applying this to the instant case, Microsoft has not defined the relevant market or properly weighed the factors outlined in *Tampa Electric* to determine whether per processor licenses had a substantial effect on competition. Therefore, Microsoft has not met its burden on this issue for purposes of summary judgment.

Finally, unlike the plaintiff in *Tampa Electric*, Caldera offers Microsoft's licencing scheme as part of a bigger picture of anticompetitive behavior by Microsoft. It is not a discrete claim of exclusive dealing. Microsoft's per processor agreements may not amount to a finding of [Section 2](#) liability standing alone, however, use of per processor licenses viewed in context with other alleged anticompetitive behavior may give rise to a [Section 2](#) violation as complained of by Caldera. Therefore, summary judgment on Microsoft's licensing practices is denied.

IV. Conclusion

Based on the foregoing, defendant's motions for [**20] partial summary judgment on "Product Preannouncement," "Product Disparagement," and "Licensing Practices" are DENIED.

DATED this 24 day of June 1999.

BY THE COURT:

Dee Benson

United States District

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Abbott Lab. v. Durrett

Supreme Court of Alabama

June 25, 1999, Released

1960464

Reporter

746 So. 2d 316 *; 1999 Ala. LEXIS 196 **; 1999-1 Trade Cas. (CCH) P72,559

Abbott Laboratories et al. v. Cecil Durrett et al.

Subsequent History: [**1] Application for Rehearing Denied October 22, 1999. Released for Publication January 21, 2000. As Corrected April 7, 2000.

Prior History: Appeal from Greene Circuit Court. (CV-94-029). William R. Gordon, TRIAL JUDGE.

This Opinion Substituted on Rehearing for Withdrawn Opinion of July 31, 1998, Previously Reported at: [1998 Ala. LEXIS 208](#).

Disposition: OPINION OF JULY 31, 1998, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED.

Core Terms

interstate commerce, combinations, commerce, monopoly, manufacture, antitrust, restraint of trade, commodity, regulation, pool, antitrust statute, anti trust law, transactions, Oil, price fixing, Sherman Act, fined, out-of-state, national bank, confederation, wholesaler, destroy, intrastate commerce, five hundred, commerce clause, interstate, intrastate, indirect, enters, cases

LexisNexis® Headnotes

Governments > Legislation > Interpretation

[**HN1**](#) Legislation, Interpretation

If possible, legislative intent should be gathered from the language of the statute itself.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[**HN2**](#) Regulated Practices, Monopolies & Monopolization

See [Ala. Code § 6-5-60 \(1975\)](#).

Governments > Legislation > Interpretation

HN3 Legislation, Interpretation

Related statutes should, when possible, be construed in pari materia.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Transportation Law > Interstate Commerce > Federal Powers

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Transportation Law > Intrastate Commerce

HN4 Interstate Commerce, State Powers

The Alabama Legislature was aware toward the end of the 19th century and at the beginning of the 20th century, when it first enacted its antitrust statutes, that its ability to regulate antitrust activity was limited in that it did not have the power to directly regulate transactions involving interstate commerce.

Governments > Legislation > Interpretation

HN5 Legislation, Interpretation

When circumstances surrounding the enactment of laws cast doubt on the otherwise clear language of the statutes themselves, the court must look to other factors in determining legislative intent.

Governments > Legislation > Interpretation

HN6 Legislation, Interpretation

It is permissible in ascertaining the purpose and intent of a statute to look to the history of the times, the existing order of things, the state of the law when the instrument was adopted, and the conditions necessitating such adoption.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN7 Regulated Practices, Private Actions

Ala. Code § 6-5-60 (1975) does not provide a cause of action for damages allegedly resulting from an agreement to control the price of goods shipped in interstate commerce.

Counsel: For Appellants: William D. Coleman and Raymond L. Jackson of Capell, Howard, Knabe & Cobbs, P.A., Montgomery, for Ciba-Geigy Corp. and on behalf of all Manufacturer Defendants.

Richard H. Gill of Copeland, Franco, Screws & Gill, Montgomery, for Schering-Plough Corp. and on behalf of all Manufacturer Defendants.

Lawrence B. Clark and E. Burton Spence of Lange, Simpson, Robinson & Somerville, L.L.P., Birmingham.

For Appellees: Joe R. Whatley, Jr., Russell Jackson Drake, and Peter Burke of Cooper, Mitch, Crawford, Kuykendall & Whatley, L.L.C., Birmingham; and Michael Straus and Philippa McC. Bainbridge of Bainbridge & Straus, Birmingham, for appellees.

Of counsel for the appellees: J. Michael Rediker, Thomas L. Krebs, Steven P. Gregory, and Michael J. Skotnicki of Ritchie & Rediker, Birmingham; David Cromwell Johnson and J. Flint Liddon of Johnson, Liddon, Bear & Tuggle, Birmingham; J.L. Chestnut, Jr., of Chestnut, Sanders, Sanders & Pettaway, P.C., Selma; and T. Roe Frazer II, Richard Freese, and Dennis C. Sweet III of Langston, Frazer, Sweet & Freese, P.A., Jackson, Mississippi.

For Amicus curiae Wholesaler Defendants: Tabor R. Novak, Jr., and E. Hamilton Wilson, Jr., of Ball, Ball, Matthews & Novak, P.A., Montgomery, for Durr Drug Company and Bergen Brunswig Corp.; and Crawford S. McGivaren, Jr., of Cabiness, Johnston, Gardner, Dumas & O'Neal, Birmingham, for Cardinal Health, Inc., Whitmire Distribution Corp., Bindley Western Industries, Inc., McKesson Corp., and Amerisource Corp.

Melvin R. Goldman and Lori A. Schechter of Morrison & Foerster, L.L.P., San Francisco, California; Thomas L. Long of Baker & Hostetler, Columbus, Ohio; Nada S. Suliaman of Arent Fox Kintner Plotkin & Kahn, Washington, D.C.; J. Thomas Rosch and Peter K. Huston, San Francisco, California; and Howard D. Scher and Steven E. Bizar of Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pennsylvania.

Judges: Hooper, C. J., and Maddox, See, and Brown, JJ., concur. Cook and Johnstone, JJ., dissent. Houston and Lyons, JJ., recuse themselves. See, J., files statement of nonrecusal.

Opinion

[*317] On Rehearing Ex Mero Motu

PER CURIAM.

The opinion of July 31, 1998, is withdrawn and the following is substituted therefor.

The issue presented on this appeal is whether [Ala. Code 1975, § 6-5-60](#), provides a cause of action for damage alleged to have resulted from a conspiracy to control the price of brand-name prescription drugs that were shipped from companies out-of-state into Alabama. The trial court ruled that [§ 6-5-60](#) provides such a cause of action; therefore, it denied the defendants' motion for a judgment on the pleadings. We granted the defendants' request for permission to appeal that interlocutory order. Rule 5, Ala.R.App.P. We [\[**2\]](#) reverse and remand.

The plaintiffs, individual owners of independent drug stores in Greene and Dallas Counties, filed this action on behalf of themselves and seeking to represent a class consisting of "similarly situated independent retail pharmacists in Alabama who purchase brand-name prescription drugs from the defendant manufacturers and defendant wholesalers at illegally high prices dictated by the discriminatory pricing scheme set by the defendant manufacturers." The defendants are various drug manufacturers, drug wholesalers, health maintenance organizations, and mail-order companies. The complaint alleges that each of the manufacturer and mail-order-company defendants is a foreign corporation with its principal place of business outside Alabama and that the same is true for the majority of the wholesaler defendants. The complaint also alleges that the health-maintenance-organization defendants are Alabama corporations and that they, along with the other defendants, engaged in a conspiracy to control the price of brandname prescription drugs shipped into Alabama. The plaintiffs allege that they were injured as a result of that conspiracy by being forced to pay the manufacturers [\[**3\]](#) and the wholesalers more for the drugs than was paid to those companies by the mail-order companies and the health maintenance organizations, which are alleged to have been "favored purchasers" and an integral part of the price-fixing scheme.

Citing, among other cases, [Georgia Fruit Exchange v. Turnipseed](#), 9 Ala. App. 123, 62 So. 542 (1913); [Dothan Oil Mill Co. v. Espy](#), 220 Ala. 605, 127 So. 178 (1930); [Ex parte Rice](#), 259 Ala. 570, 67 So. 2d 825 (1953); [San Ann Tobacco Co. v. Hamm](#), 283 Ala. 397, 217 So. 2d 803 (1968); [In re Brand Name Prescription Drugs Antitrust](#)

Litigation, 1996 U.S. Dist. LEXIS 14529, [No. 94 C 897, October 2, 1996] (N.D. Ill. 1996), reversed, 123 F.3d 599 (7th Cir. 1997); In re Nasdaq Market Makers Antitrust Litigation, 929 F. Supp. 174, 179 (S.D.N.Y. 1996); and Warren v. Playmobil U.S.A., Inc., 1996 U.S. Dist. LEXIS 22191, [CV-95-B-1591-S, March 19, 1996] (N.D. Ala. 1996), the defendants contend that Alabama's antitrust statutes have consistently been interpreted by state and federal courts to apply only to transactions involving intrastate commerce. The defendants argue that Alabama's antitrust statutes, including § 6-5-60, have the same field of operation today that they had when they [**4] were first enacted. According to the defendants, the legislative history of Alabama's antitrust statutes, as well as the [*318] state of federal caselaw at the time of their enactment, creates a presumption that the Legislature never intended to directly regulate agreements to control the price of goods shipped in interstate commerce. This presumption, the defendants argue, has not been overcome by the plaintiffs.

The plaintiffs contend that § 6-5-60 provides a cause of action in favor of "any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect," and against "any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly." According to the plaintiffs, § 6-5-60 is clear on its face and should not be construed so narrowly as to limit its application to transactions involving intrastate commerce. The plaintiffs maintain, in the alternative, that even if § 6-5-60 should be construed in light of the legislative history of Alabama's antitrust statutes and the state of federal caselaw at the time of their enactment, the clear intent of the Legislature in enacting § 6-5-60 was [**5] to regulate all agreements in restraint of trade, whether those agreements involved interstate commerce or intrastate commerce.

With the positions of the parties in mind, we pause to point out what this case is not about. We are not here concerned with whether the Legislature, based on the current state of federal caselaw, has the power to enact a statute, such as § 6-5-60, to provide a means of redress to Alabama companies for indirect injuries suffered as the result of agreements to control the price of goods shipped through interstate commerce. See California v. ARC America Corp., 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989), cited by the parties for the proposition that the Legislature now has that power.¹ This Court has held that an Alabama statute does not expand like an accordion with changes in federal law bearing on the Legislature's power. Instead, we are concerned only with whether the Legislature, when it enacted § 6-5-60, contemplated that it would apply to such agreements. See In re Upshaw, 247 Ala. 221, 23 So. 2d 861 (1945). In determining whether § 6-5-60 provides a cause of action for damage resulting from an agreement to control the price of [**6] goods shipped through interstate commerce, we must follow the cardinal rule of statutory construction and ascertain and give effect to the intent of the Legislature in enacting the statute. HN1[↑] If possible, legislative intent should be gathered from the language of the statute itself. John Deere Co. v. Gamble, 523 So. 2d 95 (Ala. 1988).

[**7] However, when circumstances surrounding the enactment of a statute cast doubt on the otherwise clear language of the statute, we must look to other factors in determining legislative intent. In Siegelman v. Chase Manhattan Bank (USA), N.A., 575 So. 2d 1041 (Ala. 1991), this Court was faced with the question whether the financial-institution excise tax, levied pursuant to Ala. Code 1975, § 40-16-1 et seq., applied to the credit-card business conducted by national banks located outside Alabama with Alabama residents. When that excise-tax statute was enacted in 1935, such taxation by the states was prohibited [*319] by federal statutes and caselaw. Federal law changed in 1976 so as to allow the taxation of national banks; the state argued that that change should

¹ We note that in 54A Am.Jur.2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 798 (1996), the following statement appears:

"A state antitrust act can have no extraterritorial operation; consequently, the courts in construing a state antitrust statute will generally apply it to trusts and combinations formed or operated within the state, even though its terms are broad enough to include combinations formed with parties residing outside the state."

But see the recent decision of the United States Court of Appeals for the Seventh Circuit in In re: Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599 (7th Cir. 1997), citing R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (Dist. Ct. App. 1974), and Heath Consultants, Inc. v. Precision Instruments, Inc., 247 Neb. 267, 527 N.W.2d 596 (1995).

render out-of-state national banks subject to the 1935 excise-tax statute. This Court rejected that argument, stating, [575 So. 2d at 1048-51](#):

"In the case presently before us, the trial court in its opinion stated that [Ex parte Dixie Tool & Die Co., \[537 So. 2d 923 \(Ala. 1988\)\]](#), controlled the resolution of the case:

"In *Dixie Tool & Die*, as in the instant case, the issue was whether in originally [\[**8\]](#) enacting the statute, the legislature intended to tax transactions not previously taxed under that statute.

"The Court holds that at the times [§ 40-16-1](#) was enacted, the State was prohibited by federal statute from taxing out-of-state national banks. The National Bank Act expressly limited the state's authority to tax only those "national banking associations located within its limits." Because the federal statute was in force at the time [§ 40-16-1](#) was enacted, full knowledge and information as to the prior and existing law on the subject of this section [are] imputed to the legislature. A legislature is presumed to know the limit of its taxing power. Further, the statute will be interpreted on the assumption that the legislature was aware of existing statutes at the time new statutes are enacted.

"Based on the foregoing, the Court finds that at the time [§ 40-16-1](#) was enacted the legislature could not have intended to impose a tax on out-of-state national banks.'

"In *Dixie Tool & Die Co.*, the Alabama Department of Revenue assessed a sales tax against an Alabama corporation for sales made to out-of-state buyers and to federal government contractors. [\[**9\]](#) The Court in *Dixie Tool & Die Co.* considered whether sales made by the corporation to out-of-state purchasers were subject to Alabama's sales tax. The sales tax provision in question was [Ala. Code 1975, § 40-23-4\(a\)\(17\)](#). This code section provides:

"(a) There are exempted from the provisions of this division and from the computation of the amount of the tax levied, assessed or payable under this division the following:

"....

"(17) The gross proceeds of sales of tangible personal property or the gross receipts of any business which the state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this state.'

"In its opinion, the Court in *Dixie Tool & Die Co.* recognized that the United States Supreme Court allowed taxation of interstate commerce if the tax met certain criteria. However, the Court stated:

"'[These] recent pronouncements of the United States Supreme Court which enlarge the permissible area of state taxation cannot change the intent or enlarge the scope of enactments passed by our Legislature. [State v. Southern Electric Generating Co., 274 Ala. 668, \[**101\] 151 So. 2d 216 \(1963\)](#). Therefore, the question is not whether the State *may*, under prevailing caselaw, impose a tax upon the gross receipts earned from those transactions. Rather, the controlling issue is whether, in originally enacting this statute, the Legislature *intended* to tax these transactions."

"The provision that has become [§ 40-23-4\(a\)\(17\)](#) was originally enacted in 1959. In 1959, and, indeed, until *Complete Auto Transit* [v. [Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326](#)] in 1977, the applicable case

law held that a tax on the sale of goods in interstate commerce was invalid. The Legislature must be deemed to have [*320] been aware of the then-existing limits on a state's power to tax when it enacted the 1959 statute from which [§ 40-23-4\(a\)\(17\)](#) derives. Thus, we must presume that the legislature knew, at the time the statute was passed, that the applicable case law would prevent the application of a sales tax to transactions in interstate commerce. The Legislature must also be presumed to be aware of the judicial enlargement of the State's permissible area and method of taxation, so it could have taken full advantage of those changes if it either [**11] intended or desired to do so. No changes have been made to [§ 40-23-4\(a\)\(17\)](#). We conclude, therefore, that it applies today in the same manner that it did when enacted in 1959 and that it exempts sales of goods in interstate commerce from sales tax.'

" [537 So. 2d at 925](#) (quoting *Ex parte Louisville & Nashville R.R.*, 398 So. 2d 291, 293 (Ala. 1981) (emphasis in [Louisville & Nashville])).

"The trial court also relied on *Ex parte Louisville & Nashville R.R., supra*. In *Ex parte Louisville & Nashville R.R.*, the Court considered 'whether Alabama's gross receipts tax upon a railroad's earnings from "intrastate business" applies to receipts generated by the L & N Railroad's movement of goods between two points in Alabama.' [Id. at 292](#). The railroad gross receipts tax statute in question, [Ala. Code 1975, § 40-21-57](#), provided:

"In addition to all other taxes imposed by this title, there is hereby levied a license or privilege tax upon each person engaged in the business of operating a railroad in the state of Alabama for the privilege of engaging in such business; said license tax or privilege tax shall be ... in a sum equal to two and [**12] one-half percent of the gross receipts in excess of \$ 150,000.00 of such railroad from all intrastate business of such railroad within the state of Alabama during the preceding year, the gross intrastate earning to be determined by the amount received from intrastate business.'

"The Court stated that the controlling issue in the case was whether in originally enacting the statute the legislature intended to tax these transactions:

"The question before us is one of legislative intent. We presume that, in enacting the statute in 1935, the Legislature was aware of the existing interpretations and permissible limits of a state's power to tax. Thus, we presume our Legislature knew that at the time the statute was passed, the rule in [*Minnesota v. Blasius*, [290 U.S. 1, 54 S. Ct. 34, 78 L. Ed. 131 \(1933\)](#),] would have prevented the application of the tax to transactions similar to those at issue because they constitute a portion of interstate commerce. We also presume that the Legislature was aware of the fact that this tax could not be sustained as one "in lieu of" other taxes because the tax was expressly levied "in addition to all other taxes." Similarly, [**13] we presume that the Legislature was apprised of the fact that it could not justify this tax as one upon "local activity," because to do so would require the indulgence in the proscribed conceptual segmentation of the integral parts of an interstate transaction. Finally, we presume that the Legislature is aware of the judicial enlargement of the State's permissible area and method of taxation, so that the Legislature could have taken full advantage of those changes if it either intended or desired to. No such changes have been made during the forty-five years since the statute was passed and the State has not, by legislation, attempted to enlarge the scope of its taxation. Thus, viewed in its broadest scope, the statute in question could reach and impose a tax upon only those activities which were local and purely intrastate in character. [*321] We therefore conclude that the statute, as enacted in 1935 and as it exists today, was not intended to apply to receipts generated by transactions such as these which, although conducted wholly within the confines of Alabama, constitute an integral portion or segment of interstate commerce.'

" [398 So. 2d at 296-97](#). See also [State v. Southern I](#)^{**14]} [Elec. Generating Co., 274 Ala. 668, 151 So. 2d 216 \(1963\)](#).

"Like the question in *Dixie Tool & Die Co.* and *Ex parte Louisville & Nashville R.R.*, the question before us is whether in originally enacting the Alabama Excise Tax Statute, the legislature intended to tax the net income derived by out-of-state national banks from solicitation of credit card applications from Alabama residents.

"In determining the intent of the legislature, we presume that in enacting the Excise Tax Statute the legislature was aware of existing prohibitions against the State's power to tax national banks. When the Excise Tax Statute was enacted in 1935, federal law and judicial interpretation prohibited states from taxing out-of-state national banks. It was not until the Congressional moratorium expired in 1976 that states were allowed to tax out-of-state national banks. Even after the expiration of the moratorium in 1976, the Alabama legislature failed to amend or to reenact the Excise Tax Statute in light of the federal change. See [Freeman v. Jefferson County, 334 So. 2d 902, 904 \(Ala. 1976\)](#) ('the rejection of an amendment by the Congress which would have made the statute [**15] applicable to a given situation furnishes a strong inference that the statute was not intended to be applicable to that given situation'). Also, the Alabama legislature failed to amend or to reenact the Excise Tax Statute after the United States Supreme Court's 1977 announcement that there would no longer be a per se ban on taxation of interstate commerce. In fact, the last amendment to the Excise Tax Statute occurred in 1978, after the change in both federal statutory and judicial law that would have allowed taxation of out-of-state national banks, and no provision was then made for such taxation. Ala. Acts 1978, Special and Regular Sessions, Act No. 840, p. 1247. We do note, however, that a bill was introduced in the 1990 Regular Session of the Alabama legislature for the stated purpose of extending the Excise Tax Statute to out-of-state national banks, but it was not enacted. House Bill No. 944, Legislative Digest, Final Status p. 14 (May 3, 1990).

"In the present case, we recognize that under existing federal law and judicial enlargement states are able to tax out-of-state national banks if their taxing measures are nondiscriminatory. See [12 U.S.C. § 548 \(1988\)](#). However, [**16] when the Excise Tax Statute was enacted in 1935, federal law prevented taxation of out-of-state national banks. In addition to the changes implemented by Congress in 1976, the United States Supreme Court changed its position so as to allow taxation of interstate commerce. See [Complete Auto Transit, Inc. v. Brady, supra](#).

"Under prevailing Alabama statutory construction law, we presume that the legislature was aware of the federal law in 1935 and of the subsequent changes in that law in 1976, as well as the changes in the United States Supreme Court's analysis of the taxation of interstate commerce. [Ex parte Louisville & Nashville R.R., supra](#), and [Ex parte Dixie Tool & Die Co., supra](#). Although the Alabama legislature presumably was aware of Congress's enlargement of state taxing power over national banks, and of the United States Supreme Court's enlargement in regard to taxation of interstate commerce, it made no changes to the Excise Tax Statute.

"This Court's role is not to displace the legislature by amending statutes to [*322] make them express what we think the legislature should have done. Nor is it this Court's role to assume the legislative prerogative [**17] to correct defective legislation or amend statutes. Consequently, we conclude that the Excise Tax Statute applies today in the same manner that it did when it was first enacted. Because states were prohibited from taxing out-of-state national banks at the time the statute levying the excise tax was first enacted and judicial interpretation disallowed taxation of interstate commerce, the State may not tax Chase, an out-of-state national bank, in the absence of additional action by the Alabama legislature."

This Court, in [Ellis v. Pope, 709 So. 2d 1161 \(Ala. 1997\)](#), reaffirmed *Siegelman*, *Ex parte Dixie Tool & Die*, and *Ex parte Louisville & N.R.R.*, insofar as those cases require that we look to the original intent of the Legislature when

interpreting a statute. In *Pope*, this Court adopted, as part of its opinion, a portion of the trial court's order, including this statement:

"The meaning of the term 'district' appears to have varied over the years. Since the [1973] adoption of the present Judicial Article [of the Alabama Constitution], 'district' [as in references to the district court] has come to mean a judicial subdivision of the State geographically [**18] equal to or less than a 'circuit.' It usually coincides with county boundaries, and is never a subdivision of a county. The term must not be viewed in light of its meaning today, but as it was used in 1901, when Art. I, § 6, was drafted. Act No. 569, Acts of Alabama, 1907, which subdivided Coffee County, was adopted within six years of the ratification of our present Constitution, and that Act used the term 'district' to refer to the subdivisions of the county. Therefore, it must be concluded that the term 'district' in the terminology used at the time of the drafting and ratification of [the Alabama] Constitution in 1901 meant the subdivision of a county."

709 So. 2d at 1165.

HN2[] Section 6-5-60 provides:

"(a) Any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of \$ 500 and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly and may commence the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, [**19] officers, or agents, who aid or abet such trust, combine, or monopoly. All such actions may be prosecuted to final judgment against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, or judgment in favor of one or more of the defendants.

"(b) Actions under this section may be commenced in any county where the trust, combine, or monopoly was formed or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed, or in any county in which either of the defendants may have a domicile or where an officer or agent of any defendant corporation may be found."

As the plaintiffs correctly point out, § 6-5-60 is not, on its face, limited to transactions involving intrastate commerce. We hasten to add, however, that there is no language in § 6-5-60 that conclusively indicates an intent on the Legislature's part to regulate transactions involving the shipment of goods through interstate commerce. Because the language of § 6-5-60, standing alone, is not conclusive on the question of legislative intent, and because other factors, including the legislative history of Alabama's antitrust statutes, [**20] as well as the state of the law at the time of their enactment, cast doubt on the original intent of the Legislature, we find it necessary [*323] to look beyond the language of the statute.

"From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly -- that is, the concentration of economic power in the hands of a few. By 1890, there was a vast accumulation of wealth in the hands of corporations and individuals, and an enormous development of corporate organization with the facility for combining into 'trusts.' Units of traders and producers had snowballed by combining into trusts, and there was a widespread impression that the trusts had used and would use their power to oppress individuals and injure the public. Competition was threatened; price control was feared; and individual initiative was dampened.

"On the basis of these fears, Congress passed the Sherman Antitrust Act in July 1890 [15 U.S.C. § 1 et seq.], in order to prevent or suppress devices or practices which create monopolies or restrain trade or commerce by suppressing or restricting competition and obstructing the course of trade. It is designed [**21] to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. The basic objective of the Act, therefore, is the protection of competition and a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods. Thus,

the purpose of the Act is not to protect businesses from the working of the market, but to protect the public from the failure of the market. The Act is not directed against conduct which is competitive, even severely so, but is directed against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns, but out of concern for the public interest."

[54 Am.Jur.2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 1](#) (1996).

Following the lead of other states, the Alabama Legislature enacted this state's first general antitrust law on February 7, 1891.² Ala. Acts 1890-91, Act No. 202, p. [*324] 438, entitled "An Act to prohibit pools, trusts, or combines to regulate or control the prices of products, goods, wares or merchandise in this state," was patterned after a similar [**22] statute that had been enacted in Illinois and was akin to the Sherman Antitrust Act, which Congress had enacted shortly before on July 2, 1890. Act No. 202, which was criminal in nature, provided:

[**23]

"Section 1. Be it enacted by the General Assembly of Alabama, That any person, corporation or association of persons who shall, *within this state*, engage or agree with other persons, corporations or association of persons, or enter into, either directly [sic], any combination, pool, trust or confederation to regulate or fix the price of any article or commodity to be sold *within this state* for speculation; and any person, corporation or

²The Legislature had enacted a law, approved on February 23, 1883, regulating the "pooling of freights":

"Section 1. Be it enacted by the General Assembly of Alabama, That it shall be unlawful for two or more railroad companies or persons operating railroads *in this State* to enter into any agreement among themselves, directly or indirectly, for the division among themselves of the freight carrying business at any station, town or city *in this State*, or into any pool arrangement among themselves of the nature and character aforesaid, the object, purpose and effect of which in either event shall be to prevent free and fair competition among said railroad companies or persons operating said railroads, for said freight carrying business, and to establish extortionate rates in favor of said companies or persons in doing said business, and which shall have the effect of being in undue restraint of the trade and business at any such station, town or city *of this State*.

"Sec. 2. Be it further enacted, That any officer, agent or servant of any such company, or person operating any railroad *in this State* who shall violate any of the provisions of this act, or who shall aid or assist in making or carrying out or performing any such agreement or pool arrangement shall be guilty of a misdemeanor and on conviction for every such offense shall be fined not less than fifty dollars, nor more than two hundred dollars, at the discretion of the court trying the same.

"Sec. 3. Be it further enacted, That it is the true intent and meaning of this act, that any such agreement, rates or pool agreement made by any convention or association of freight agents, or commissioner of freight rates or rate making committee outside of this State, *but to be performed in whole or in part in this State*, shall as to such part of the same, as is to be performed *within this State*, come within the provisions of this act.

"Sec. 4. Be it further enacted, That any agreement, rates, or pool arrangements made by two or more railroad companies, or persons operating railroads *in this State*, or by any convention, or by any association of freight agents or commissioner of freight rates, or rate making committee outside of this State, *but to be performed in whole or in part within this State* for the purpose of cheapening freight rates or of extending additional facilities to the public generally, or to any town, city or station *in this State* and which are not extortionate and in undue restraint of trade at any town, city, or station *in this State*, shall not be construed as coming within this act.

"Sec. 5. Be it further enacted, That if any such agreement, rate, or pool arrangement as is mentioned in the fourth section of this act shall have the certified approval of the railroad commission of Alabama, it shall be deemed as *prima facie* lawful and just in any proceeding before any court or officer of this State, and no officer, agent or servant of any railroad company, or person shall be liable to prosecution, for aiding or assisting in carrying out, or performing any such agreement or pool arrangement, so approved by any railroad commission of Alabama."

(Emphasis added.) Ala. Acts 1882-83, Act No. 79, p. 152-53. Section 2 of Act No. 79 was codified in the Alabama Code of 1886 as Article IV, § 4145.

association of persons who shall enter into, become a member of a party to, any pool, agreement, combination or confederation to fix or limit the amount or quantity of any article or commodity to be produced or manufactured, mined or sold *in this state*, shall be guilty of a misdemeanor, and subject to indictment and punishment as herein provided.

"Sec. 2. *Be it further enacted*, That it shall not be lawful for any corporation chartered under the laws of Alabama, or for any officer, stockholder, agent or employe of such corporation to enter into any combination with other persons or corporations, the purpose and effect of which are to place the management or control thereof in the hands of others, with the purpose or **[**24]** intent to limit or fix the price, or lessen the production or sale of any article of commerce, use or consumption, or to restrict or diminish the manufacture of such article.

"Sec. 3. *Be it further enacted*, That any person or corporation violating the provisions of section one or two of this act, *within the State of Alabama*, shall, on conviction, be fined not less than five hundred dollars, nor more than two thousand dollars, at the discretion of the jury trying the same; and any officer, agent or employe of such corporation guilty of violating either of the two preceding sections of this act may be imprisoned, in addition to the fine, not less than six months, and not more than twelve months for every such offense: *Provided*, That nothing in this act shall prevent the producers of agricultural products from holding the same for higher prices; And *provided further*, That nothing in this act shall prevent the producer of any article of food or commerce from holding the same for higher prices, provided he does not combine or confederate with others thus to raise or lower prices.

"Sec. 4. *Be it further enacted*, That it shall be the duty of the circuit **[**25]** and city courts to give this act in special charge to the several grand juries of the state."

(Emphasis added.) Act No. 202 was codified in the Alabama Code of 1896 as Chapter 196, Article 5, § 5557, § 5558, and § 5559:

[*325] "5557. Forming pools or combinations to regulate the quantity or price of products. -- Any person or corporation, who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold within this state for speculation, or any person or corporation who enters into, becomes a member of, or party to, any pool, agreement, combination, or confederation to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold in this state, must, on conviction, be fined not less than five hundred, nor more than two thousand dollars.

"5558. Combinations to control corporations with intent to fix the price or production of commodities. - Any corporation chartered under the laws of this state, or any officer, stockholder, agent, or employe of any such corporation, **[**26]** which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person and thereby limit or fix the price, or restrict or diminish the production, manufacture, sale, use, or consumption of any article of commerce, must, on conviction, be fined not less than five hundred, nor more than two thousand dollars.

"5559. Preceding two sections given in special charge to grand juries. -- The preceding two sections must be given in special charge to the grand jury."

What clearly stands out with respect to the 1896 codification of Act No. 202 is the change in phraseology in § 5557, specifically, the deletion of the words "within this state," which had appeared as the 20th, 21st, and 22d words of Act No. 202. This change was made by William L. Martin, Alabama's Code commissioner. Pursuant to Ala. Acts 1894-95, Act No. 507, [§ 1](#), p. 1001, Martin was given the authority to "revise, digest and codify all of the statutes of this state of a general and public nature, both civil and criminal." Act No. 507 specifically provided as follows:

"Sec. [**27] 3. *Be it further enacted*, That it shall be the duty of the said commissioner, at least three months before the meeting of the next general assembly to deliver said code to the governor of this state, together with a sworn statement, showing all the changes he shall have made in the phraseology of all the acts and laws codified by him, including additions thereto and omission therefrom, with accurate reference to the acts and laws so altered or changed; and it shall be the duty of the governor carefully to examine the same, and to specifically report upon the same to the succeeding general assembly, recommending such alterations if any, as to him may seem proper; and attaching to his report the sworn statement of the commissioner herein provided for.

"Sec. 4. *Be it further enacted*, That said commissioner shall prepare appropriate chapters, titles, and subdivisions of titles for each chapter, clearly and briefly expressive of the subjects treated, which shall be arranged alphabetically, bringing into each chapter as near as may be, a condensation of all public laws, appertaining to the subject treated in each chapter: that said commissioner shall not simply transfer [**28] or transcribe the laws, but shall (without changing the sense) so alter the phraseology as to exclude all redundancy, or obscurity of expression, and where there shall be several acts relating to the same subject, they shall be condensed into one, and so expressed, as clearly to set forth the sense of the whole, having regard to judicial exposition thereof: that whenever it shall be apparent that there may be legislative omissions in any statute, said commissioner shall supply the same, so as to perfect such statute, and render its operation complete, and shall add all [*326] such original notes and references as shall be proper for the clear elucidation of them, and for easy reference to the several laws from which they may be compiled, showing as far as may be, when such acts and statutes become operative, when amended, with foot notes of all decisions of the supreme court, construing or mentioning such sections or acts, and as far as practicable, a brief and concise statement of the question decided by such decisions."

In his report to the Governor, on page 111, Martin stated as follows:

"CHAPTER 195. TRADE, PUBLIC POLICY AND POLICE.

"....

"5549, 5550, [**29] 5551. Based on the act of February 7, 1891 -- page 438. To prohibit pools, trusts, etc. Rewritten with such changes as were necessary in phraseology."

We note that Act No. 202, dealing with the prohibition of "pools, trusts, etc." was codified as Article 5, § 5557, § 5558, and § 5559 of Chapter 196 of the 1896 Code, not as § 5549, § 5550, and § 5551, of Chapter 195. Notwithstanding these apparent errors, Martin did specifically state that he had rewritten "the act of February 7, 1891 -- page 438" (Act No. 202) so as to make "such changes as were necessary in phraseology." Neither the Governor nor the Legislature made any changes to § 5557, § 5558, or § 5559 before the Legislature adopted the 1896 Code.

Article IV, § 103, of the Constitution of Alabama of 1901 provided:

"The legislature shall provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade, or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition [**30] in any calling, trade, or business."

This constitutional mandate, Rogers v. City of Mobile, 277 Ala. 261, 169 So. 2d 282 (1964), resulted in the Legislature's readopting § 5557, § 5558, and § 5559 of the 1896 Code in substantially the same form in the 1907 Code as § 7579, § 7580, and § 7582:

"7579. (5557) Forming pools or combinations to regulate the quantity or price of products. -- Any person or corporation who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold or produced within this state, or any person or corporation who enters into, becomes a member of, or party to, any pool, agreement, combination, or confederation, to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold, in this state, must, on conviction, be fined not less than five hundred nor more than two thousand dollars.

"7580. (5558) Combinations to control corporations with intent to fix the price or production of commodities. -- Any corporation chartered [**31] under the laws of this state, or any officer, stockholder, agent, or employe of any such corporation, which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person, and thereby limit or fix the price, restrict or diminish the production, manufacture, sale, use, or consumption of any article of commerce, must, on conviction, be fined not less than five hundred nor more than two thousand dollars.

"....

"7582. (5559) Four preceding sections given in special charge to grand juries. -- The four preceding sections must be given in special charge to the grand jury."

[*327] The Legislature also added the following provision, which appeared as § 7581 of Chapter 273 of the 1907 Code:

"7581. Monopolies, penalty for. -- Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, or which shall monopolize or attempt to monopolize the production, control, or sale of any commodity, or the prosecution, management, or control of any kind, class, or description [**32] of business; or which shall destroy, or attempt to destroy, competition in the manufacture or sale of a commodity, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than two thousand dollars for each offense."

In addition to these criminal antitrust provisions, in the 1907 Code the Legislature, for the first time, provided for a civil cause of action for injuries resulting from the effects of a trust, combine, or monopoly:

"2487. Actions against trusts, combines, or monopolies. -- Any person, firm, or corporation injured or damaged by an unlawful trust, combine, or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of five hundred dollars and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly; and may maintain the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. And all such actions may be prosecuted to final judgment or decree against [**33] any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, judgment, or decree in favor of one or more of the defendants.

"2488. County in which action brought. -- Actions under the preceding section may be brought in any county where the trust, combine, or monopoly was formed, or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed; or in any county in which either of the defendants may have a domicile, or where an officer or agent of any defendant corporation may be found."

Section 7579, § 7580, § 7581, and § 7582 of the 1907 Code were carried forward in substantially the same form into the 1923 Code as § 5212, § 5213, § 5214, and § 5215, respectively:

"5212. (7579) (5557) Forming pools or combinations to regulate the quantity or price of products. -- Any person or corporation who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold or produced within this state, or any person or corporation [**34] who enters into, becomes a member of, or party to, any pool agreement, combination, or confederation, to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold, in this state, must, on conviction, be fined not less than five hundred, nor more than two thousand dollars.

"5213. (7580) (5558) Combinations to control corporations with intent to fix the price or production of commodities. -- Any corporation chartered under the laws of this state, or any officer, stockholder, agent or employe of any such corporation, which enters into any combination with any other corporation or person with

the intent to place the management or control of any such corporation in the hands of another corporation or person, and thereby limit or fix the price, restrict or diminish the production, manufacture, sale, use or consumption of any article of commerce, must, on conviction, be fined not less than five hundred nor more than two thousand dollars.

[*328] "5214. (7581) Monopolies, penalty for. -- Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, **[**35]** or which shall monopolize or attempt to monopolize the production, control, or sale of any commodity, or the prosecution, management, or control of any kind, class, or description of business; or which shall destroy or attempt to destroy, competition in the manufacture or sale of a commodity, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than two thousand dollars for each offense.

"5215. (7582) Three preceding sections given in special charge to grand juries. -- The three preceding sections must be given in special charge to the grand jury."

Section 2487 and § 2488 of the 1907 Code (providing for a civil cause of action) were carried forward in substantially the same form into the 1923 Code as § 5697 and § 5698:

"5697. (2487) Actions against trusts, combines, or monopolies. -- Any person, firm, or corporation injured or damaged by an unlawful trust, combine, or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of five hundred dollars and all actual damages from any person, firm, or corporation creating, operating, **[**36]** aiding, or abetting such trust, combine, or monopoly; and may maintain the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. And all such actions may be prosecuted to final judgment or decree against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, judgment, or decree in favor of one or more of the defendants.

"5698. (2488) County in which action brought. -Actions under the preceding section may be brought in any county where the trust, combine, or monopoly was formed, or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed; or in any county in which either of the defendants may have a domicile, or where an officer or agent of any defendant corporation may be found."

Section 5212, § 5213, and § 5214 of the 1923 Code were carried forward in substantially the same form into the 1940 Code as Title 57, § 106, § 107, and § 108, respectively:

" § 106. (5212) (7579) (5557) Forming pools or combinations to regulate **[37]** the quantity or price of products.** -- Any person or corporation who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold or produced within this state, or any person or corporation who enters into, becomes a member of, or party to, any pool agreement, combination, or confederation, to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold, in this state, **[*329]** must, on conviction, be fined not less than five hundred, nor more than two thousand dollars.

" § 107. (5213) (7580) (5558) Combinations to control corporations with intent to fix the price or production of commodities. -- Any corporation chartered under the laws of this state, or any officer, stockholder, agent or employee of any such corporation, which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person, and thereby limit or fix the price, restrict or diminish the production, **[**38]** manufacture, sale, use or consumption of any article of commerce, must, on conviction, be fined not less than five hundred nor more than two thousand dollars.

" § 108. (5214) (7581) Monopolies, penalty for. -Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, or which shall monopolize or attempt to monopolize the production, control, or sale of any commodity, or the prosecution, management, or control of

any kind, class, or description of business; or which shall destroy or attempt to destroy, competition in the manufacture or sale of a commodity, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than two thousand dollars for each offense."

Section 5697 and § 5698 of the 1923 Code (providing for a civil cause of action) were carried forward in substantially the same form into the 1940 Code as Title 7, § 124 and § 125:

"§ 124. (5697) (2487) Actions against trusts, combines, or monopolies. -- Any person, firm, or corporation injured or damaged by an unlawful trust, combine, or monopoly, or its effect, **[**39]** direct or indirect, may, in each instance of such injury or damage, recover the sum of five hundred dollars and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly; and may maintain the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. And all such actions may be prosecuted to final judgment or decree against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, judgment, or decree in favor of one or more of the defendants.

"§ 125. (5698) (2488) County in which action brought. -- Actions under the preceding section may be brought in any county where the trust, combine, or monopoly was formed, or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed; or in any county in which either of the defendants may have a domicile, or where an officer or agent of any defendant corporation may be found."

Section 106, § 107, and § 108 of Title 57 of the 1940 Code were **[**40]** carried forward in substantially the same form into the 1975 Code as § 8-10-1, § 8-10-2, and § 8-10-3, respectively:

"[§ 8-10-1] Any person or corporation who engages or agrees with other persons or corporations or enters, directly or indirectly, into any combination, pool, trust, or confederation to regulate or fix the price of any article or commodity to be sold or produced within this state or any person or corporation who enters into, becomes a member of or party to any pool agreement, combination, or confederation to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold in this state must be fined, on conviction, not less than \$ 500 nor more than \$ 2,000."

"[§ 8-10-2] Any corporation chartered under the laws of this state or any officer, stockholder, agent, or employee of any such corporation which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person and thereby limit or fix the price, restrict or diminish the production, manufacture, sale, use, or consumption of any article **[**41]** of commerce must be fined, on conviction, not less than \$ 500 nor more than \$ 2,000."

"[§ 8-10-3] Any person or corporation, domestic or foreign, which shall **[*330]** restrain, or attempt to restrain, the freedom of trade or production, or which shall monopolize, or attempt to monopolize, the production, control, or sale of any commodity or the prosecution, management, or control of any kind, class, or description of business or which shall destroy, or attempt to destroy, competition in the manufacture or sale of a commodity shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than \$ 500 nor more than \$ 2,000 for each offense."

Section 124 and § 125 of Title 7 of the 1940 Code (providing for a civil cause of action) were carried forward in substantially the same form into the 1975 Code as subsections (a) and (b), respectively, of [§ 6-5-60](#).

With this legislative history in mind, we move next to the state of federal constitutional law at the time Alabama's antitrust statutes were originally enacted. In 1 ABA Antitrust Law Section, *State Antitrust Practice and Statutes* Introduction-20 (1990), we find the following:

"An important **[**42]** factor in most early state antitrust cases was the prevailing 'dual sovereignty' theory of state-federal regulatory authority. This theory postulated distinct and mutually exclusive zones of jurisdiction for the states, which exercised jurisdiction only over purely *intrastate* matters, and the federal government, which exercised jurisdiction only over goods and services in *interstate commerce*."

(Emphasis in original.) See, also, Lawrence H. Tribe, *American Constitutional Law*, § 5-4, at 307-08 (2d ed. 1988) (discussing the United States Supreme Court's varying approaches to interpreting the Commerce Clause, Article I, § 8, of the United States Constitution, but specifically noting the consistent dichotomy maintained by that Court between interstate commerce and intrastate commerce prior to the New Deal). This dichotomy between interstate commerce and intrastate commerce is clearly illustrated in a series of cases decided by the Court between 1888 and 1899. See Bowman v. Chicago & N.W. Ry., 125 U.S. 465, 493, 31 L. Ed. 700, 8 S. Ct. 689 (1888) ("[A] State has legislative control, exclusive of Congress, within its territory, of all persons, things, and transactions [**43] of strictly internal concern. ... It cannot, without the consent of Congress, expressed or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be."); Brennan v. Titusville, 153 U.S. 289, 302, 38 L. Ed. 719, 14 S. Ct. 829 (1894) ("we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress"); United States v. E.C. Knight Co., 156 U.S. 1, 12, 39 L. Ed. 325, 15 S. Ct. 249 (1895) ("That which belongs to commerce [between the States] is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State." ³ [**45]); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 233,

³ *United States v. E.C. Knight Co.* was the Supreme Court's first decision construing the Sherman Antitrust Act. The full text in which this quotation appears is as follows:

"It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power. On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 189, 210, 6 L. Ed. 23; Brown v. Maryland, 25 U.S. 419, 12 Wheat. 419, 448, 6 L. Ed. 678; The License Cases, 5 How. 504, 599; [County of] Mobile v. Kimball, 102 U.S. 691, 26 L. Ed. 238; Bowman v. Chicago & N.W. Railway, 125 U.S. 465, 31 L. Ed. 700, 8 S. Ct. 689; Leisy v. Hardin, 135 U.S. 100, 34 L. Ed. 128, 10 S. Ct. 681; In re Rahrer, 140 U.S. 545, 555, 35 L. Ed. 572, 11 S. Ct. 865."

156 U.S. at 11-12.

In P. Areeda & D. Turner, 1 Antitrust Law, An Analysis of Antitrust Principles and their Application, § 232c (1978), we find the following discussion of *Knight*:

"The 1895 *Knight* case, the Supreme Court's first Sherman Act decision, held a national monopoly of sugar manufacturing beyond the constitutional reach of the act because mere manufacturing was not 'commerce.' At that time, the Commerce

[44 L. Ed. 136, 20 S. Ct. 96 \(1899\)](#) (also involving an alleged violation of the Sherman Antitrust Act) ("each state ... would have complete jurisdiction over the commerce which was wholly within its own borders, while the jurisdiction of Congress, under the provisions of the [**44] Constitution, over interstate commerce would be paramount, and would include therein jurisdiction over contracts [in restraint of such commerce]"); see, also, W. W. Thomas, *A Treatise On Combinations In Restraint of Trade*, § 90-91, at 229, 232 (2d ed. 1928) ("Congress has no control over intrastate commerce.... No state may in any way enact legislation which in any wise controls, regulates, or infringes on interstate commerce.").⁴

[**46] [**332] One of the best discussions of the prevailing dual-sovereignty theory of state-federal regulatory authority at the turn of the century is found in Justice Stewart's dissenting opinion in [Cantor v. Detroit Edison Co., 428 U.S. 579, 632-36, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 \(1976\)](#). In *Cantor*, the Supreme Court was called upon to decide whether [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#), which had held that the Sherman Antitrust Act was not violated by state action displacing competition in the marketing of raisins, immunized private action that had been approved by a state regulatory agency and that had to continue while the state approval remained effective. Justice Stewart's historical analysis of the legislative history of the Sherman Antitrust Act, which was not in dispute, reads as follows:

"The floor debates and the House Report on the proposed legislation [the Sherman Antitrust Act] clearly reveal, as at least one commentator has noted, that 'Congress fully understood the narrow scope given to the

Clause embraced only the actual and 'direct' purchase, sale, or transportation of goods across state lines. The Court acknowledged that such commerce was affected by the sugar monopoly, but only 'indirectly.'

"Two characteristics of the *Knight* decision remain important today. First, the Court never reached the merits of the government's case because the constitutional determination was made first, and the courts still treat the commerce question as a preliminary jurisdictional hurdle in antitrust litigation. Second, the jurisdictional inquiry was entirely independent of the Sherman Act's purposes. That separation seemed feasible in 1895 when 'interstate commerce' was wholly dependent upon the location of the defendant's conduct, and without regard to its impact on the interests protected by the Sherman Act. This neat separation of jurisdictional and substantive inquiries caused difficulties with later and more expansive definitions of interstate commerce."

⁴We note that the Supreme Court had held at the time Alabama first enacted its antitrust statutes that the Commerce Clause, in conferring on Congress the power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress had not exercised its power, even though the regulation in some way affected interstate commerce. See, e.g., [California v. Thompson, 313 U.S. 109, 113, 85 L. Ed. 1219, 61 S. Ct. 930 \(1941\)](#), in which the Court noted:

"Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245 [(1829)], and *Cooley v. [Board of Wardens of the Port of Philadelphia]*, 53 U.S. 299, 12 How. 299, 13 L. Ed. 996 [(1851)], it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints."

See, also, [South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177, 82 L. Ed. 734, 58 S. Ct. 510 \(1938\)](#); [Hall v. Geiger-Jones Co., 242 U.S. 539, 61 L. Ed. 480, 37 S. Ct. 217 \(1917\)](#); [Bowman v. Chicago & N.W. Ry., supra](#), and the cases cited therein. There is nothing, however, in the Supreme Court's decisions in [United States v. E.C. Knight Co., supra](#), and [Addyston Pipe & Steel Co. v. United States, supra](#), that indicates that the Court would have viewed extraterritorial state antitrust provisions as falling within that constitutionally permissible category of local regulation having only an indirect or incidental effect on interstate commerce.

commerce clause' in 1890. This understanding is, in many ways, of historic interest only, because subsequent decisions of this Court [**47] have 'permitted the reach of the Sherman Act to expand along with expanding notions of congressional power.' But the narrow view taken by the Members of Congress in 1890 remains relevant for the limited purpose of assessing their intention regarding the interaction of the Sherman Act and state economic regulation.

"The legislative history reveals very clearly that Congress' perception of the limitations of its power under the Commerce Clause was coupled with an intent not to intrude upon the authority of the several States to regulate 'domestic' commerce. As the House Report stated:

"It will be observed that the provisions of the bill are carefully confined to such subjects of legislation as are clearly within the legislative authority of Congress.

"No attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds. No system of laws can be devised by Congress alone which would effectually protect the people of the United States against the evils and oppression of trusts and monopolies. Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate [**48] in respect of commerce between the several States or with foreign nations.

"It follows, therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies. Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation [*333] as may be within their legislative authority.'

"Similarly, the floor debates on the proposed legislation reveal an intent to 'go as far as the Constitution permits Congress to go,' in the words of Senator Sherman, conjoined with an intent not to 'interfere with' state-law efforts to 'prevent and control' combinations within the limit of the State.' Far from demonstrating an intent to pre-empt state laws aimed at preventing or controlling combinations or monopolies, the legislative debates show that Congress' goal was to supplement such state efforts, themselves restricted to the geographic boundaries of the several States. As Senator Sherman stated: 'Each State can deal with a combination within the State, but only [**49] the General Government can deal with combinations reaching not only the several States, but the commercial world. This bill does not include combinations within a State' Indeed a preexisting body of state law forbidding combinations in restraint of trade provided the model for the federal Act. As Senator Sherman stated with respect to the proposed legislation: 'It declares that certain contracts are against public policy, null and void. It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State in the Union are now, by common or statute law, null and void.'

"It is noteworthy that the body of state jurisprudence which formed the model for the Sherman Act coexisted with state laws permitting regulated industries to operate under governmental control in the public interest. Indeed, state regulatory laws long antedated the passage of the Sherman Act and had, prior to its passage, been upheld by this Court against constitutional attack. Such laws were an integral part of state efforts to regulate competition to which Congress [**50] turned for guidance in barring restraints of interstate commerce, and it is clear that those laws were left undisturbed by the passage of the Sherman Act in 1890. For, as congressional spokesmen expressly stated, there was no intent to 'interfere with' state laws regulating domestic commerce or 'invade the legislative authority of the several States....'

"As previously noted, the intent of the draftsmen of the Sherman Act not to intrude on the sovereignty of the States was coupled with a full and precise understanding of the narrow scope of congressional power under the Commerce Clause, as it was then interpreted by decisions of this Court. Subsequent decisions of the Court, however, have permitted the 'jurisdictional' reach of the Sherman Act to expand along with an expanding view of the commerce power of Congress. See [Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 743 n.2, 48 L. Ed. 2d 338, 96 S. Ct. 1848](#), and cases cited therein. These decisions, based on a determination that Congress intended to exercise all the power it possessed when it enacted the Sherman Act, have in effect allowed the Congress of 1890 the retroactive benefit of an enlarged judicial [**51] conception of the commerce power.

"It was this retroactive expansion of the jurisdictional reach of the Sherman Act that was in large part responsible for the advent of the *Parker* doctrine. *Parker* involved a program regulating the production of raisins within the State of California. Under the original understanding of the draftsmen of the Sherman Act, such in-state production, like in-state manufacturing, would not have been subject to the regulatory power of Congress under the Commerce Clause and thus not within the 'jurisdictional' reach of the Sherman Act. See [United States v. E.C. Knight Co., 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249](#). If the state of the law had remained static, the *Parker* problem would rarely, if ever, [*334] have arisen. As stated in [Northern Securities Co. v. United States, 193 U.S. 197, 48 L. Ed. 679, 24 S. Ct. 436](#), the operative premise would have been that the 'Anti-Trust Act ... prescribed ... a rule for *interstate and international commerce*, (not for domestic commerce,') *id.* at 337. The relevant question would have been whether the anticompetitive conduct required or permitted by the state statute was in restraint of [*52] domestic or interstate commerce. If the former, the conduct would have been beyond the reach of the Sherman Act; if the latter, the conduct would probably have violated the Sherman Act, regardless of contrary state law, on the theory that 'no State can, by ... any ... mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or ... to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce.' *Id.* at 345-346."

[428 U.S. at 632-36](#) (Stewart, J., dissenting) (emphasis in Justice Stewart's opinion).

An Alabama appellate court first dealt with the scope of this state's antitrust statutes in 1913. In [Georgia Fruit Exchange v. Turnipseed, supra](#), the defendant in a breach-of-contract action defended on the ground that the contract was illegal and void as in restraint of trade and against public policy. The Court of Appeals upheld the trial court's order sustaining the defendant's demurrer to the complaint, stating:

"Section 23 of our Constitution forbids [*53] the granting of exclusive and irrevocable special privileges and immunities by the Legislature, and section 103 thereof, which is a provision new to the Constitution of 1901, enjoins positively upon the Legislature the duty of providing by law for the 'regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, or increasing unreasonably the costs thereof to the consumer, or preventing reasonable competition in any trade, calling or business.' In pursuance of this latter provision the Legislature of this state, following the lead of other states, has passed the act now embraced in sections 7579, 7580, and 7581 of the Code, patterned after a similar statute in Illinois and other states and akin to the federal statute, known as the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200).

"Said section 7579 of our Code thus provides: 'Any person or corporation who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, [*54] pool, or trust, or confederation to regulate or fix the price of any article or commodity to be sold or produced within this state, or ... must, on conviction, be fined,' etc.

"Section 7581 reads: 'Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, or which shall monopolize or attempt to monopolize the production, control or sale of any commodity, or ... shall be fined,' etc.

"The Sherman Anti-Trust Act makes illegal, punishing the parties thereto by fine or imprisonment, 'every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations,' etc.

"*There being thus both a state and national law prohibiting unlawful combinations in restraint of trade -- the one law relating to intrastate, the other to interstate, commerce -- it is immaterial as to which character of commerce, [*335] whether only one or both, is involved in the contract here under consideration; for if the contract is in violation of either law it is void as contravening a positive statute; and, even if it does not go to the*

*extent [**55] of being in actual violation of either statute, yet if it tends to create a monopoly by unreasonably restraining trade, it is still void under our law, as at common law, as being against public policy.* [Arnold v. Jones, 152 Ala. 501, 44 So. 662, 12 L.R.A. \(N.S.\) 150](#); 2 May. Dig. 784; 5 May. Dig. 218; 6 May. Dig. 182, where the authorities are cited."

[9 Ala. App. at 131-33; 62 So. at 545-46.](#) (Emphasis added.)

This Court first considered the application of Alabama's antitrust statutes in *Dothan Oil Mill Co. v. Espy, supra*. The defendants in that case were Alabama manufacturers of cottonseed oil "in different localities in this state" and were "the only buyers in Alabama of any appreciable amount of cotton-seed offered for sale in the State." 220 Ala. at 606-07, 127 So. at 179-80. The plaintiffs, Alabama cotton ginners, alleged that the defendants had "agreed among themselves the price to be paid for cotton-seed throughout the State of Alabama." 220 Ala. at 606, 127 So. at 179. The defendants argued that the trial court lacked subject-matter jurisdiction, on the ground that the challenged conspiracy to control the price of cottonseed involved interstate commerce. [**56] The defendants based their argument on the fact that a portion of the products that were manufactured from cottonseed were sold outside Alabama. This Court rejected the defendants' argument, stating:

"We are not of [the] opinion, however, that the business of buying cotton seed, confined wholly to the state, to be crushed and manufactured into oil and other products, in such state, constitutes interstate commerce, within the scope and purpose of [the Federal Trade Commission Act] or within the sense of the Sherman and Clayton Acts (15 [U.S.C.] §§ 1-7, 15, and sections 12-27, [44](#)) which confer on the federal courts exclusive jurisdiction to enforce said acts, though some of the manufactured products may eventually find their way into and become commodities of interstate commerce. 'The fact, of itself, that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce.' [Crescent Cotton Oil Co. v. State of Mississippi, 257 U.S. 129, 42 S. Ct. 42, 44, 66 L. Ed. 166; Coe v. Errol, 116 U.S. 517, 6 S. Ct. 475, 29 L. Ed. 715; New York Central R. R. Co. v. Mohney, 252 U.S. 152, 40 S. Ct. 287, 1**571 64 L. Ed. 502, 9 A.L.R. 496.](#)"

220 Ala. at 610, 127 So. at 182. Thus, the essence of this Court's decision in *Espy* was that the plaintiffs' complaint stated a statelaw antitrust claim because the alleged illegal conduct involved only commercial transactions wholly confined to Alabama.

This Court next commented on Alabama's antitrust statutes in [Ex parte Rice, supra](#). That case involved an original petition for a writ of mandamus to require the trial court to vacate its order overruling the plaintiffs' motion to compel answers to interrogatories. The underlying action was filed by the Sinclair Refining Company and sought the specific performance of a contract. The defendant raised as a defense that the contract was illegal, arguing that its "purpose was to engage in a monopoly in violation of the state and federal law." [259 Ala. at 572, 67 So. 2d at 826](#). This Court denied mandamus relief, holding that the motion to compel had been properly denied because the interrogatories filed by the defendant sought to place an improper burden on the plaintiff. In the course of its discussion of the applicable law, this Court noted:

"We do not seem to have in Alabama a statute [**58] which defines an unlawful monopoly. Section 108, Title 57, Code, makes it a crime, punishable by fine, for any person, including a corporation, to [~~336~~] restrain trade or create a monopoly. Section 103 of the Constitution requires legislation to prohibit monopolies and combinations. Section 78, Title 57, Code, makes lawful certain contracts fixing a minimum resale price. We have applied the common law, which is substantially as set out in the Sherman and Clayton Acts. See [Sherrill v. Alabama Appliance Co., 240 Ala. 46 \(7\), 197 So. 1.](#)

"The federal statutes, Sherman and Clayton Acts, prescribe the terms of unlawful monopolies and restraints of trade as they should also be administered in Alabama. The question, therefore, is properly affected by those acts, and it must be controlled by them when the business involved in the suit affects interstate commerce. It is upon that basis that the foregoing conclusions prevail in this case."

[259 Ala. at 575, 67 So. 2d at 829.](#) (Emphasis added.)

In *San Ann Tobacco Co. v. Hamm*, *supra*, this Court addressed the constitutionality of an amendment to the Alabama Unfair Cigarette Sales Act, Ala. Acts 1951, Act No. 805, as amended [**59] in 1965 by Ala. Acts 1965, Act No. 78, p. 105, Second Special Session. In striking down the amendment as violating § 1 and § 35 of the Alabama Constitution, this Court wrote:

"This Court held the original Act to be constitutional on its face, *Simonetti, Inc. v. State ex rel. Gillion*, 272 Ala. 398, 132 So. 2d 252, and appellants do not attack that holding. But appellants do argue that one part of the 1965 amendment does render the Act unconstitutional on its face.

"The pertinent part of § 3(a) (Tit. 57, § 83(3)) of the original Act provided:

"It shall be unlawful for any wholesaler or retailer, with intent to injure competitors, destroy or substantially lessen competition, to advertise, offer to sell, or sell at wholesale or retail, cigarettes at less than cost to such wholesaler or retailer as the case may be.'

"This sentence was amended in 1965 and we emphasize the five additional words added which are pertinent to this decision:

"It shall be unlawful for any wholesaler or retailer with intent to injure competitors, destroy or substantially lessen competition, *or with the effect thereof*, to advertise, offer to sell [**60] or sell at wholesale or retail cigarettes at less than cost to such wholesaler or retailer as the case may be'

"We quote excerpts from the decision in *Simonetti, Inc. v. State ex rel. Gillion, supra*:

""The present bill directly alleges a dual or cumulative specific intent to 'injure competitors and destroy or substantially lessen competition' and that respondent's advertising, offers to sell, and sale of cigarettes at wholesale have been 'at less than cost to said respondent.' These are considered to be allegations of ultimate, issuable facts, sufficient for the purpose of pleading, since the respondent's actual intent in fact, its costs, and its selling prices are presumably matters within its knowledge, and greater particularity would not seem to be required either to frame the issue or inform respondent of the charge against which it is required to defend. By these allegations, the State as complainant assumes a heavy burden of proof, since it must be proof of far more than mere intent of injury to competitors or 'unfairness' of competition. *It must also prove, under the construction placed upon the Act, a selling below cost with the specific intent* [**61] *of destroying or substantially lessening competition, since the Act, if valid at all, can only be held so as an exercise of the police power of the state over intrastate commerce to the end of inhibiting practices tending toward monopolization.*""

[*337] 283 Ala. at 400, 217 So. 2d at 804-05. (Some emphasis original; other emphasis added.)

At least three federal courts have followed the aforementioned line of Alabama decisions and have declined to interpret Alabama's antitrust statutes as reaching transactions involving interstate commerce. See *In re Brand Name Prescription Drugs Antitrust Litigation, supra* (district court denying motion to remand to state court, stating that "it is clear that the statute [§ 6-5-60] applies only to intrastate activity");⁵ *In re Nasdaq Market Makers Antitrust*

⁵ The Court of Appeals for the Seventh Circuit reversed the district court's order denying the motion to remand. In doing so, the court recognized that at the turn of the century the Alabama Legislature lacked the constitutional authority to regulate interstate commerce through the use of antitrust provisions:

"The cases on which the defendants rely, for example, *Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123, 62 So. 542, 546 (1913), date from a period in which, interstate commerce being narrowly defined, see, e.g., *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 F. 242, 244 (8th Cir. 1906), and federal power to regulate such commerce being deemed

Litigation, supra, at 179 (denying motion to remand and noting that "the Alabama state courts have deemed the Alabama antitrust statutes upon which the complaint is based to regulate only intrastate commerce"); and Warren v. Playmobil U.S.A., Inc., supra (denying motion to remand, concluding that "the Alabama statutes the plaintiff purports to rely upon § 6-5-60, § [**62] 8-10-1, and § 8-10-3] regulate only intrastate commerce").

[**63] After carefully reviewing the record and the briefs (which, we note, were exceptionally well written), we conclude that the rationale of *Siegelman* (that because the states were prohibited by federal law from taxing out-of-state national banks at the time the statute levying the excise tax was first enacted, the state could not tax an out-of-state national bank under the existing tax statute in the absence of further action by the Legislature) is equally applicable in the present case. Although what is now § 6-5-60 (providing for a civil cause of action) was enacted a little over 16 years after what are now § 8-10-1, [*338] § 8-10-2, and § 8-10-3 (prescribing criminal penalties), all of these statutes are part of a uniform system of regulation, in the sense that they are all directed toward punishing or providing redress for activities in restraint of trade. HN3 [↑] Related statutes of this kind should, when possible, be construed *in pari materia*. Jordan v. Reliable Life Insurance Co., 589 So. 2d 699 (Ala. 1991), citing N. Singer, *Sutherland Statutory Construction*, § 70.05, at 505 (4th ed. 1986). It is significant, we think, that all of these antitrust provisions were first enacted [**64] at a time in this country's history when the United States Supreme Court maintained a clear dichotomy with respect to a state's power to regulate commerce. Our research indicates that at the time of the enactment of what are now § 8-10-1, § 8-10-2, and § 8-10-3 (1891), and extending through the time of the enactment in 1907 of what is now § 6-5-60, the United States Supreme Court had clearly held that the regulation of interstate commerce was within the exclusive domain of Congress. It is also significant that a federal **antitrust law** (the Sherman Antitrust Act) was already in effect at the time of the enactment of what are now § 8-10-1, § 8-10-2, and § 8-10-3. Thus, under the rationale of *Siegelman*, we must entertain a strong presumption that HN4 [↑] the Alabama Legislature was aware toward the end of the 19th century and at the beginning of the 20th century, when it first enacted these antitrust statutes, that its ability to regulate antitrust activity was limited in that it did not have the power to directly regulate transactions involving interstate commerce. The United States Supreme Court had clearly signaled, however, that the regulation of intrastate commerce at the turn [**65] of the century was still largely within the exclusive domain of the states.

This presumption that the Legislature intended to limit the scope of its antitrust laws to transactions involving intrastate commerce is strengthened by several additional factors. First, the Illinois statute that formed the basis for what are now § 8-10-1, § 8-10-2, and § 8-10-3, was held early on by the Illinois Supreme Court to be limited to transactions involving intrastate commerce. See People ex rel. Akin v. Butler Street Foundry & Iron Co., 201 Ill. 236,

exclusive, *id.*; United States v. E.C. Knight Co., 156 U.S. 1, 11, 15 S. Ct. 249, 253, 39 L. Ed. 325 (1895), a state statute limited to intrastate commerce would have some, albeit a strictly limited, scope and could not have a greater scope no matter how much the state wanted it to."

123 F.3d at 612-13. The court then went on to reason that "the cases thus were not interpreting the statute; they were interpreting the Constitution as placing upper and lower bounds on the reach of the statute." 123 F.3d at 613. Stating that the United States Constitution "has since been reinterpreted," the court noted that "other states [have] read their antitrust statutes to reach what is now understood to be interstate commerce," and that "we are given no reason to suppose that Alabama would buck this trend." *Id.* This Court's decisions in Siegelman v. Chase Manhattan Bank, supra; Ex parte Dixie Tool & Die Co., supra; and Ex parte Louisville & N.R.R., supra, which created a presumption that the Legislature did not intend to exceed its constitutional authority in enacting this state's antitrust provisions, preclude the kind of statutory construction that the Seventh Circuit Court of Appeals thought we might engage in. As we have explained, this presumption was strengthened by, among other things, the extensive legislative history of the Alabama statutes that we have set out, including the critical limiting words contained in Act No. 202 -- "within this state." The Seventh Circuit apparently ruled without the benefit of this legislative history or this Court's decisions referenced above. We also note that the Seventh Circuit expressed concern that "if the statute is limited today as it once was to commerce that is not within the regulatory power of Congress under the commerce clause, it is a dead letter because there are virtually no sales, in Alabama or anywhere else in the United States, that are intrastate in that sense." 123 F.3d at 613. However, the statutes, as we interpret them, may yet have a field of operation because they continue to reach transactions within this state, in the geographic sense, even though such transactions may affect interstate commerce as currently defined by federal law. See Cantor v. Detroit Edison Co., 428 U.S. 579, 633, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976) (Stewart, J., dissenting) (recognizing that when Congress passed the Sherman Antitrust Act, state efforts to restrain monopolies were "restricted to the geographic boundaries of the several states").

66 N.E. 349 (1903). Second, Act No. 202, § 1 (the predecessor of § 8-10-1), as originally enacted by the Legislature in 1891, read as follows:

*"Section 1. Be it enacted by the General Assembly of Alabama, That any person, corporation or association of persons who shall, within this state, engage or agree with other persons, corporations or association of persons, or enter into, either directly [sic], any combination, pool, trust or confederation to regulate or fix the price of any article or commodity to be sold within this state for speculation; and any person, corporation or association of persons who shall enter into, become [**66] a member of a party to, any pool, agreement, combination or confederation to fix or limit the amount or quantity of any article or commodity to be produced or manufactured, mined or sold in this state, shall be guilty of a misdemeanor, and subject to indictment and punishment as herein provided."*

(Emphasis added.) Although this fact is certainly not conclusive, this section, as originally worded, suggests that the Legislature intended to limit the scope of Alabama's antitrust regulations to transactions involving intrastate commerce. Although the Code commissioner deleted the words "within this state" from § 5557 during his compilation of the 1896 Code, we find in our research no indication that he had the authority or the intent to make any substantive changes to Act No. 202, or that the Legislature, by adopting the 1896 Code with the commissioner's suggested change to § 5557, contemplated that the deletion of the words would effect the kind of substantive change that the plaintiffs suggest was intended -- to expand the scope of the statute to encompass transactions involving interstate [*339] commerce. We find it more probable (although we certainly can never know for sure) that [**67] the commissioner deleted the words, and that the Legislature accepted that change, out of an understanding or belief that the state lacked extraterritorial authority over commerce and, therefore, that the words were not necessary. Third, and perhaps most important, the Court of Appeals stated in 1913, shortly after these statutes were enacted, that the Legislature's regulatory power over antitrust violations did not extend to transactions involving interstate commerce, specifically recognizing that the regulation of such transactions had been undertaken by Congress pursuant to the Sherman Antitrust Act. The understanding of the Court of Appeals in this respect has been echoed by this Court on every occasion on which it has considered the matter. Fourth, the Legislature, with presumptive knowledge of the interpretation placed on Alabama's antitrust laws by Alabama appellate courts, has made no substantive changes to any of Alabama's antitrust laws since their original enactment.

As previously noted, HN5 when circumstances surrounding the enactment of laws, such as the antitrust statutes at issue here, cast doubt on the otherwise clear language of the statutes themselves, we must look [**68] to other factors in determining legislative intent. Siegelman, supra. In an effort to avoid indulging in conjecture or searching for imaginary purposes with respect to these antitrust statutes, we have followed the well-settled rule of statutory construction "HN6" that it is permissible in ascertaining [the purpose and intent of a statute] to look to the history of the times, the existing order of things, the state of the law when the instrument was adopted, and the conditions necessitating such adoption." In re Upshaw, 247 Ala. at 223, 23 So. 2d at 863. Having done that, we hold, based on the above, that HN7 does not provide a cause of action for damages allegedly resulting from an agreement to control the price of goods shipped in interstate commerce. We reiterate what we stated in Siegelman, supra:

"This Court's role is not to displace the legislature by amending statutes to make them express what we think the legislature should have done. Nor is it this Court's role to assume the legislative prerogative to correct defective legislation or amend statutes."

575 So. 2d at 1051. We hold only that the field of operation of Alabama's antitrust statutes, [**69] specifically § 6-5-60, is no greater today than it was when the laws were first enacted. Thus, these statutes regulate monopolistic activities that occur "within this state" -- within the geographic boundaries of this state -- even if such activities fall within the scope of the Commerce Clause of the Constitution of the United States.⁶ We leave to the Legislature the

⁶ Of course, Alabama's antitrust statutes may not be applied in a manner that discriminates against or unduly burdens interstate commerce. See Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977).

policy decision of whether to expand the reach of Alabama's antitrust statutes to activities that cross state boundaries.

The trial court's order denying the defendants' motion for a judgment on the pleadings is reversed, and the cause is remanded for further proceedings consistent with this opinion.

[70] OPINION OF JULY 31, 1998, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED.**

Hooper, C. J., and Maddox, See, and Brown, JJ., concur.

Cook and Johnstone, JJ., dissent.

Houston and Lyons, JJ., recuse themselves.

SEE, Justice (statement of nonrecusal).

For the reasons given in my statement of nonrecusal in *Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc., [Ms. 1960220, June 25, 1999] 1999 Ala. LEXIS 201, So. 2d*, (Ala. 1999) (See, J., statement of nonrecusal), I decline to recuse.

Hooper, C.J., and Maddox, Kennedy,¹⁵ Cook, Brown, and Johnstone, JJ., concur.

Dissent by: COOK; JOHNSTONE

Dissent

[*340] COOK, Justice (dissenting).

I dissent from the majority's holding that § 6-5-60, Ala. Code 1975, does not provide a cause of action for damage occurring within Alabama and resulting from an unlawful agreement to control the price of goods shipped through interstate commerce into Alabama.

The issue presented by this appeal is whether the application of Alabama's antitrust law, § 6-5-60, to the in-state purchase of brand-name prescription drugs shipped from companies out-of-state is precluded because of the minimal presence of interstate commerce, which arguably invokes the Commerce Clause of the United States Constitution.⁷ The actual focus is on the narrow issue of state-antitrust-law preclusion under the Commerce Clause.

[71]** Like the majority, I also believe a review of the legislative history of the statute is a necessary prerequisite to an analysis of the statute. Therefore, for a court to ascertain legislative intent, it is necessary to examine the plain language of the statute and to consider conditions existing when the Alabama antitrust laws were enacted. See *Advertiser Co. v. Hobbie*, 474 So. 2d 93 (Ala. 1985); *League of Women Voters v. Renfro*, 292 Ala. 128, 290 So. 2d 167 (1974).

¹⁵ Justice Kennedy's vote regarding the motion to recuse was made prior to his resignation on June 11, 1999.

⁷ In *Perez v. United States*, 402 U.S. 146, 150, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971), the United States Supreme Court explained:

"The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused Second, protection of the instrumentalities of interstate commerce Third, those activities affecting commerce."

We are concerned with the third element of interstate-commerce jurisdiction stated in *Perez*.

The time immediately before the enactment of the Sherman Antitrust Act in 1890 and the Alabama antitrust laws in 1891 was a period of high prices and reduced output.⁸ According to Robert Lande, Congress's primary concern in 1890 was the abundance of wealth transfers away from consumers to the monopolist.⁹ Senator Sherman and Senator John T. Morgan of Alabama described the abuse by trusts in 1890 as a predatory practice by the cottonseed-oil trust against competitors that injured customers by monopolistic price increases.¹⁰ The Sherman Antitrust Act was passed on July 2, 1890, as a response to the unfair competitive practices against independent businesses that were occurring in the oil and railroad industries. [**72] In *Standard Oil Co. of Kentucky v. Tennessee*, 217 U.S. 413, 54 L. Ed. 817, 30 S. Ct. 543 (1910), a Kentucky corporation attempted to raise oil prices in Tennessee by persuading local merchants to cancel orders with that corporation's competitor located in Pennsylvania. The Kentucky corporation was convicted of violating the Tennessee antitrust act. On appeal to the United States Supreme Court, the defendant contended:

"As the only illegal purpose that can be attributed to this agreement is that of protecting the defendant's oil against interstate competition, it could not be made the subject of punishment by the state; ... the offense, if any, is against interstate commerce alone."

217 U.S. at 421.

Justice Holmes responded [**73] by stating:

"The mere fact that it [the Tennessee Act] may happen to remove an interference with commerce among the States as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery that the person assaulted was engaged in peddling [*341] goods from another State. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law at least that excludes the States from a familiar exercise of their power."

Id. at 422.

The Alabama legislature responded to the discontent and resentment of monopolistic practices in Alabama by enacting Alabama's first criminal **antitrust law** in 1891, Act No. 202, 1890-91 Ala. Acts 438 (presently codified at § 8-10-1, in substantial form), only one year after the passage of the Sherman Act. Act No. 202 provided:

"Section 1. Be it enacted by the General Assembly of Alabama, That any person, corporation or association of persons who shall, *within this state*, engage or agree with other persons, corporations or association of persons, [**74] or enter into, either directly [sic], any combination, pool, trust or confederation to regulate or fix the price of any article or commodity to be sold within this state for speculation; and any person, corporation or association of persons who shall enter into, become a member of a party to, any pool, agreement, combination or confederation to fix or limit the amount or quantity of any article or commodity to be produced or manufactured, mined or sold in this state, shall be guilty of a misdemeanor, and subject to indictment and punishment as herein provided.

"Sec. 2. Be it further enacted, That it shall not be lawful for any corporation chartered under the laws of Alabama, or for any officer, stockholder, agent or employee of such corporation to enter into any combination

⁸ A. Marshall, *Principles of Economics*, 493-94, 820 (8th ed. 1938).

⁹ Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 67, 150 (1982).

¹⁰ 21 Cong. Rec. 1768, 2609-10 (1890).

with other persons or corporations, the purpose and effect of which are to place the management or control thereof in the hands of others, with the purpose or intent to limit or fix the price, or lessen the production or sale of any article of commerce, use or consumption, or to restrict or diminish the manufacture of such article.

"Sec. 3. *Be it further enacted*, That any person or corporation **[**75]** violating the provisions of section one or two of this act, within the State of Alabama, shall, on conviction, be fined not less than five hundred dollars, nor more than two thousand dollars, at the discretion of the jury trying the same"

(Emphasis added.)

Act No. 202 was codified in the 1896 Code, at Chapter 196, Article 5, § 5557, § 5558, and § 5559.¹¹ I note that in the 1896 codification of Act No. 202, the phrase "within this state" was omitted from § 5557. However, Act. No. 202, a criminal statute prohibiting pools, trusts, etc., was applicable only to criminal activity occurring *in Alabama*, because of the phrase "within this state." When this phrase was omitted in the 1896 codification of Act No. 202, the applicability of the statute only to criminal activity occurring within Alabama was not eliminated. Because Act No. 202 and its successor statutes are criminal in nature, they apply only to prohibited criminal activity in Alabama, regardless of whether the language of the statute provides for that result. Therefore, the omission of the phrase "within this state" is immaterial, because this criminal statute could not have regulated criminal activity occurring **[**76]** "outside Alabama."

The Alabama legislature, in the 1907 Code, Chapter 48, Article 6, § 2487 and **[*342]** § 2488,¹² provided for a civil cause of action for injuries occurring from damage caused by an antitrust violation. Sections 2487 and 2488 provided:

[77]**

"2487. Actions against trusts, combines, or monopolies.-- Any person, firm, or corporation injured or damaged by an unlawful trust, combine, or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of five hundred dollars and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly; and may maintain the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. And all such actions may be prosecuted to final judgment or decree against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, judgment, or decree in favor of one or more of the defendants.

"2488. County in which action brought. -- Actions under the preceding section may be brought in any county where the trust, combine, or monopoly was formed, or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed; or in any county in which either of the defendants may have **[**78]** a domicile, or where an officer or agent of any defendant corporation may be found."

On its face, § 6-5-60 does not indicate whether the statute applies to activities affecting both "intrastate" and "interstate" commerce. Unlike Act No. 202, the language in § 6-5-60 and its predecessors, §§ 2487 and 2488, are broadly written and give no indication whether the Alabama legislature intended for § 6-5-60 to apply to transactions occurring within Alabama but touching interstate commerce.

¹¹ Sections 5557, 5558, and 5559 of the 1896 Code were adopted in primarily the same form in the 1907 Code, Chapter 273, as § 7579, § 7580, and § 7582. The legislature added § 7581 of the 1907 Code entitled "Monopolies, penalty for." Sections 7579, 7580, 7581, and 7582 were readopted in the 1923 Code as § 5212, § 5213, § 5214, and § 5215. Sections 5212, 5213, and 5214 were readopted in the 1940 Code as Title 57, § 106, § 107, and § 108. Sections 106, 107, and 108 were readopted in the 1975 Code as § 8-10-1, § 8-10-2, and § 8-10-3.

¹² Sections 2487 and 2488 were adopted in primarily the same form in the 1923 Code, as § 5697 and § 5698. Sections 5697 and 5698 were readopted in the 1940 Code as Title 7, § 124 and § 125. Sections 124 and 125 were readopted in the 1975 Code as § 6-5-60 (a) and (b) respectively.

During the period following the enactment of the Sherman Antitrust Act, the United States Supreme Court described that Act as one aimed at preserving free and unfettered competition as the rule of trade. The Supreme Court declared any attempt by the states to regulate interstate commerce a burden on commerce and, therefore, unconstitutional. The United States Supreme Court "narrowly" defined interstate commerce as being within the exclusive realm of federal regulatory control.¹³ The regulation of interstate commerce was deemed to be beyond the scope of state antitrust laws. See [United States v. E.C. Knight Co., 156 U.S. 1, 11, 39 L. Ed. 325, 15 S. Ct. 249 \(1895\)](#); [Hadley Dean Plate Glass \[**79\] Co. v. Highland Glass Co., 143 F. 242, 244 \(8th Cir. 1906\)](#); see also [Brennan v. City of Titusville, 153 U.S. 289, 38 L. Ed. 719, 14 S. Ct. 829 \(1894\)](#) (license tax imposed upon the defendant was a direct burden on interstate commerce and was beyond the power of the state); [Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 228, 44 L. Ed. 136, 20 S. Ct. 96 \(1899\)](#) ("The power to regulate interstate commerce is ... full and complete in Congress"). However, I note that the United States Supreme Court has recognized that the Commerce Clause allows state regulation of activities that happen to affect interstate commerce, but which Congress has not regulated. See [California v. Thompson, 313 U.S. 109, 113, 85 L. Ed. 1219, 61 S. Ct. 930 \(1941\)](#) ("it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity [*343] may never be adequately dealt with by Congress").

[**80] Because of the United States Supreme Court's narrow conception of interstate commerce during the time that the Sherman Act was enacted, our cases during that period, constrained by the Supremacy Clause, reflect those views. This Court viewed the federal Constitution as placing a barrier on the breadth of our antitrust laws, recognizing the then absolute power of Congress to exclusively regulate interstate commerce. Therefore, the Court did not have the need to interpret the "scope" of our antitrust laws. Instead, we accepted the status of federal constitutional law at that time and acknowledged its impact upon our state antitrust laws. See [Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178 \(1930\)](#) (Alabamians' purchase of cottonseed from Alabama manufacturers to be used in Alabama did not constitute interstate commerce, even if some of the manufactured products eventually made their way into interstate commerce); [Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 62 So. 542, 546 \(1913\)](#).

In [Georgia Fruit Exchange v. Turnipseed, supra](#), the Georgia Fruit Exchange sued D.C. Turnipseed for breach of contract. In pertinent part, the contract stated:

"Penrode, [**81] Ala., March 10, 1909. In consideration of the benefits I expect to receive in common with all other fruit growers in Georgia by the organization of the Georgia Fruit Exchange, I hereby subscribe for membership and stock therein, and I hereby pledge to the Georgia Fruit Exchange, as follows: First, I agree to make all car load shipments of peaches grown by me during 1909, through the Georgia Fruit Exchange and pay 10 percent. of gross sales to cover all commission charges, remittance to be made by commission house direct to shipper, and the shipper reserving the right to designate by April 1 of each year the commission house in each market to which his consignments have been allotted. On orchard and other sales f.o.b. my station in consideration of a protected market and consequent enhanced price, I agree to pay the exchange 5 per cent. of such gross sales, and I further agree to abide by all the rules and regulations of the board of trustees of said exchange. Second, I hereby subscribe for and I agree to pay for on a basis of 10 per cent. Nov. 1, 1908, and 10 per cent. monthly thereafter on shares at \$ 10 each of the stock of the Georgia Fruit Exchange aggregating \$ 10. This agreement [**82] is not binding until \$ 50,000 of stock is subscribed, and pledges secured covering 60 per cent of the prospective crop for 1909, based on 1908 shipments. D.C. Turnipseed."

See [9 Ala. App. at 125, 62 So. at 543.](#)

The trial court entered a judgment for Turnipseed, and Georgia Fruit Exchange appealed. The Alabama Court of Appeals held that the contract at issue was void as being against public policy, because the contract's object was to

¹³ "The Congress shall have Power ... to regulate Commerce ... among the several states...." [U.S. Const. Art. I, § 8, cl. 3.](#)

prevent free and fair competition in trade. [9 Ala. App. at 143, 62 So. at 549](#). In its opinion, the court acknowledged the then bright-line distinction between state and federal antitrust laws.¹⁴ The court stated:

"There being thus both a state and [a] national law prohibiting unlawful combinations in restraint of trade -- the one law relating to intrastate, the other to interstate, commerce -- it is immaterial as **[**83]** to which character of commerce, whether only one or both, is involved in the contract here under consideration"

[Georgia Fruit Exchange, 9 Ala. App. at 132-33, 62 So. at 546.](#)

However, the court refused to determine the scope of Alabama antitrust laws:

*"It is not necessary to the invalidity of the contract here and to the disposition **[*344]** of the present case to decide whether the contract is in violation of the state statute or of the federal statute, or any statute at all. We are not dealing with a criminal prosecution, and need not therefore concern ourselves with the question as to whether the commerce involved in the contract is inter or intra state, or both, or whether the terms of either statute have been violated. It is sufficient, as before seen, to destroy it and all obligations created by it, if it violates the public policy of the state or nation, as declared in judicial decisions predicated upon the principles of the common law obtaining here. It does contravene such public policy if it unreasonably restrains trade, because in such event it tends to create a monopoly, which is odious to our law and detrimental to public good, which requires freedom of **[**84]** trade and competition -- 'the life of a people's prosperity.'"*

[9 Ala. App. at 142, 62 So. at 549](#) (emphasis added) (citation omitted).

We have interpreted our state antitrust laws and have decided our antitrust cases in accordance with the state of federal constitutional law existing at the time our antitrust laws were enacted. However, those cases are now of little precedential value because they were premised on strict adherence to the United States Supreme Court's mechanical intrastate-interstate view of the Commerce Clause. Although state **antitrust law** and federal **antitrust law** were seen as occupying separate fields during the period around 1890, it was not long before these two fields were almost concurrent. See [Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 \(1942\)](#) (holding that although a small amount of wheat grown by a farmer was essentially consumed on his farm and some was sold locally, a marketing quota to control the price of wheat could be legitimately applied to the farmer); and [Katzenbach v. McClung, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 \(1964\)](#) (upholding the application of Title II of the Civil Rights Act to Ollie's barbecue restaurant **[**85]** in Birmingham, stating that the family-owned restaurant's purchase of \$ 70,000 worth of meat that had originated out-of-state brought the restaurant under the Act and supported a constitutional exercise of Congress's commerce power over that purchase). The usefulness of the solely-intrastate-or-soley-interstate classification in 1890 has now been lost. It is almost inconceivable today for the sale of goods to be viewed solely as intrastate, because interstate commerce is affected if there is any arguable connection between a regulation and commerce that touches more than one state; this fact results in an overlap between state **antitrust law** and federal **antitrust law**. The fact that the **Commerce Clause of the United States Constitution** has historically dominated the field of regulating interstate commerce does not now prevent the application of state antitrust laws to activities affecting interstate commerce, given the recent broadening of the concept of interstate commerce. Another state court has wisely observed:

"Monopolies and restraints of trade are of infinite form and variety. ... Some expend their efforts almost wholly upon intrastate commerce and are of only local interest **[**86]** and some almost wholly upon interstate commerce and so become matters of national concern, and there are all gradations between. In many cases it would be very difficult to draw the line. If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can

¹⁴ The court did not address the issue whether state or federal antitrust laws were applicable in that case, because the contract was held to be void.

perceive, any corresponding contribution to the national welfare. ... Especially is this true in view of the immense broadening in the conception of interstate commerce in recent years."

[Commonwealth v. McHugh, 326 Mass. 249, 265, 93 N.E.2d 751, 762 \(1950\).](#)

[*345] Because of the very nature of commerce and the expanding scope of transactions that affect interstate commerce, it stands to reason that the legislature intended for [§ 6-5-60](#) to apply to conduct occurring within Alabama but touching interstate commerce. Finding state preclusion whenever interstate commerce is involved would effectively destroy our state antitrust enforcement. Since the demise of the mechanical "dual-sovereignty" theory and the development of expansive federal power over activities merely "affecting" interstate [*87] commerce (see, e.g., [Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 92 L. Ed. 1328, 68 S. Ct. 996 \(1948\); United States v. Frankfort Distilleries, Inc. 324 U.S. 293, 298, 89 L. Ed. 951, 65 S. Ct. 661 \(1943\)](#) ["Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied"]), the regulatory power of the national government has become so broad that, if it was fully exercised, virtually all intrastate activity might be regulated, to the complete exclusion of state authority. See, e.g., [Perez v. United States 402 U.S. 146, 28 L. Ed. 2d 686, 91 S. Ct. 1357 \(1971\)](#) (loan-sharking); [Heart of Atlanta Motel, Inc. v. United States 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 \(1964\)](#) (public accommodations). Therefore, if our state antitrust laws are deemed inapplicable to conduct occurring within Alabama but having interstate characteristics, our antitrust laws would become irrelevant, given that courts now recognize that most activities, however localized, have some effect, however remote, on interstate commerce.

The United States Supreme Court has consistently held that the Commerce Clause "does not exclude all state [*88] power of regulation" and that "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless ... affect interstate commerce or even ... regulate it." [Southern Pacific Co. v. Arizona, 325 U.S. 761, 766-67, 89 L. Ed. 1915, 65 S. Ct. 1515 \(1945\)](#); see [St. Joe Paper Co. v. Superior Court, 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 \(1981\)](#), cert. denied, 455 U.S. 982, 102 S. Ct. 1489, 71 L. Ed. 2d 691 (1982).

The United States Supreme Court has also shown a long-time willingness to defer to state regulation. See [Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 53 L. Ed. 417, 29 S. Ct. 220 \(1909\); Standard Oil Co. of Kentucky v. Tennessee, 217 U.S. 413, 54 L. Ed. 817, 30 S. Ct. 543 \(1910\); Straus v. American Publishers' Ass'n, 231 U.S. 222, 58 L. Ed. 192, 34 S. Ct. 84 \(1913\)](#). Therefore, Alabama is not precluded from exercising jurisdiction to enforce its own [antitrust law](#) unless its doing so places an undue burden on interstate commerce. See [Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 57 L. Ed. 2d 91, 98 S. Ct. 2207 \(1978\)](#) (state not without power to regulate retail sale or distribution of gasoline).

Congress has also left unregulated the right of indirect [*89] purchasers to sue for damages under the Sherman Act. In [Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 \(1977\)](#), the Supreme Court barred indirect purchasers from bringing certain kinds of antitrust actions for damages under federal law, thereby leaving indirect purchasers seeking antitrust damages to sue under state law. However, like state antitrust statutes in many other states, Alabama's antitrust statute, [§ 6-5-60\(a\)](#), expressly allows indirect purchasers to sue for antitrust damages. Because the United States Supreme Court expressly held in *Illinois Brick* that indirect purchasers lack standing to sue in federal courts under the Sherman Act, it is permissible for Alabama's antitrust laws to regulate activities that affect "interstate" commerce. *Id.*

Reflecting the United States Supreme Court's interpretation of the federal Constitution as allowing states to reach interstate commerce under their antitrust statutes and addressing the standing of indirect purchasers to sue under Alabama's antitrust laws, the United States Court of Appeals for the Seventh Circuit reversed the district court's judgment entered [*346] in *In re Brand Name Prescription* [*90] [Drugs Antitrust Litigation, 1996 U.S. Dist. LEXIS 14529, \[Ms. 94 C 897, Oct. 2, 1996\]](#) (N.D. Ill. 1996) (not reported in F. Supp.). See [In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599 \(7th Cir. 1997\)](#). In that case, retail pharmacists filed an antitrust lawsuit against drug manufacturers and wholesalers of prescription drugs, challenging a price-fixing conspiracy. The drug manufacturers gave discounts only to favored customers, such as hospitals, HMOs, nursing homes, and mail-order companies. The manufacturer and a favored customer would enter a contract establishing a discounted price at

which the customer would purchase prescription drugs from the wholesaler. After the customer purchased from the wholesaler at that price, the manufacturer reimbursed the wholesaler the difference between the regular wholesale price and the discounted price. The manufacturers argued that only the direct purchasers (wholesalers and others who purchased drugs directly from the manufacturers) could sue under the Sherman Act for overcharges, and not indirect purchasers (pharmacists who had purchased drugs from the wholesalers). The trial court entered a summary judgment for one of the manufacturers and [**91] denied the other manufacturers' summary-judgment motions. The Seventh Circuit reversed, holding, among other things, that the indirect-purchaser rule barred pharmacists' actions against manufacturers. In its discussion of an indirect purchaser's standing now to sue for damages under Alabama **antitrust law**, the court stated:

"If the [state] statute is limited today as it once was to commerce that is not within the regulatory power of Congress under the commerce clause, it is a dead letter because there are virtually no sales, in Alabama or anywhere else in the United States, that are intrastate in that sense. *United States v. Lopez*, 514 U.S. 549, 558, 115 S. Ct. 1624, 1630, 131 L. Ed. 2d 626 (1995); *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942); *United States v. Hicks*, 106 F.3d 187, 189-90 (7th Cir. 1997). Other states read their antitrust statutes to reach what it now understood to be interstate commerce. ... The reading is constitutionally permissible, *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 84 S. Ct. 1197, 12 L. Ed. 2d 229 (1964), and we are given no reason to suppose that Alabama would buck this trend and by doing so kill its statute."

[**92] *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d at 613 (emphasis omitted).

Given the exclusive regulatory power over interstate commerce that Congress had under the Supreme Court's interpretation of the Commerce Clause at the time Alabama's antitrust statutes were enacted, which interpretation presumptively was known by the legislature, Alabama legislators, given the choice between a restrictive statute or a broad statute, chose to construct what is now § 6-5-60 with broad language. It is reasonable to assume that the legislature chose a broadly worded statute with the intent to afford maximum protection to the citizens of Alabama. It would be incongruous to interpret our state statute in a manner that would not provide maximum protection from unfair competitive practices, when the legislative history of the Sherman Antitrust Act evinces an intent to "supplement" state antitrust enforcement. Thus, continuing to interpret Alabama antitrust laws as applying only to purely intrastate commerce and as not applying to commerce with any hint of an interstate nature, is inconsistent with providing Alabamians maximum protection from unfair competition.

I do not think [**93] that to interpret our antitrust statute so as to provide Alabamians with maximum protection from unfair competition, as we are permitted to interpret it under the United States Constitution, is to treat the statute as an accordion. The language of § 6-5-60 has not [*347] changed. However, we can now correctly read that section, in light of the reasoning in *Brand Name Prescription Drugs, supra*, to permit this claim by indirect purchasers; to do so, I think, would be to recognize that section's constitutionally permissible scope. It is Federal law, not Alabama state law, that is changing. My view of the scope of Alabama's antitrust statute is, therefore, not expansive; it would continue to apply our state law to conduct occurring within Alabama.

I believe the trial court correctly ruled that § 6-5-60 provides a cause of action for damages alleged to have resulted from a conspiracy to control the price of brand-name prescription drugs shipped by out-of-state companies into Alabama. The conspiracy alleged in this case was directed toward an "intrastate" market and actually occurred within Alabama.

I therefore dissent.

JOHNSTONE, Justice (dissenting).

I respectfully dissent from the [**94] reversal of the trial judge's order for two reasons. First, the trial judge's denial of the defendants' motions for judgment on the pleadings does not conflict with the express holding by the majority. Second, the holding, to the extent that it be construed to require reversing the trial judge, is based on a

misinterpretation of the federal constitutional law existing in 1907 when the statute invoked by the plaintiffs originated.

The majority holds, in pertinent part,

"that [§ 6-5-60 \[Ala. Code 1975\]](#) does not provide a cause of action for damages allegedly resulting from an agreement to control the price of goods shipped in interstate commerce" and that "these [Alabama] statutes regulate monopolistic activities that occur 'within this state' -- within the geographic boundaries of this state -- even if such activities fall within the scope of the [Commerce Clause of the Constitution of the United States](#)."

The plaintiffs' pleadings, which must be deemed true for the purpose of deciding a motion for judgment on the pleadings, expressly allege, in pertinent part, that the defendants violated [§ 6-5-60, Ala. Code 1975](#),

"by sending their agents and employees ... [\[**95\]](#) into Alabama to make presentations to physicians, hospital administrators, HMO officers and administrators and others in the health-care field, and by marketing and selling their pharmaceutical products *in this state* either directly or through some or all of the defendant wholesalers, which pharmaceutical products ultimately were purchased by the named plaintiffs and members of the class at artificially high prices as a result of the price-fixing and unfair competition conspiracy" (C. 192.) (Emphasis added.)

These pleadings expressly allege "monopolistic activities that [have] occurred 'within this state'" (the language of the majority holding, So. 2d at) and thus which are, according to the express majority holding, regulated by [§ 6-5-60](#). Therefore, the pleadings, even as judged by the express language of the majority holding, state a claim upon which relief can be granted; and this Court should not reverse the trial judge's recognition of this claim in his denial of the defendants' motions.

To the extent that the majority deems its holding to mean that [§ 6-5-60](#) does not regulate the conduct alleged by the plaintiffs, the majority proceeds from the mistaken [\[**96\]](#) premise that, in 1907, when [§ 6-5-60](#) originated, federal constitutional law prohibited states from regulating combinations in restraint of trade in interstate commerce. From this mistaken premise, the majority concludes that the Alabama legislature, in adopting its statute, must not have intended to regulate such conduct, but must have intended to exempt it, notwithstanding the utter absence of any language excluding the conduct and notwithstanding the all-encompassing language of the statute.

[*348] The United States Supreme Court case of [Standard Oil of Kentucky v. Tennessee, 217 U.S. 413, 54 L. Ed. 817, 30 S. Ct. 543 \(1910\)](#), however, declares the pertinent federal constitutional jurisprudence as it existed in 1907. There, Justice Holmes himself writes, "certainly there is *nothing* in the present state of the law, at least, that excludes the states from a familiar exercise of their power." [217 U.S. at 422](#) (emphasis added).

Standard Oil of Kentucky is controlling precedent for the case at issue on the power of states to regulate combinations in restraint of trade in interstate commerce notwithstanding the [Commerce Clause of the United States Constitution](#). Tennessee adopted [\[**97\]](#) its statute in 1903, four years before Alabama adopted its, and well after Congress adopted the Sherman Antitrust Act. The State of Tennessee sued to disenfranchise Standard Oil of Kentucky for entering "into an arrangement for the purpose and with the effect of lessening competition in the sale of oil at Gallatin, Tennessee, and with the further result of advancing the price of oil there." [217 U.S. at 419](#). The operative facts are that Standard Oil of Kentucky had induced "merchants in Gallatin to revoke orders on a rival company for oil to be shipped from Pennsylvania, by an agreement to give them 300 gallons of oil." [217 U.S. at 421](#). The pertinent defense advanced by Standard Oil of Kentucky was "that, although construed by the [trial] court to apply to domestic business only, nevertheless [the statute] is held to warrant turning the defendant out of the State for an interference with *interstate* trade." [217 U.S. at 421](#) (emphasis added), and that the statute is, therefore, "an unconstitutional interference with commerce among the States," [217 U.S. at 419](#). The trial court, affirmed by the Supreme Court of Tennessee, rejected this defense and forbade Standard Oil of Kentucky [\[**98\]](#) to do business "other than interstate commerce" in Tennessee. Standard Oil of Kentucky appealed to the United States Supreme Court, which affirmed. Justice Holmes reasons:

"The mere fact that it may happen to remove an interference with commerce among the States as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery that the person assaulted was engaged in peddling goods from another State. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law at least that excludes the States from a familiar exercise of their power." [217 U.S. at 422.](#)

This case, *Standard Oil of Kentucky*, is controlling because the *interstate* features of the commerce are as strong as, and the *intrastate* features are no stronger than, those respective categories of features in the case at issue. *Standard Oil of Kentucky* distinguishes the *intrastate* aspects of interstate commerce and allows the states to regulate those *intrastate* aspects. Importantly, one of the *intrastate* aspects [**99] the Supreme Court allows Tennessee to regulate is the "domestic business," the sales within Tennessee, by the oil company, even though most or all of the oil to be sold (or not sold) would necessarily have travelled in interstate commerce into Tennessee.

On the one hand, some treatises and some passages in some cases say or imply that the regulatory authority of the states over combinations in restraint of trade is confined to *intrastate* commerce. On the other hand, the actual rulings applicable to the parties in the cases decided by the Alabama state appellate courts, the United States Supreme Court, and the United States Circuit Courts of Appeals with jurisdiction over Alabama cases have always allowed the states to regulate the *intrastate* aspects of combinations in restraint of trade in *interstate* commerce as "*interstate* [*349] commerce" is now defined. See, e.g., [Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 62 So. 542 \(1913\)](#); [Dothan Oil Mill v. Espy, 220 Ala. 605, 127 So. 178 \(1930\)](#); [Standard Oil of Kentucky, supra](#); [California v. ARC America Corp., 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 \(1989\)](#); [In re Brand Name Prescription](#) [**100] [Drugs Antitrust Litigation, 123 F.3d 599 \(7th Cir. 1997\)](#) (reversing a United States District Court decision from Alabama, consolidated with a similar case in the Northern District of Illinois under the federal multi-district litigation rules).

The majority does not cite a single Alabama state appellate court decision, United States Supreme Court decision, or United States Circuit Court of Appeals decision which invalidates a complaint, claim, or defense of a party to the case grounded on a state law regulating combinations in restraint of trade. None of these courts has invoked the Commerce Clause to invalidate such a complaint, claim, or defense by a party before the court.

The expansion of the inclusiveness of the term *interstate commerce* over the decades has in no way diminished the power of the states to regulate combinations in restraint of trade. The states can regulate such conduct as that alleged by the plaintiffs in the case at issue now just as the states could in 1907, when [§ 6-5-60](#) originated. [In re Brand Name Prescription Drugs and California v. ARC, supra](#).

An analysis of the Alabama state appellate court decisions cited by the defendants and the [**101] majority is instructive as much for what the decisions do not hold as for what they do hold. They will be discussed in chronological order.

[Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 62 So. 542 \(1913\)](#), decided six years after the origination of [§ 6-5-60](#), held that Alabama courts would condemn a contract effectuating a combination in restraint of trade regardless of whether the trade be intrastate or interstate.

"It is not necessary to the invalidity of the contract here and to the disposition of the present case to decide whether the contract is in violation of the state statute or of the federal statute, or any statute at all. We are not dealing with a criminal prosecution, and need not therefore concern ourselves with the question as to whether the commerce involved in the contract is inter or intra state, or both, or whether the terms of either statute have been violated. It is sufficient, as before seen, to destroy it and all obligations created by it, if it violates the public policy of the state or nation, as declared in judicial decisions predicated upon the principles of the common law obtaining here. It does contravene such public policy if it unreasonably [*102] restrains trade, because in such event it tends to create a monopoly, which is odious to our law and detrimental to public good,

which requires freedom of trade and competition --'the life of a people's prosperity.'-- *Bir. & Pratt [Mines St.] Ry. Co. v. Bir. St. Ry. Co.*, 79 Ala. [465, 475 (1885)]." [9 Ala. App. at 142, 62 So. at 549](#).

This decision is significant for several reasons. First, the trade under scrutiny certainly would be called "interstate" commerce these days. The contract on which the plaintiff sued, and to which the defendant successfully objected, was part of a combination which gave the plaintiff brokerage control over at least 60 percent of the peach crop in the southeast. Second, *Georgia Fruit Exchange* opines that not only federal and state statutory law but also common law existing contemporaneously with the origination of [§ 6-5-60](#) (which the opinion does not address specifically) *all* forbade combinations in restraint of trade. And, third, the opinion states that the statutory law *both* federal and state could apply to this multi-state combination. [9 Ala. App. at 130-33, 62 So. at 545-46](#).

The chief holding of *Dothan Oil Mill Co. [**103] v. Espy*, 220 Ala. 605, 127 So. 178 (1930), is [[*350](#)] that Alabama residents may sue other Alabama residents for combining in restraint of trade in cotton seed even though the products to be manufactured by one or more parties to the trade "may eventually find their way into and become commodities of interstate commerce." 220 Ala. at 610, 127 So. at 182.

"Taking as true the averments of the bill, as must be done on demurrer, and interpreting the alleged resolutions made Exhibit A to the bill in the light of the facts averred, however inoffensive they may appear on their face, we have no difficulty in reaching the conclusion that the defendants have entered into a combine, pool trust, or confederation, to regulate or fix the price of cotton seed in this state, and are attempting to destroy competition in the sale thereof in violation of the state anti-trust laws. Code 1923, §§ 5212-5214; *Southern Cotton Oil Co. v. Knox et als.*, 202 Ala. 694, 81 So. 656; [Arnold v. Jones Cotton Co., 152 Ala. 501, 44 So. 662, 12 L.R.A. \(N.S.\) 150; Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 62 So. 542](#)." 220 Ala. at 610, 127 So. at 183.

The secondary holding of [[**104](#)] *Dothan Oil Mill* is that the complainants were not suing under the "Sherman and Clayton Acts ([15 USCA §§ 1-7, 15](#), and sections 12-27, [44](#)) which confer on the federal courts exclusive jurisdiction to enforce said acts." 220 Ala. at 610, 127 So. at 182.

Dothan Oil Mill also exemplifies the limited scope of the term *interstate commerce* in the older cases as follows:

"The fact, of itself, that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce." 220 Ala. at 610, 127 So. at 182.

Of course, all commerce that was not "*interstate*" (or international) would necessarily have been "*intrastate*." Thus, to the extent that the definition of "*interstate commerce*" was narrow, the definition of "*intrastate commerce*" was concomitantly broad. Therefore, language in the older cases confining state regulatory power over combinations in restraint of trade to "*intrastate commerce*" does not confine that power to the limited sphere of trade that would fit inside today's extremely restricted definition of "*intrastate commerce*" and does not prohibit the states from regulating [[**105](#)] the *intrastate* aspects of combinations in restraint of trade in what is "*interstate commerce*" by today's more inclusive definition. Indeed, as revealed, *Dothan Oil Mill* allows the suit for violations of Alabama antitrust statutes committed in the Alabama-based aspects of what would now be regarded as *interstate commerce*.

[Ex parte Rice, 259 Ala. 570, 67 So. 2d 825 \(1953\)](#), holds that, for a pleading to invoke the Sherman and Clayton acts in the Alabama state courts, the pleading must allege that the matter in controversy (a filling station in this case) is directly (and not merely incidentally) influential in effecting a monopoly, [259 Ala. at 573, 67 So. 2d at 828](#), and must allege that the lessening of competition is *substantial*, [259 Ala. at 574, 67 So. 2d at 828](#). The *Rice* court concluded on this topic only that the allegations of the particular pleading there at issue (an answer) did not meet those requirements of the Sherman and Clayton Acts and therefore did not effectively invoke those Acts. 259 Ala. at 575, 67 So. 2d at 829. The *chief holding* of *Rice* follows that, because the pleadings invoked only Alabama state law, Alabama discovery privileges [[**106](#)] applied so as to defeat the discovery sought by the petitioner. [259 Ala. at 575-76, 67 So. 2d at 829](#).

Rice does not in any way whatsoever hold that Alabama state law cannot prohibit and redress combinations in restraint of trade in interstate commerce. On the contrary, notwithstanding the interstate nature of the commerce in the case, Rice specifically holds that state law controlled. [259 Ala. at 575, 67 So. 2d at 829](#).

San Ann Tobacco Co. v. Hamm, 283 Ala. 397, 217 So. 2d 803 (1968), does not [*351] address, tangentially or otherwise, [§ 6-5-60](#) or any dispute about the Commerce Clause. While the Court referred to the Alabama Unfair Cigarette Sales Act, Tit. 57, § 83(3), Ala. Code 1940, as "an exercise of the police power of the state over *intrastate* commerce," 283 Ala. at 400, 217 So. 2d at 805 (emphasis added), the commerce at issue was the sale of nationally manufactured and distributed cigarettes in Jefferson County, which would be called "*interstate* commerce" by today's definition. *San Ann* held *only* that the act could not be amended to forbid price cutting absent intent to "destroy or substantially lessen competition." 283 Ala. at 401, 217 So. 2d at 805. [**107] The *San Ann* court left intact the original act, which forbade price cutting with the intent to destroy or substantially to lessen competition, notwithstanding the national character of the source of the cigarettes.

The case which epitomizes the extremely narrow scope of the old-timey definition of "*interstate* commerce" and the concomitantly *broad* scope of the old-timey definition of *intrastate* commerce, and which virtually eliminates any likelihood that Alabama legislators would have thought the Sherman Act preempted the power of the states to regulate combinations in restraint of trade in 1907, is [United States v. E.C. Knight Co., 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 \(1895\)](#). There the United States Supreme Court held that a monopoly over 98% of the manufacture of sugar in the United States "bore no direct relation to commerce between the States or with foreign nations," [156 U.S. at 17](#), and thus did not warrant a suit under the Sherman Act.

The Sherman Act was essentially the same in 1907, when [§ 6-5-60](#) originated, as it is now. The Commerce Clause and the [Supremacy Clause of the United States Constitution](#) were exactly the same then as now. Barring some judicial [**108] philosophy that the courts have the power to change the constitution, a philosophy which I reject, the Commerce Clause no more restricted the power of the states to regulate combinations in restraint of trade then than it does now. In 1907 the Alabama legislators' oath of office obliged them to support and to defend the same Commerce Clause and Supremacy Clause, not to support and to defend misleading or mistaken language, or passages in distinguishable contexts, in judicial decisions.

In 1907 combinations in restraint of trade were as odious as trafficking in cocaine is now. Virtually all cocaine trade is interstate and international, well within the ambit of the Commerce Clause. The mood and law in 1907 no more limited Alabama legislators' intent to regulate all combinations in restraint of trade affecting Alabamians than the mood and law of the present limit the current intent of Alabama legislators to eliminate cocaine traffic, intrastate, interstate, or international.

The plain and unambiguous language of [§ 6-5-60](#) reaches the Alabama aspects of combinations in restraint of trade in interstate commerce. This Court has no valid ground to question the intent or to engraft an exception.

[**109] Thus, the majority opinion reversing the trial court should be withdrawn, and the trial court should be affirmed, first because the plaintiffs' complaint states a claim upon which relief can be granted even under the holding written by the majority and, second, because in 1907 Alabama could, and the plain and unambiguous language of [§ 6-5-60](#) does, regulate combinations in restraint of trade in interstate commerce resulting in damage from sales and purchases in Alabama.

Archer Daniels Midland Co. v. Seven Up Bottling Co.

Supreme Court of Alabama

June 25, 1999, Released

1960220

Reporter

746 So. 2d 966 *; 1999 Ala. LEXIS 201 **; 1999-1 Trade Cas. (CCH) P72,560

Archer Daniels Midland Company et al. v. Seven Up Bottling Company of Jasper, Inc.

Subsequent History: [**1] Application for Rehearing Denied October 22, 1999. Released for Publication January 21, 2000. As Corrected April 7, 2000.

Prior History: Appeal from Walker Circuit Court. (CV-95-436.80). John L. Madison, Jr., TRIAL JUDGE.

Disposition: REVERSED AND REMANDED.

Core Terms

combine, monopoly, interstate commerce, commodity, commerce, recusal, law firm, manufacture, pool, transactions, fined, national bank, Antitrust, price fixing, out-of-state, antitrust statute, confederation, enters, intrastate commerce, five hundred, taxation, changes, excise tax, Sherman Act, destroy, thousand dollars, regulation, products, trusts, cases

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1 **Legislation, Interpretation**

If possible, legislative intent should be gathered from the language of the statute itself.

Torts > Business Torts > Unfair Business Practices > General Overview

HN2 **Business Torts, Unfair Business Practices**

A state antitrust act can have no extraterritorial operation; consequently, the courts in construing a state antitrust statute will generally apply it to trusts and combinations formed or operated within the state, even though its terms are broad enough to include combinations formed with parties residing outside the state.

Governments > Legislation > Interpretation

HN3 Legislation, Interpretation

When circumstances surrounding the enactment of a statute cast doubt on the otherwise clear language of the statute, a court must look to other factors in determining legislative intent.

Governments > Legislation > Interpretation

HN4 Legislation, Interpretation

A statute will be interpreted on the assumption that the legislature was aware of existing statutes at the time new statutes are enacted.

Banking Law > Bank Activities > State Tax

Governments > Legislation > Interpretation

HN5 Bank Activities, State Tax

The rejection of an amendment by the legislature which would have made a statute applicable to a given situation furnishes a strong inference that the statute was not intended to be applicable to that given situation.

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

HN6 Legislation, Interpretation

A court's role is not to displace the legislature by amending statutes to make them express what the court thinks the legislature should have done. Nor is it the court's role to assume the legislative prerogative to correct defective legislation or amend statutes.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Torts > Business Torts > Unfair Business Practices > General Overview

HN7 Private Actions, State Regulation

Any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of \$ 500 and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly and may commence the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. All such actions may be prosecuted to final judgment against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, or judgment in favor of one or more of the defendants. [Ala. Code § 6-5-60\(a\) \(1975\)](#).

Torts > Business Torts > Unfair Business Practices > General Overview

[**HN8**](#) [down] Business Torts, Unfair Business Practices

Actions under [Ala. Code § 6-5-60](#) may be commenced in any county where a trust, combine, or monopoly was formed or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed, or in any county in which either of the defendants may have a domicile or where an officer or agent of any defendant corporation may be found. [Ala. Code § 6-5-60\(b\) \(1975\)](#).

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Transportation Law > Intrastate Commerce

[**HN9**](#) [down] Contracts, Sales of Goods

[Ala. Code § 6-5-60 \(1975\)](#) is not, on its face, limited to transactions involving intrastate commerce. However, there is no language in [Ala. Code § 6-5-60 \(1975\)](#) that conclusively indicates an intent on the legislature's part to regulate transactions involving the shipment of goods through interstate commerce.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Constitutional Law > Congressional Duties & Powers > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

[**HN10**](#) [down] US Department of Justice Actions, Civil Actions

The dual sovereignty theory postulates distinct and mutually exclusive zones of jurisdiction for the states, which exercise jurisdiction only over purely intrastate matters, and the federal government, which exercises jurisdiction only over goods and services in interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Intrastate Commerce

[**HN11**](#) [down] Congressional Duties & Powers, Commerce Clause

A state has legislative control, exclusive of Congress, within its territory, of all persons, things, and transactions of strictly internal concern. It cannot, without the consent of Congress, expressed or implied, regulate commerce between its people and those of the other states of the union in order to effect its end, however desirable such a regulation might be.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

[**HN12**](#) [down] Interstate Commerce, State Powers

Nothing which is a direct burden upon interstate commerce can be imposed by a state without the assent of Congress.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Governments > Police Powers

HN13 [blue icon] **Congressional Duties & Powers, Commerce Clause**

That which belongs to commerce between the states is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN14 [blue icon] **Congressional Duties & Powers, Commerce Clause**

Each state has complete jurisdiction over the commerce which is wholly within its own borders, while the jurisdiction of Congress, under the provisions of the Constitution, over interstate commerce is paramount, and includes therein jurisdiction over contracts in restraint of such commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Intrastate Commerce

HN15 [blue icon] **Congressional Duties & Powers, Commerce Clause**

Congress has no control over intrastate commerce.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN16 [blue icon] **Interstate Commerce, State Powers**

No state may in any way enact legislation which in any wise controls, regulates, or infringes on interstate commerce.

Torts > Business Torts > Unfair Business Practices > General Overview

HN17 [blue icon] **Business Torts, Unfair Business Practices**

A plaintiff's complaint states a state-law antitrust claim where the alleged illegal conduct involves only commercial transactions wholly confined to that state.

Torts > Business Torts > Unfair Business Practices > General Overview

HN18 [blue icon] Business Torts, Unfair Business Practices

It is clear that [Ala. Code § 6-5-60 \(1975\)](#) applies only to intrastate activity.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Torts > Business Torts > Unfair Business Practices > General Overview

Transportation Law > Intrastate Commerce

HN19 [blue icon] Interstate Commerce, State Powers

The Alabama state courts have deemed the Alabama antitrust statutes to regulate only intrastate commerce.

Torts > Business Torts > Unfair Business Practices > General Overview

Transportation Law > Intrastate Commerce

HN20 [blue icon] Business Torts, Unfair Business Practices

The Alabama statutes found in [Ala. Code §§ 6-5-60, 8-10-1](#), -3 regulate only intrastate commerce.

Governments > Legislation > Interpretation

HN21 [blue icon] Legislation, Interpretation

Related statutes should, when possible, be construed in pari materia.

Governments > Legislation > Interpretation

HN22 [blue icon] Legislation, Interpretation

It is permissible in ascertaining the purpose and intent of a statute to look to the history of the times, the existing order of things, the state of the law when the instrument was adopted, and the conditions necessitating such adoption.

Counsel: For Appellants: Vernon L. Wells and Julia Boaz-Cooper of Walston, Wells, Anderson & Bains, L.L.P., Birmingham; L. Vastine Stabler, Jr., Birmingham, and Aubrey M. Daniel III and John Schmidlein of Williams & Connolly, Washington D.C., "of counsel," for Archer Daniels Midland Co.

Robert D. Eckinger and E. Berton Spence of Lange, Simpson, Robinson & Somerville, Birmingham, for Haarmann & Reimer Corp.

James L. North of James L. North & Associates, Birmingham, for Cargill, Inc.

For Appellee: Garve Ivey, Jr., of King & Ivey, Jasper; Philippa McC. Bainbridge and Michael Straus of Bainbridge & Straus, Birmingham; J. Michael Rediker, Thomas L. Krebs, and Steve P. Gregory of Ritchie & Rediker, Birmingham; Larry W. Morris and Randall S. Haynes of Morris, Haynes, Ingram & Hornsby, Alexander City; and Herman Watson, Jr., and Douglas C. Adair of Watson, Fees & Jimmerson, Huntsville.

Judges: Hooper, C. J., and Maddox, Houston, See, and Brown, JJ., concur. Cook and Johnstone, [**2] JJ., dissent. Lyons, J., recuses himself. See, J., files statement of nonrecusal.

Opinion

[*967] PER CURIAM.

The issue presented on this appeal is whether [Ala. Code 1975, § 6-5-60](#), provides a cause of action for damage alleged to have resulted from a conspiracy to control the price of citric acid that was shipped from companies out-of-state into Alabama. The trial court ruled that [§ 6-5-60](#) provides such a cause of action; therefore, it denied the defendants' Rule 12(b)(6), Ala.R.Civ.P., motion to dismiss. We granted the defendants' request for permission to appeal that interlocutory order. Rule 5, Ala.R.App.P. We reverse and remand.

The plaintiff, Seven Up Bottling Company of Jasper, Inc. ("Seven Up"), filed this action on behalf of itself and seeking to represent a class consisting of "all persons or entities within Alabama who purchased citric acid and/or products containing citric acid indirectly from any of the Defendants or their co-conspirators at any time during the period January 1, 1991, to the present." Seven Up is an Alabama corporation engaged in the business of bottling and distributing soft drinks. Seven Up uses citric acid in its bottling operation. The defendants, [**3] Archer Daniels Midland Company; Cargill, Inc.; and Haarmann & Reimer Corporation, are in the business of selling citric acid. The complaint alleges that each of the defendants is a foreign corporation with its principal place of business outside Alabama. The complaint also alleges that the defendants engaged in a conspiracy to control the price of citric acid shipped into Alabama. The complaint further alleges that the plaintiff and others were injured as a result of that conspiracy by paying more for citric acid and for products containing citric acid than they would have paid if the price of citric acid had been set by free competition. In its order denying the defendants' motion to [*968] dismiss, the trial court stated that "the dispositive legal issue, as advanced by the Defendants, is whether [\[Ala. Code 1975, § 6-5-60\]](#), has application to such a conspiracy which, if conducted at all, is admittedly conducted in interstate commerce rather than in intrastate commerce."

Citing, among other cases, [Georgia Fruit Exchange v. Turnipseed](#), 9 Ala. App. 123, 62 So. 542 (1913); [Dothan Oil Mill Co. v. Espy](#), 220 Ala. 605, 127 So. 178 (1930); [Ex parte Rice](#), 259 Ala. 570, 67 So. 2d 825 (1953); [**4] [San Ann Tobacco Co. v. Hamm](#), 283 Ala. 397, 217 So. 2d 803 (1968); [In re Brand Name Prescription Drugs Antitrust Litigation](#), 1996 U.S. Dist. LEXIS 14529, [No. 94 C 897, October 2, 1996] (N.D. Ill. 1996), reversed, [123 F.3d 599](#) (7th Cir. 1997); [In re Nasdaq Market Makers Antitrust Litigation](#), 929 F. Supp. 174, 179 (S.D.N.Y. 1996); and [Warren v. Playmobil U.S.A., Inc.](#), 1996 U.S. Dist. LEXIS 22191, [CV-95-B-1591-S, March 19, 1996] (N.D. Ala. 1996), the defendants contend that Alabama's antitrust statutes have consistently been interpreted by state and federal courts to apply only to transactions involving intrastate commerce. The defendants argue that Alabama's antitrust statutes, including [§ 6-5-60](#), have the same field of operation today that they had when they were first enacted. According to the defendants, the legislative history of Alabama's antitrust statutes, as well as the state of federal caselaw at the time of their enactment, creates a presumption that the Legislature never intended to directly regulate agreements to control the price of goods shipped in interstate commerce. This presumption, [**5] the defendants argue, has not been overcome by the plaintiff.

The plaintiff contends that [§ 6-5-60](#) provides a cause of action in favor of "any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect," and against "any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly." According to the plaintiff, [§ 6-5-60](#) is clear on its face and should not be construed so narrowly as to limit its application to transactions involving intrastate commerce. The plaintiff maintains, in the alternative, that even if [§ 6-5-60](#) should be construed in light of the legislative history of Alabama's antitrust statutes and the state of federal caselaw at the time of their enactment, the clear intent of the Legislature in enacting [§ 6-5-60](#) was to regulate all agreements in restraint of trade, whether those agreements involved interstate commerce or intrastate commerce.

With the positions of the parties in mind, we pause to point out what this case is not about. We are not here concerned with whether the Legislature, based on the current state of federal caselaw, has the power to enact [**6] a statute, such as [§ 6-5-60](#), to provide a means of redress to Alabama companies for indirect injuries suffered as the result of agreements to control the price of goods shipped through interstate commerce. See [California v. ARC America Corp., 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 \(1989\)](#), cited by the parties for the proposition that the Legislature now has that power.¹ This Court has held that an Alabama statute does not expand like an accordion with changes in federal law bearing on the Legislature's power. Instead, [*969] we are concerned only with whether the Legislature, when it enacted [§ 6-5-60](#), contemplated that it would apply to such agreements. See [In re Upshaw, 247 Ala. 221, 23 So. 2d 861 \(1945\)](#). In determining whether [§ 6-5-60](#) provides a cause of action for damage resulting from an agreement to control the price of goods shipped through interstate commerce, we must follow the cardinal rule of statutory construction and ascertain and give effect to the intent of the Legislature in enacting the statute. [HN1](#)[[↑]] If possible, legislative intent should be gathered from the language of the statute itself. [John Deere Co. v. Gamble, 523 So. 2d 95 \(Ala. 1988\)](#). [**7]

However, [HN3](#)[[↑]] when circumstances surrounding the enactment of a statute cast doubt on the otherwise [**8] clear language of the statute, we must look to other factors in determining legislative intent. In [Siegelman v. Chase Manhattan Bank \(USA\), N.A., 575 So. 2d 1041 \(Ala. 1991\)](#), this Court was faced with the question whether the financial-institution excise tax, levied pursuant to [Ala. Code 1975, § 40-16-1 et seq.](#), applied to the credit-card business conducted by national banks located outside Alabama with Alabama residents. When that excise-tax statute was enacted in 1935, such taxation by the states was prohibited by federal statutes and caselaw. Federal law changed in 1976 so as to allow the taxation of national banks; the state argued that that change should render out-of-state national banks subject to the 1935 excise-tax statute. This Court rejected that argument, stating, at [575 So. 2d 1041](#):

"In the case presently before us, the trial court in its opinion stated that [Ex parte Dixie Tool & Die Co., \[537 So. 2d 923 \(Ala. 1988\)\]](#), controlled the resolution of the case:

"'In *Dixie Tool & Die*, as in the instant case, the issue was whether in originally enacting the statute, the legislature intended to tax transactions [**9] not previously taxed under that statute.'

"The Court holds that at the times [§ 40-16-1](#) was enacted, the State was prohibited by federal statute from taxing out-of-state national banks. The National Bank Act expressly limited the state's authority to tax only those "national banking associations located within its limits." Because the federal statute was in force at the time [§ 40-16-1](#) was enacted, full knowledge and information as to the prior and existing law on the subject of this section [are] imputed to the legislature. A legislature is presumed to know the limit of its taxing power. Further, [HN4](#)[[↑]] the statute will be interpreted on the assumption that the legislature was aware of existing statutes at the time new statutes are enacted.

¹ We note that in [54A Am.Jur.2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 798](#) (1996), the following statement appears:

"[HN2](#)[[↑]] A state antitrust act can have no extraterritorial operation; consequently, the courts in construing a state antitrust statute will generally apply it to trusts and combinations formed or operated within the state, even though its terms are broad enough to include combinations formed with parties residing outside the state."

But see the recent decision of the United States Court of Appeals for the Seventh Circuit in *In re: Brand Name Prescription Drugs Antitrust Litigation*, [123 F.3d 599 \(7th Cir. 1997\)](#), citing [R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 \(Dist. Ct. App. 1974\)](#), and [Heath Consultants, Inc. v. Precision Instruments, Inc., 247 Neb. 267, 527 N.W.2d 596 \(1995\)](#).

"Based on the foregoing, the Court finds that at the time [§ 40-16-1](#) was enacted the legislature could not have intended to impose a tax on out-of-state national banks.'

"In *Dixie Tool & Die Co.*, the Alabama Department of Revenue assessed a sales tax against an Alabama corporation for sales made to out-of-state buyers and to federal government contractors. The Court in *Dixie Tool & Die Co.* considered whether [**10] sales made by the corporation to out-of-state purchasers were subject to Alabama's sales tax. The sales tax provision in question was [Ala. Code 1975, § 40-23-4\(a\)\(17\)](#). This code section provides:

"(a) There are exempted from the provisions of this division and from the computation of the amount of the tax levied, assessed or payable under this division the following:

"....

"(17) The gross proceeds of sales of tangible personal property or the gross receipts of any business which the state is prohibited from taxing under the Constitution [*970] or laws of the United States or under the Constitution of this state.'

"In its opinion, the Court in *Dixie Tool & Die Co.* recognized that the United States Supreme Court allowed taxation of interstate commerce if the tax met certain criteria. However, the Court stated:

"'[These] recent pronouncements of the United States Supreme Court which enlarge the permissible area of state taxation cannot change the intent or enlarge the scope of enactments passed by our Legislature. [State v. Southern Electric Generating Co., 274 Ala. 668, 151 So. 2d 216 \(1963\)](#). Therefore, the question [**11] is not whether the State *may*, under prevailing caselaw, impose a tax upon the gross receipts earned from those transactions. Rather, the controlling issue is whether, in originally enacting this statute, the Legislature *intended* to tax these transactions.'

"The provision that has become [§ 40-23-4\(a\)\(17\)](#) was originally enacted in 1959. In 1959, and, indeed, until *Complete Auto Transit* [v. [Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326](#)] in 1977, the applicable case law held that a tax on the sale of goods in interstate commerce was invalid. The Legislature must be deemed to have been aware of the then-existing limits on a state's power to tax when it enacted the 1959 statute from which [§ 40-23-4\(a\)\(17\)](#) derives. Thus, we must presume that the legislature knew, at the time the statute was passed, that the applicable case law would prevent the application of a sales tax to transactions in interstate commerce. The Legislature must also be presumed to be aware of the judicial enlargement of the State's permissible area and method of taxation, so it could have taken full advantage of those changes if it either intended or desired to do so. No [**12] changes have been made to [§ 40-23-4\(a\)\(17\)](#). We conclude, therefore, that it applies today in the same manner that it did when enacted in 1959 and that it exempts sales of goods in interstate commerce from sales tax.'

" [537 So. 2d at 925](#) (quoting [Ex parte Louisville & Nashville R.R., 398 So. 2d 291, 293 \(Ala. 1981\)](#) (emphasis in [Louisville & Nashville])).

"The trial court also relied on [Ex parte Louisville & Nashville R.R., supra](#). In *Ex parte Louisville & Nashville R.R.*, the Court considered 'whether Alabama's gross receipts tax upon a railroad's earnings from "intrastate

"business" applies to receipts generated by the L & N Railroad's movement of goods between two points in Alabama.¹ 398 So. 2d at 292. The railroad gross receipts tax statute in question, [Ala. Code 1975, § 40-21-57](#), provided:

"In addition to all other taxes imposed by this title, there is hereby levied a license or privilege tax upon each person engaged in the business of operating a railroad in the state of Alabama for the privilege of engaging in such business; said license tax or privilege tax shall be ... in [**13] a sum equal to two and one-half percent of the gross receipts in excess of \$ 150,000.00 of such railroad from all intrastate business of such railroad within the state of Alabama during the preceding year, the gross intrastate earning to be determined by the amount received from intrastate business.'

"The Court stated that the controlling issue in the case was whether in originally enacting the statute the legislature intended to tax these transactions:

"The question before us is one of legislative intent. We presume that, in enacting the statute in 1935, the Legislature was aware of the existing interpretations and permissible limits of a state's power to tax. Thus, we presume our Legislature knew that at the time the statute was passed, the [*971] rule in *[Minnesota v. Blasius, 290 U.S. 1, 54 S. Ct. 34, 78 L. Ed. 131 (1933)]* would have prevented the application of the tax to transactions similar to those at issue because they constitute a portion of interstate commerce. We also presume that the Legislature was aware of the fact that this tax could not be sustained as one "in lieu of" other taxes because the tax was expressly levied "in addition [**14] to all other taxes." Similarly, we presume that the Legislature was apprised of the fact that it could not justify this tax as one upon "local activity," because to do so would require the indulgence in the proscribed conceptual segmentation of the integral parts of an interstate transaction. Finally, we presume that the Legislature is aware of the judicial enlargement of the State's permissible area and method of taxation, so that the Legislature could have taken full advantage of those changes if it either intended or desired to. No such changes have been made during the forty-five years since the statute was passed and the State has not, by legislation, attempted to enlarge the scope of its taxation. Thus, viewed in its broadest scope, the statute in question could reach and impose a tax upon only those activities which were local and purely intrastate in character. We therefore conclude that the statute, as enacted in 1935 and as it exists today, was not intended to apply to receipts generated by transactions such as these which, although conducted wholly within the confines of Alabama, constitute an integral portion or segment of interstate commerce.'

¹ [398 So. 2d at 296-97.](#) [**15] See also [State v. Southern Elec. Generating Co., 274 Ala. 668, 151 So. 2d 216 \(1963\)](#).

"Like the question in *Dixie Tool & Die Co.* and *Ex parte Louisville & Nashville R.R.*, the question before us is whether in originally enacting the Alabama Excise Tax Statute, the legislature intended to tax the net income derived by out-of-state national banks from solicitation of credit card applications from Alabama residents.

"In determining the intent of the legislature, we presume that in enacting the Excise Tax Statute the legislature was aware of existing prohibitions against the State's power to tax national banks. When the Excise Tax Statute was enacted in 1935, federal law and judicial interpretation prohibited states from taxing out-of-state national banks. It was not until the Congressional moratorium expired in 1976 that states were allowed to tax out-of-state national banks. Even after the expiration of the moratorium in 1976, the Alabama legislature failed to amend or to reenact the Excise Tax Statute in light of the federal change. See [Freeman v. Jefferson County, 334 So. 2d 902, 904 \(Ala. 1976\)](#) (HN5) [**16] 'the rejection of an amendment [**16] by the Congress which would have made the statute applicable to a given situation furnishes a strong inference that the statute was not

intended to be applicable to that given situation'). Also, the Alabama legislature failed to amend or to reenact the Excise Tax Statute after the United States Supreme Court's 1977 announcement that there would no longer be a per se ban on taxation of interstate commerce. In fact, the last amendment to the Excise Tax Statute occurred in 1978, after the change in both federal statutory and judicial law that would have allowed taxation of out-of-state national banks, and no provision was then made for such taxation. Ala. Acts 1978, Special and Regular Sessions, Act No. 840, p. 1247. We do note, however, that a bill was introduced in the 1990 Regular Session of the Alabama legislature for the stated purpose of extending the Excise Tax Statute to out-of-state national banks, but it was not enacted. House Bill No. 944, Legislative Digest, Final Status p. 14 (May 3, 1990).

[*972] "In the present case, we recognize that under existing federal law and judicial enlargement states are able to tax out-of-state national banks if their taxing measures are nondiscriminatory. [**17] See [12 U.S.C. § 548 \(1988\)](#). However, when the Excise Tax Statute was enacted in 1935, federal law prevented taxation of out-of-state national banks. In addition to the changes implemented by Congress in 1976, the United States Supreme Court changed its position so as to allow taxation of interstate commerce. See [Complete Auto Transit, Inc. v. Brady, supra](#).

"Under prevailing Alabama statutory construction law, we presume that the legislature was aware of the federal law in 1935 and of the subsequent changes in that law in 1976, as well as the changes in the United States Supreme Court's analysis of the taxation of interstate commerce. [Ex parte Louisville & Nashville R.R., supra](#), and [Ex parte Dixie Tool & Die Co., supra](#). Although the Alabama legislature presumably was aware of Congress's enlargement of state taxing power over national banks, and of the United States Supreme Court's enlargement in regard to taxation of interstate commerce, it made no changes to the Excise Tax Statute.

[HN6] This Court's role is not to displace the legislature by amending statutes to make them express what we think the legislature should [**18] have done. Nor is it this Court's role to assume the legislative prerogative to correct defective legislation or amend statutes. Consequently, we conclude that the Excise Tax Statute applies today in the same manner that it did when it was first enacted. Because states were prohibited from taxing out-of-state national banks at the time the statute levying the excise tax was first enacted and judicial interpretation disallowed taxation of interstate commerce, the State may not tax Chase, an out-of-state national bank, in the absence of additional action by the Alabama legislature."

This Court, in [Ellis v. Pope, 709 So. 2d 1161 \(Ala. 1997\)](#), reaffirmed *Siegelman*, *Ex parte Dixie Tool & Die*, and *Ex parte Louisville & N.R.R.*, insofar as those cases require that we look to the original intent of the Legislature when interpreting a statute. In *Pope*, this Court adopted, as part of its opinion, a portion of the trial court's order, including this statement:

"The meaning of the term 'district' appears to have varied over the years. Since the [1973] adoption of the present Judicial Article [of the Alabama Constitution], 'district' [as [**19] in references to the district court] has come to mean a judicial subdivision of the State geographically equal to or less than a 'circuit.' It usually coincides with county boundaries, and is never a subdivision of a county. The term must not be viewed in light of its meaning today, but as it was used in 1901, when Art. I, § 6, was drafted. Act No. 569, Acts of Alabama, 1907, which subdivided Coffee County, was adopted within six years of the ratification of our present Constitution, and that Act used the term 'district' to refer to the subdivisions of the county. Therefore, it must be concluded that the term 'district' in the terminology used at the time of the drafting and ratification of [the Alabama] Constitution in 1901 meant the subdivision of a county."

[709 So. 2d at 1165](#).

[Section 6-5-60](#) provides:

"(a) HNT[↑] Any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of \$ 500 and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly and **[**20]** may commence the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. **[*973]** All such actions may be prosecuted to final judgment against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, or judgment in favor of one or more of the defendants.

"(b) HN8[↑] Actions under this section may be commenced in any county where the trust, combine, or monopoly was formed or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed, or in any county in which either of the defendants may have a domicile or where an officer or agent of any defendant corporation may be found."

As the plaintiff correctly points out, HN9[↑] § 6-5-60 is not, on its face, limited to transactions involving intrastate commerce. We hasten to add, however, that there is no language in § 6-5-60 that conclusively indicates an intent on the Legislature's part to regulate transactions involving the shipment of goods through interstate commerce. Because the language of § 6-5-60, standing alone, is not conclusive **[**21]** on the question of legislative intent, and because other factors, including the legislative history of Alabama's antitrust statutes, as well as the state of the law at the time of their enactment, cast doubt on the original intent of the Legislature, we find it necessary to look beyond the language of the statute.

"From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly -- that is, the concentration of economic power in the hands of a few. By 1890, there was a vast accumulation of wealth in the hands of corporations and individuals, and an enormous development of corporate organization with the facility for combining into 'trusts.' Units of traders and producers had snowballed by combining into trusts, and there was a widespread impression that the trusts had used and would use their power to oppress individuals and injure the public. Competition was threatened; price control was feared; and individual initiative was dampened.

"On the basis of these fears, Congress passed the Sherman Antitrust Act in July 1890 [15 U.S.C. § 1 et seq.], in order to prevent or suppress devices or **[**22]** practices which create monopolies or restrain trade or commerce by suppressing or restricting competition and obstructing the course of trade. It is designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. The basic objective of the Act, therefore, is the protection of competition and a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods. Thus, the purpose of the Act is not to protect businesses from the working of the market, but to protect the public from the failure of the market. The Act is not directed against conduct which is competitive, even severely so, but is directed against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns, but out of concern for the public interest."

54 Am.Jur.2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 1 (1996).

Following the lead of other states, the Alabama Legislature enacted this state's first general antitrust law on February 7, 1891.² Ala. Acts 1890-91, Act No. 202, p. **[*974]** 438, entitled "An Act to **[**23]** prohibit pools, trusts,

²The Legislature had enacted a law, approved on February 23, 1883, regulating the "pooling of freights":

Section 1. Be it enacted by the General Assembly of Alabama, That it shall be unlawful for two or more railroad companies or persons operating railroads *in this State* to enter into any agreement among themselves, directly or indirectly, for the division among themselves of the freight carrying business at any station, town or city *in this State*, or into any pool arrangement among themselves of the nature and character aforesaid, the object, purpose and effect of which in either event shall be to prevent free and fair competition among said railroad companies or persons operating said railroads, for

or combines to regulate or control the prices of products, goods, wares or merchandise in this state," was patterned after a similar statute that had been enacted in Illinois and was akin to the Sherman Antitrust Act, which Congress had enacted shortly before on July 2, 1890. Act No. 202, which was criminal in nature, provided:

[**24]

"Section 1. Be it enacted by the General Assembly of Alabama, That any person, corporation or association of persons who shall, *within this state*, engage or agree with other persons, corporations or association of persons, or enter into, either directly [sic], any combination, pool, trust or confederation to regulate or fix the price of any article or commodity to be sold *within this state* for speculation; and any person, corporation or association of persons who shall enter into, become a member of a party to, any pool, agreement, combination or confederation to fix or limit the amount or quantity of any article or commodity to be produced or manufactured, mined or sold *in this state*, shall be guilty of a misdemeanor, and subject to indictment and punishment as herein provided.

"Sec. 2. Be it further enacted, That it shall not be lawful for any corporation chartered under the laws of Alabama, or for any officer, stockholder, agent or employe of such corporation to enter into any combination with other persons or corporations, the purpose and effect of which are to place the management or control thereof in the hands of others, with the purpose or [**25] intent to limit or fix the price, or lessen the production or sale of any article of commerce, use or consumption, or to restrict or diminish the manufacture of such article.

[*975] "Sec. 3. Be it further enacted, That any person or corporation violating the provisions of section one or two of this act, *within the State of Alabama*, shall, on conviction, be fined not less than five hundred dollars, nor more than two thousand dollars, at the discretion of the jury trying the same; and any officer, agent or employe of such corporation guilty of violating either of the two preceding sections of this act may be imprisoned, in

said freight carrying business, and to establish extortionate rates in favor of said companies or persons in doing said business, and which shall have the effect of being in undue restraint of the trade and business at any such station, town or city of *this State*.

"Sec. 2. Be it further enacted, That any officer, agent or servant of any such company, or person operating any railroad *in this State* who shall violate any of the provisions of this act, or who shall aid or assist in making or carrying out or performing any such agreement or pool arrangement shall be guilty of a misdemeanor and on conviction for every such offense shall be fined not less than fifty dollars, nor more than two hundred dollars, at the discretion of the court trying the same.

"Sec. 3. Be it further enacted, That it is the true intent and meaning of this act, that any such agreement, rates or pool agreement made by any convention or association of freight agents, or commissioner of freight rates or rate making committee outside of this State, *but to be performed in whole or in part in this State*, shall as to such part of the same, as is to be performed *within this State*, come within the provisions of this act.

"Sec. 4. Be it further enacted, That any agreement, rates, or pool arrangements made by two or more railroad companies, or persons operating railroads *in this State*, or by any convention, or by any association of freight agents or commissioner of freight rates, or rate making committee outside of this State, *but to be performed in whole or in part within this State* for the purpose of cheapening freight rates or of extending additional facilities to the public generally, or to any town, city or station *in this State* and which are not extortionate and in undue restraint of trade at any town, city, or station *in this State*, shall not be construed as coming within this act.

"Sec. 5. Be it further enacted, That if any such agreement, rate, or pool arrangement as is mentioned in the fourth section of this act shall have the certified approval of the railroad commission of Alabama, it shall be deemed as *prima facie* lawful and just in any proceeding before any court or officer of this State, and no officer, agent or servant of any railroad company, or person shall be liable to prosecution, for aiding or assisting in carrying out, or performing any such agreement or pool arrangement, so approved by any railroad commission of Alabama."

(Emphasis added.) Ala. Acts 1882-83, Act No. 79, p. 152-53. Section 2 of Act No. 79 was codified in the Alabama Code of 1886 as Article IV, § 4145.

addition to the fine, not less than six months, and not more than twelve months for every such offense: *Provided*, That nothing in this act shall prevent the producers of agricultural products from holding the same for higher prices; And *provided further*, That nothing in this act shall prevent the producer of any article of food or commerce from holding the same for higher prices, provided he does not combine or confederate with others thus to raise or lower prices.

"Sec. 4. *Be it further enacted*, That it shall be the duty of the circuit [**26] and city courts to give this act in special charge to the several grand juries of the state."

(Emphasis added.) Act No. 202 was codified in the Alabama Code of 1896 as Chapter 196, Article 5, § 5557, § 5558, and § 5559:

"5557. Forming pools or combinations to regulate the quantity or price of products. -- Any person or corporation, who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold within this state for speculation, or any person or corporation who enters into, becomes a member of, or party to, any pool, agreement, combination, or confederation to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold in this state, must, on conviction, be fined not less than five hundred, nor more than two thousand dollars.

"5558. Combinations to control corporations with intent to fix the price or production of commodities. - Any corporation chartered under the laws of this state, or any officer, stockholder, agent, or employe of any such corporation, [**27] which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person and thereby limit or fix the price, or restrict or diminish the production, manufacture, sale, use, or consumption of any article of commerce, must, on conviction, be fined not less than five hundred, nor more than two thousand dollars.

"5559. Preceding two sections given in special charge to grand juries. -- The preceding two sections must be given in special charge to the grand jury."

What clearly stands out with respect to the 1896 codification of Act No. 202 is the change in phraseology in § 5557, specifically, the deletion of the words "within this state," which had appeared as the 20th, 21st, and 22d words of Act No. 202. This change was made by William L. Martin, Alabama's Code commissioner. Pursuant to Ala. Acts 1894-95, Act No. 507, § 1, p. 1001, Martin was given the authority to "revise, digest and codify all of the statutes of this state of a general and public nature, both civil and criminal." Act No. 507 specifically provided as follows:

"Sec. [**28] 3. *Be it further enacted*, That it shall be the duty of the said commissioner, at least three months before the meeting of the next general assembly to deliver said code to the governor of this state, together with a sworn statement, showing all the changes he shall have made in the phraseology of all the acts and laws codified by him, including additions thereto and omission therefrom, with accurate reference to the acts and laws so altered or changed; and it shall [**976] be the duty of the governor carefully to examine the same, and to specifically report upon the same to the succeeding general assembly, recommending such alterations if any, as to him may seem proper; and attaching to his report the sworn statement of the commissioner herein provided for.

"Sec. 4. *Be it further enacted*, That said commissioner shall prepare appropriate chapters, titles, and subdivisions of titles for each chapter, clearly and briefly expressive of the subjects treated, which shall be arranged alphabetically, bringing into each chapter as near as may be, a condensation of all public laws, appertaining to the subject treated in each chapter: that said commissioner shall not simply transfer [**29] or transcribe the laws, but shall (without changing the sense) so alter the phraseology as to exclude all redundancy, or obscurity of expression, and where there shall be several acts relating to the same subject, they shall be condensed into one, and so expressed, as clearly to set forth the sense of the whole, having

regard to judicial exposition thereof: that whenever it shall be apparent that there may be legislative omissions in any statute, said commissioner shall supply the same, so as to perfect such statute, and render its operation complete, and shall add all such original notes and references as shall be proper for the clear elucidation of them, and for easy reference to the several laws from which they may be compiled, showing as far as may be, when such acts and statutes become operative, when amended, with foot notes of all decisions of the supreme court, construing or mentioning such sections or acts, and as far as practicable, a brief and concise statement of the question decided by such decisions."

In his report to the Governor, on page 111, Martin stated as follows:

"CHAPTER 195. TRADE, PUBLIC POLICY AND POLICE.

"....

"5549, 5550, **[**30]** 5551. Based on the act of February 7, 1891 -- page 438. To prohibit pools, trusts, etc. Rewritten with such changes as were necessary in phraseology."

We note that Act No. 202, dealing with the prohibition of "pools, trusts, etc." was codified as Article 5, § 5557, § 5558, and § 5559 of Chapter 196 of the 1896 Code, not as § 5549, § 5550, and § 5551, of Chapter 195. Notwithstanding these apparent errors, Martin did specifically state that he had rewritten "the act of February 7, 1891 -- page 438" (Act No. 202) so as to make "such changes as were necessary in phraseology." Neither the Governor nor the Legislature made any changes to § 5557, § 5558, or § 5559 before the Legislature adopted the 1896 Code.

Article IV, § 103, of the Constitution of Alabama of 1901 provided:

"The legislature shall provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade, or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition **[**31]** in any calling, trade, or business."

This constitutional mandate, Rogers v. City of Mobile, 277 Ala. 261, 169 So. 2d 282 (1964), resulted in the Legislature's readopting § 5557, § 5558, and § 5559 of the 1896 Code in substantially the same form in the 1907 Code as § 7579, § 7580, and § 7582:

"7579. (5557) Forming pools or combinations to regulate the quantity or price of products. -- Any person or corporation who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold or produced within this state, or any person or corporation **[*977]** who enters into, becomes a member of, or party to, any pool, agreement, combination, or confederation, to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold, in this state, must, on conviction, be fined not less than five hundred nor more than two thousand dollars.

"7580. (5558) Combinations to control corporations with intent to fix the price or production of commodities. -- Any corporation **[**32]** chartered under the laws of this state, or any officer, stockholder, agent, or employe of any such corporation, which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person, and thereby limit or fix the price, restrict or diminish the production, manufacture, sale, use, or consumption of any article of commerce, must, on conviction, be fined not less than five hundred nor more than two thousand dollars.

"....

"7582. (5559) Four preceding sections given in special charge to grand juries. -- The four preceding sections must be given in special charge to the grand jury."

The Legislature also added the following provision, which appeared as § 7581 of Chapter 273 of the 1907 Code:

"7581. Monopolies, penalty for. -- Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, or which shall monopolize or attempt to monopolize the production, control, or sale of any commodity, or the prosecution, management, or control of any kind, class, [**33] or description of business; or which shall destroy, or attempt to destroy, competition in the manufacture or sale of a commodity, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than two thousand dollars for each offense."

In addition to these criminal antitrust provisions, in the 1907 Code the Legislature, for the first time, provided for a civil cause of action for injuries resulting from the effects of a trust, combine, or monopoly:

"2487. Actions against trusts, combines, or monopolies. -- Any person, firm, or corporation injured or damaged by an unlawful trust, combine, or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of five hundred dollars and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly; and may maintain the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. And all such actions may be prosecuted to final judgment [**34] or decree against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, judgment, or decree in favor of one or more of the defendants.

"2488. County in which action brought. -- Actions under the preceding section may be brought in any county where the trust, combine, or monopoly was formed, or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed; or in any county in which either of the defendants may have a domicile, or where an officer or agent of any defendant corporation may be found."

Section 7579, § 7580, § 7581, and § 7582 of the 1907 Code were carried forward in substantially the same form into the 1923 Code as § 5212, § 5213, § 5214, and § 5215, respectively:

"5212. (7579) (5557) Forming pools or combinations to regulate the quantity or price of products. -- Any person or corporation who engages or agrees [*978] with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold or produced within this state, or any person [**35] or corporation who enters into, becomes a member of, or party to, any pool agreement, combination, or confederation, to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold, in this state, must, on conviction, be fined not less than five hundred, nor more than two thousand dollars.

"5213. (7580) (5558) Combinations to control corporations with intent to fix the price or production of commodities. -- Any corporation chartered under the laws of this state, or any officer, stockholder, agent or employe of any such corporation, which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person, and thereby limit or fix the price, restrict or diminish the production, manufacture, sale, use or consumption of any article of commerce, must, on conviction, be fined not less than five hundred nor more than two thousand dollars.

"5214. (7581) Monopolies, penalty for. -- Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade [**36] or production, or which shall monopolize or attempt to monopolize the production, control, or sale of any commodity, or the prosecution, management, or control of any kind, class, or description of business; or which shall destroy or attempt to destroy, competition in the manufacture or sale of a commodity, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than two thousand dollars for each offense.

"5215. (7582) Three preceding sections given in special charge to grand juries. -- The three preceding sections must be given in special charge to the grand jury."

Section 2487 and § 2488 of the 1907 Code (providing for a civil cause of action) were carried forward in substantially the same form into the 1923 Code as § 5697 and § 5698:

"5697. (2487) Actions against trusts, combines, or monopolies. -- Any person, firm, or corporation injured or damaged by an unlawful trust, combine, or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of five hundred dollars and all actual damages from any person, firm, or corporation creating, **[**37]** operating, aiding, or abetting such trust, combine, or monopoly; and may maintain the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. And all such actions may be prosecuted to final judgment or decree against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, judgment, or decree in favor of one or more of the defendants.

"5698. (2488) County in which action brought. -Actions under the preceding section may be brought in any county where the trust, combine, or monopoly was formed, or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed; or in any county in which either of the defendants may have a domicile, or where an officer or agent of any defendant corporation may be found."

Section 5212, § 5213, and § 5214 of the 1923 Code were carried forward in substantially the same form into the 1940 Code as Title 57, § 106, § 107, and § 108, respectively:

[*979] " § 106. (5212) (7579) (5557) Forming pools or combinations **[38]** to regulate the quantity or price of products.** -- Any person or corporation who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold or produced within this state, or any person or corporation who enters into, becomes a member of, or party to, any pool agreement, combination, or confederation, to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold, in this state, must, on conviction, be fined not less than five hundred, nor more than two thousand dollars.

" § 107. (5213) (7580) (5558) Combinations to control corporations with intent to fix the price or production of commodities. -- Any corporation chartered under the laws of this state, or any officer, stockholder, agent or employee of any such corporation, which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person, and thereby limit or fix the price, restrict or diminish the **[**39]** production, manufacture, sale, use or consumption of any article of commerce, must, on conviction, be fined not less than five hundred nor more than two thousand dollars.

" § 108. (5214) (7581) Monopolies, penalty for. -Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, or which shall monopolize or attempt to monopolize the production, control, or sale of any commodity, or the prosecution, management, or control of any kind, class, or description of business; or which shall destroy or attempt to destroy, competition in the manufacture or sale of a commodity, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than two thousand dollars for each offense."

Section 5697 and § 5698 of the 1923 Code (providing for a civil cause of action) were carried forward in substantially the same form into the 1940 Code as Title 7, § 124 and § 125:

" § 124. (5697) (2487) Actions against trusts, combines, or monopolies. -- Any person, firm, or corporation injured or damaged by an unlawful trust, combine, or monopoly, **[**40]** or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of five hundred dollars and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly; and may maintain the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. And all such actions may be prosecuted to final judgment or decree against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, judgment, or decree in favor of one or more of the defendants.

" § 125. (5698) (2488) County in which action brought. -- Actions under the preceding section may be brought in any county where the trust, combine, or monopoly was formed, or where it exists or is carried on,

promoted, operated, practiced, employed, used, or enjoyed; or in any county in which either of the defendants may have a domicile, or where an officer or agent of any defendant corporation may be found."

Section 106, § 107, and § 108 of Title 57 of the [**41] 1940 Code were carried forward in substantially the same form into the 1975 Code as [§ 8-10-1](#), § 8-10-2, and § 8-10-3, respectively:

"[[§ 8-10-1](#)] Any person or corporation who engages or agrees with other [*980] persons or corporations or enters, directly or indirectly, into any combination, pool, trust, or confederation to regulate or fix the price of any article or commodity to be sold or produced within this state or any person or corporation who enters into, becomes a member of or party to any pool agreement, combination, or confederation to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold in this state must be fined, on conviction, not less than \$ 500 nor more than \$ 2,000."

"[§ 8-10-2] Any corporation chartered under the laws of this state or any officer, stockholder, agent, or employee of any such corporation which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person and thereby limit or fix the price, restrict or diminish the production, manufacture, sale, use, or consumption [**42] of any article of commerce must be fined, on conviction, not less than \$ 500 nor more than \$ 2,000."

"[§ 8-10-3] Any person or corporation, domestic or foreign, which shall restrain, or attempt to restrain, the freedom of trade or production, or which shall monopolize, or attempt to monopolize, the production, control, or sale of any commodity or the prosecution, management, or control of any kind, class, or description of business or which shall destroy, or attempt to destroy, competition in the manufacture or sale of a commodity shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than \$ 500 nor more than \$ 2,000 for each offense."

Section 124 and § 125 of Title 7 of the 1940 Code (providing for a civil cause of action) were carried forward in substantially the same form into the 1975 Code as subsections (a) and (b), respectively, of [§ 6-5-60](#).

With this legislative history in mind, we move next to the state of federal constitutional law at the time Alabama's antitrust statutes were originally enacted. In 1 ABA *Antitrust Law* Section, *State Antitrust Practice and Statutes* Introduction-20 (1990), we find the following: [**43]

"An important factor in most early state antitrust cases was the prevailing 'dual sovereignty' theory of state-federal regulatory authority. [HN10](#)[¹] This theory postulated distinct and mutually exclusive zones of jurisdiction for the states, which exercised jurisdiction only over purely *intrastate* matters, and the federal government, which exercised jurisdiction only over goods and services in *interstate* commerce."

(Emphasis in original.) See, also, Lawrence H. Tribe, *American Constitutional Law*, § 5-4, at 307-08 (2d ed. 1988) (discussing the United States Supreme Court's varying approaches to interpreting the [Commerce Clause, Article I, § 8, of the United States Constitution](#), but specifically noting the consistent dichotomy maintained by that Court between interstate commerce and intrastate commerce prior to the New Deal). This dichotomy between interstate commerce and intrastate commerce is clearly illustrated in a series of cases decided by the Court between 1888 and 1899. See [Bowman v. Chicago & N.W. Ry.](#), 125 U.S. 465, 493, 31 L. Ed. 700, 8 S. Ct. 689 (1888) ("[HN11][¹] A] State has legislative control, exclusive of Congress, within its territory, [**44] of all persons, things, and transactions of strictly internal concern. ... It cannot, without the consent of Congress, expressed or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be."); [Brennan v. Titusville](#), 153 U.S. 289, 302, 38 L. Ed. 719, 14 S. Ct. 829 (1894) ("we think it must be considered, in view of a long line of decisions, [*981] that it is settled that [HN12](#)[¹] nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress"); [United States v. E.C. Knight Co.](#), 156 U.S. 1, 12, 39 L. Ed. 325, 15 S. Ct. 249 (1895) ("[HN13](#)[¹] That which belongs to commerce [between the States] is within the jurisdiction of the United States, but that which does

not belong to commerce is within the jurisdiction of the police power of the State." ³ [**46]); [Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 233, 44 L. Ed. 136, 20 S. Ct. 96 \(1899\)](#) (also involving an alleged violation of the [*982] Sherman Antitrust Act) ("HN14[¹] each state ... would have complete jurisdiction over the commerce which was wholly within [**45] its own borders, while the jurisdiction of Congress, under the provisions of the Constitution, over interstate commerce would be paramount, and would include therein jurisdiction over contracts [in restraint of such commerce]"); see, also, W. W. Thomas, *A Treatise On Combinations In Restraint of Trade*, § 90-91, at 229, 232 (2d ed. 1928) ("HN15[¹] Congress has no control over intrastate commerce.... HN16[¹] No

³ *United States v. E.C. Knight Co.* was the Supreme Court's first decision construing the Sherman Antitrust Act. The full text in which this quotation appears is as follows:

"It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power. On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. [Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 189, 210, 6 L. Ed. 23; Brown v. Maryland, 25 U.S. 419, 12 Wheat. 419, 448, 6 L. Ed. 678; The License Cases, 5 How. 504, 599; \[County of\] Mobile v. Kimball, 102 U.S. 691, 26 L. Ed. 238; Bowman v. Chicago & N.W. Railway, 125 U.S. 465, 31 L. Ed. 700, 8 S. Ct. 689; Leisy v. Hardin, 135 U.S. 100, 34 L. Ed. 128, 10 S. Ct. 681; In re Rahrer, 140 U.S. 545, 555, 35 L. Ed. 572, 11 S. Ct. 865.](#)"

[156 U.S. at 11-12.](#)

In P. Areeda & D. Turner, 1 [Antitrust Law, An Analysis of Antitrust Principles and their Application](#), § 232c (1978), we find the following discussion of *Knight*:

"The 1895 *Knight* case, the Supreme Court's first Sherman Act decision, held a national monopoly of sugar manufacturing beyond the constitutional reach of the act because mere manufacturing was not 'commerce.' At that time, the Commerce Clause embraced only the actual and 'direct' purchase, sale, or transportation of goods across state lines. The Court acknowledged that such commerce was affected by the sugar monopoly, but only 'indirectly.'

"Two characteristics of the *Knight* decision remain important today. First, the Court never reached the merits of the government's case because the constitutional determination was made first, and the courts still treat the commerce question as a preliminary jurisdictional hurdle in antitrust litigation. Second, the jurisdictional inquiry was entirely independent of the Sherman Act's purposes. That separation seemed feasible in 1895 when 'interstate commerce' was wholly dependent upon the location of the defendant's conduct, and without regard to its impact on the interests protected by the Sherman Act. This neat separation of jurisdictional and substantive inquiries caused difficulties with later and more expansive definitions of interstate commerce."

state may in any way enact legislation which in any wise controls, regulates, or infringes on interstate commerce.").

⁴

[**47] One of the best discussions of the prevailing dual-sovereignty theory of state-federal regulatory authority at the turn of the century is found in Justice Stewart's dissenting opinion in [Cantor v. Detroit Edison Co., 428 U.S. 579, 632-36, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 \(1976\)](#). In *Cantor*, the Supreme Court was called upon to decide whether [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#), which had held that the Sherman Antitrust Act was not violated by state action displacing competition in the marketing of raisins, immunized private action that had been approved by a state regulatory agency and that had to continue while the state approval remained effective. Justice Stewart's historical analysis of the legislative history of the Sherman Antitrust Act, which was not in dispute, reads as follows:

"The floor debates and the House Report on the proposed legislation [the Sherman Antitrust Act] clearly reveal, as at least one commentator has noted, that 'Congress fully understood the narrow scope given to the commerce clause' in 1890. This understanding is, in many ways, of historic interest only, because subsequent [**48] decisions of this Court have 'permitted the reach of the Sherman Act to expand along with expanding notions of congressional power.' But the narrow view taken by the Members of Congress in 1890 remains relevant for the limited purpose of assessing their intention regarding the interaction of the Sherman Act and state economic regulation.

"The legislative history reveals very clearly that Congress' perception of the limitations of its power under the Commerce Clause was coupled with an intent [*983] not to intrude upon the authority of the several States to regulate 'domestic' commerce. As the House Report stated:

"It will be observed that the provisions of the bill are carefully confined to such subjects of legislation as are clearly within the legislative authority of Congress.

"*No attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds.* No system of laws can be devised by Congress alone which would effectually protect the people of

⁴ We note that the Supreme Court had held at the time Alabama first enacted its antitrust statutes that the Commerce Clause, in conferring on Congress the power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress had not exercised its power, even though the regulation in some way affected interstate commerce. See, e.g., [California v. Thompson, 313 U.S. 109, 113, 85 L. Ed. 1219, 61 S. Ct. 930 \(1941\)](#), in which the Court noted:

"Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245 [(1829)], and *Cooley v. [Board of Wardens of the Port of Philadelphia]*, 53 U.S. 299, 12 How. 299, 13 L. Ed. 996 [(1851)], it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints."

See, also, [South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177, 82 L. Ed. 734, 58 S. Ct. 510 \(1938\)](#); [Hall v. Geiger-Jones Co., 242 U.S. 539, 61 L. Ed. 480, 37 S. Ct. 217 \(1917\)](#); [Bowman v. Chicago & N.W. Ry., supra](#), and the cases cited therein. There is nothing, however, in the Supreme Court's decisions in [United States v. E.C. Knight Co., supra](#), and [Addyston Pipe & Steel Co. v. United States, supra](#), that indicates that the Court would have viewed extraterritorial state antitrust provisions as falling within that constitutionally permissible category of local regulation having only an indirect or incidental effect on interstate commerce.

the United States against the evils and oppression of trusts and monopolies. Congress has no authority to deal, generally, with the subject within the States, and the States [**49] have no authority to legislate in respect of commerce between the several States or with foreign nations.

"It follows, therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies. Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority.'

"Similarly, the floor debates on the proposed legislation reveal an intent to 'go as far as the Constitution permits Congress to go,' in the words of Senator Sherman, conjoined with an intent not to 'interfere with' state-law efforts to 'prevent and control' combinations within the limit of the State.' Far from demonstrating an intent to pre-empt state laws aimed at preventing or controlling combinations or monopolies, the legislative debates show that Congress' goal was to supplement such state efforts, themselves restricted to the geographic boundaries of the several States. As Senator Sherman stated: 'Each State can deal with a combination [**50] within the State, but only the General Government can deal with combinations reaching not only the several States, but the commercial world. This bill does not include combinations within a State' Indeed a preexisting body of state law forbidding combinations in restraint of trade provided the model for the federal Act. As Senator Sherman stated with respect to the proposed legislation: 'It declares that certain contracts are against public policy, null and void. It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State in the Union are now, by common or statute law, null and void.'

"It is noteworthy that the body of state jurisprudence which formed the model for the Sherman Act coexisted with state laws permitting regulated industries to operate under governmental control in the public interest. Indeed, state regulatory laws long antedated the passage of the Sherman Act and had, prior to its passage, been upheld by this Court against constitutional attack. Such laws were an integral part of state efforts to regulate [**51] competition to which Congress turned for guidance in barring restraints of interstate commerce, and it is clear that those laws were left undisturbed by the passage of the Sherman Act in 1890. For, as congressional spokesmen expressly stated, there was no intent to 'interfere with' state laws regulating domestic commerce or 'invade the legislative authority of the several States....'

"As previously noted, the intent of the draftsmen of the Sherman Act not to intrude on the sovereignty of the States was coupled with a full and precise understanding of the narrow scope of congressional power under the Commerce Clause, as it was then interpreted by [*984] decisions of this Court. Subsequent decisions of the Court, however, have permitted the 'jurisdictional' reach of the Sherman Act to expand along with an expanding view of the commerce power of Congress. See [Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 743 n.2, 48 L. Ed. 2d 338, 96 S. Ct. 1848](#), and cases cited therein. These decisions, based on a determination that Congress intended to exercise all the power it possessed when it enacted the Sherman Act, have in effect allowed the Congress of 1890 [**52] the retroactive benefit of an enlarged judicial conception of the commerce power.

"It was this retroactive expansion of the jurisdictional reach of the Sherman Act that was in large part responsible for the advent of the *Parker* doctrine. *Parker* involved a program regulating the production of raisins within the State of California. Under the original understanding of the draftsmen of the Sherman Act, such in-state production, like in-state manufacturing, would not have been subject to the regulatory power of Congress under the Commerce Clause and thus not within the 'jurisdictional' reach of the Sherman Act. See [United States v. E.C. Knight Co., 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249](#). If the state of the law had remained static, the *Parker* problem would rarely, if ever, have arisen. As stated in [Northern Securities Co. v. United States, 193 U.S. 197, 48 L. Ed. 679, 24 S. Ct. 436](#), the operative premise would have been that the 'Anti-Trust Act ... prescribed ... a rule for *interstate and international* commerce, (not for domestic commerce,') *id., at 337*. The relevant question would have been whether the anticompetitive [**53] conduct required or permitted by the state statute was in restraint of domestic or interstate commerce. If the former, the conduct would have been beyond the reach of the Sherman Act; if the latter, the conduct would probably have violated the Sherman Act,

regardless of contrary state law, on the theory that 'no State can, by ... any ... mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or ... to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce.' *Id.* at [345-346](#)."

[428 U.S. at 632-36](#) (Stewart, J., dissenting) (emphasis in Justice Stewart's opinion).

An Alabama appellate court first dealt with the scope of this state's antitrust statutes in 1913. In [Georgia Fruit Exchange v. Turnipseed, supra](#), the defendant in a breach-of-contract action defended on the ground that the contract was illegal and void as in restraint of trade and against public policy. The Court of Appeals upheld the trial court's order sustaining [\[**54\]](#) the defendant's demurrer to the complaint, stating:

"Section 23 of our Constitution forbids the granting of exclusive and irrevocable special privileges and immunities by the Legislature, and section 103 thereof, which is a provision new to the Constitution of 1901, enjoins positively upon the Legislature the duty of providing by law for the 'regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, or increasing unreasonably the costs thereof to the consumer, or preventing reasonable competition in any trade, calling or business.' In pursuance of this latter provision the Legislature of this state, following the lead of other states, has passed the act now embraced in sections 7579, 7580, and 7581 of the Code, patterned after a similar statute in Illinois and other states and akin to the federal statute, known as [\[*985\]](#) the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200).

"Said section 7579 of our Code thus provides: 'Any person or corporation who engages or [\[**55\]](#) agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, or trust, or confederation to regulate or fix the price of any article or commodity to be sold or produced within this state, or ... must, on conviction, be fined,' etc.

"Section 7581 reads: 'Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, or which shall monopolize or attempt to monopolize the production, control or sale of any commodity, or ... shall be fined,' etc.

"The Sherman Anti-Trust Act makes illegal, punishing the parties thereto by fine or imprisonment, 'every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations,' etc.

*"There being thus both a state and national law prohibiting unlawful combinations in restraint of trade -- the one law relating to intrastate, the other to interstate, commerce -- it is immaterial as to which character of commerce, whether only one or both, is involved in the contract here under consideration; for if the contract is in violation [\[**56\]](#) of either law it is void as contravening a positive statute; and, even if it does not go to the extent of being in actual violation of either statute, yet if it tends to create a monopoly by unreasonably restraining trade, it is still void under our law, as at common law, as being against public policy. [Arnold v. Jones, 152 Ala. 501, 44 So. 662, 12 L.R.A. \(N.S.\) 150](#); 2 May. Dig. 784; 5 May. Dig. 218; 6 May. Dig. 182, where the authorities are cited."*

[9 Ala. App. at 131-33; 62 So. at 545-46](#). (Emphasis added.)

This Court first considered the application of Alabama's antitrust statutes in *Dothan Oil Mill Co. v. Espy, supra*. The defendants in that case were Alabama manufacturers of cottonseed oil "in different localities in this state" and were "the only buyers in Alabama of any appreciable amount of cotton-seed offered for sale in the State." *220 Ala. at 606-07, 127 So. at 179-80*. The plaintiffs, Alabama cotton ginners, alleged that the defendants had "agreed among themselves the price to be paid for cotton-seed throughout the State of Alabama." *220 Ala. at 606, 127 So. at 179*. The defendants [\[**57\]](#) argued that the trial court lacked subject-matter jurisdiction, on the ground that the

challenged conspiracy to control the price of cottonseed involved interstate commerce. The defendants based their argument on the fact that a portion of the products that were manufactured from cottonseed were sold outside Alabama. This Court rejected the defendants' argument, stating:

"We are not of [the] opinion, however, that the business of buying cotton seed, confined wholly to the state, to be crushed and manufactured into oil and other products, in such state, constitutes interstate commerce, within the scope and purpose of [the Federal Trade Commission Act] or within the sense of the Sherman and Clayton Acts (15 [U.S.C.] §§ 1-7, 15, and sections 12-27, 44) which confer on the federal courts exclusive jurisdiction to enforce said acts, though some of the manufactured products may eventually find their way into and become commodities of interstate commerce. 'The fact, of itself, that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce.' *Crescent Cotton Oil Co. v. State of Mississippi*, 257 U.S. 129, 42 S. Ct. 42, 44, 66 L. Ed. 166; **[**58]** *Coe v. Errol*, 116 U.S. 517, 6 S. Ct. 475, 29 L. Ed. 715; *New York Central R. R. Co. v. Mohney*, 252 U.S. 152, 40 S. Ct. 287, 64 L. Ed. 502, 9 A.L.R. 496."

[*986] 220 Ala. at 610, 127 So. at 182. Thus, the essence of this Court's decision in *Espy* was that **HN17** the plaintiffs' complaint stated a state-law antitrust claim because the alleged illegal conduct involved only commercial transactions wholly confined to Alabama.

This Court next commented on Alabama's antitrust statutes in *Ex parte Rice, supra*. That case involved an original petition for a writ of mandamus to require the trial court to vacate its order overruling the plaintiffs' motion to compel answers to interrogatories. The underlying action was filed by the Sinclair Refining Company and sought the specific performance of a contract. The defendant raised as a defense that the contract was illegal, arguing that its "purpose was to engage in a monopoly in violation of the state and federal law." *259 Ala. at 572, 67 So. 2d at 826*. This Court denied mandamus relief, holding that the motion to compel had been properly denied because the interrogatories **[**59]** filed by the defendant sought to place an improper burden on the plaintiff. In the course of its discussion of the applicable law, this Court noted:

"We do not seem to have in Alabama a statute which defines an unlawful monopoly. Section 108, Title 57, Code, makes it a crime, punishable by fine, for any person, including a corporation, to restrain trade or create a monopoly. Section 103 of the Constitution requires legislation to prohibit monopolies and combinations. Section 78, Title 57, Code, makes lawful certain contracts fixing a minimum resale price. We have applied the common law, which is substantially as set out in the Sherman and Clayton Acts. See *Sherrill v. Alabama Appliance Co.*, *240 Ala. 46 (7), 197 So. 1*.

"The federal statutes, Sherman and Clayton Acts, prescribe the terms of unlawful monopolies and restraints of trade as they should also be administered in Alabama. The question, therefore, is properly affected by those acts, and it must be controlled by them when the business involved in the suit affects interstate commerce. It is upon that basis that the foregoing conclusions prevail in this case."

259 Ala. at 575, 67 So. 2d at 829. **[**60]** (Emphasis added.)

In *San Ann Tobacco Co. v. Hamm, supra*, this Court addressed the constitutionality of an amendment to the Alabama Unfair Cigarette Sales Act, Ala. Acts 1951, Act No. 805, as amended in 1965 by Ala. Acts 1965, Act No. 78, p. 105, Second Special Session. In striking down the amendment as violating § 1 and § 35 of the Alabama Constitution, this Court wrote:

"This Court held the original Act to be constitutional on its face, *Simonetti, Inc. v. State ex rel. Gallion*, 272 Ala. 398, 132 So. 2d 252, and appellants do not attack that holding. But appellants do argue that one part of the 1965 amendment does render the Act unconstitutional on its face.

"The pertinent part of § 3(a) (Tit. 57, § 83(3)) of the original Act provided:

"It shall be unlawful for any wholesaler or retailer, with intent to injure competitors, destroy or substantially lessen competition, to advertise, offer to sell, or sell at wholesale or retail, cigarettes at less than cost to such wholesaler or retailer as the case may be.'

"This sentence was amended in 1965 and we emphasize the five additional words added which are **[**61]** pertinent to this decision:

"It shall be unlawful for any wholesaler or retailer with intent to injure competitors, destroy or substantially lessen competition, *or with the effect thereof*, to advertise, offer to sell or sell at wholesale or retail cigarettes at less than cost to such wholesaler or retailer as the case may be'

"We quote excerpts from the decision in [*Simonetti, Inc. v. State ex rel. Gillion, supra*](#):

[*987] ""The present bill directly alleges a dual or cumulative specific intent to 'injure competitors *and* destroy or substantially lessen competition' and that respondent's advertising, offers to sell, and sale of cigarettes at wholesale have been 'at less than cost to said respondent.' These are considered to be allegations of ultimate, issuable facts, sufficient for the purpose of pleading, since the respondent's actual intent in fact, its costs, and its selling prices are presumably matters within its knowledge, and greater particularity would not seem to be required either to frame the issue or inform respondent of the charge against which it is required to defend. By these allegations, the State as complainant assumes **[**62]** a heavy burden of proof, since it must be proof of far more than mere intent of injury to competitors or 'unfairness' of competition. *It must also prove, under the construction placed upon the Act, a selling below cost with the specific intent of destroying or substantially lessening competition, since the Act, if valid at all, can only be held so as an exercise of the police power of the state over intrastate commerce to the end of inhibiting practices tending toward monopolization.*""

283 Ala. at 400, 217 So. 2d at 804-05. (Some emphasis original; other emphasis added.)

At least three federal courts have followed the aforementioned line of Alabama decisions and have declined to interpret Alabama's antitrust statutes as reaching transactions involving interstate commerce. See [*In re Brand Name Prescription Drugs Antitrust Litigation, supra*](#) (district court denying motion to remand to state court, stating that **[HN18]** it is clear that the statute **[§ 6-5-60]** applies only to intrastate activity");⁵ [*In re Nasdaq* \[*988\] *Market*](#)

⁵ The Court of Appeals for the Seventh Circuit reversed the district court's order denying the motion to remand. In doing so, the court recognized that at the turn of the century the Alabama Legislature lacked the constitutional authority to regulate interstate commerce through the use of antitrust provisions:

"The cases on which the defendants rely, for example, [*Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123, 62 So. 542, 546 \(1913\)](#), date from a period in which, interstate commerce being narrowly defined, see, e.g., [*Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 F. 242, 244 \(8th Cir. 1906\)](#), and federal power to regulate such commerce being deemed exclusive, *id.*; [*United States v. E. C. Knight Co.*, 156 U.S. 1, 11, 15 S. Ct. 249, 253, 39 L. Ed. 325 \(1895\)](#), a state statute limited to intrastate commerce would have some, albeit a strictly limited, scope and could not have a greater scope no matter how much the state wanted it to."

[*123 F.3d at 612-13*](#). The court then went on to reason that "the cases thus were not interpreting the statute; they were interpreting the Constitution as placing upper and lower bounds on the reach of the statute." [*123 F.3d at 613*](#). Stating that the United States Constitution "has since been reinterpreted," the court noted that "other states [have] read their antitrust statutes to reach what is now understood to be interstate commerce," and that "we are given no reason to suppose that Alabama would buck this trend." *Id.* This Court's decisions in [*Siegelman v. Chase Manhattan Bank, supra*](#); [*Ex parte Dixie Tool & Die Co., supra*](#); and [*Ex parte Louisville & N.R.R., supra*](#), which created a presumption that the Legislature did not intend to exceed its constitutional authority in enacting this state's antitrust provisions, preclude the kind of statutory construction that the Seventh Circuit Court of Appeals thought we might engage in. As we have explained, this presumption was strengthened by, among

Makers Antitrust Litigation, supra, at 179 (denying motion to remand and noting that "HN19" [↑] the Alabama state courts have deemed [**63] the Alabama antitrust statutes upon which the complaint is based to regulate only intrastate commerce"); and *Warren v. Playmobil U.S.A., Inc., supra* (denying motion to remand, concluding that "HN20" [↑] the Alabama statutes the plaintiff purports to rely upon [§ 6-5-60, §8-10-1, and § 8-10-3] regulate only intrastate commerce").

[**64] After carefully reviewing the record and the briefs (which, we note, were exceptionally well written), we conclude that the rationale of *Siegelman* (that because the states were prohibited by federal law from taxing out-of-state national banks at the time the statute levying the excise tax was first enacted, the state could not tax an out-of-state national bank under the existing tax statute in the absence of further action by the Legislature) is equally applicable in the present case. Although what is now § 6-5-60 (providing for a civil cause of action) was enacted a little over 16 years after what are now § 8-10-1, § 8-10-2, and § 8-10-3 (prescribing criminal penalties), all of these statutes are part of a uniform system of regulation, in the sense that they are all directed toward punishing or providing redress for activities in restraint of trade. HN21 [↑] Related statutes of this kind should, when possible, be construed *in pari materia*. *Jordan v. Reliable Life Insurance Co., 589 So. 2d 699 (Ala. 1991)*, citing N. Singer, *Sutherland Statutory Construction*, § 70.05, at 505 (4th ed. 1986). It is significant, we think, that all of these antitrust provisions [**65] were first enacted at a time in this country's history when the United States Supreme Court maintained a clear dichotomy with respect to a state's power to regulate commerce. Our research indicates that at the time of the enactment of what are now § 8-10-1, § 8-10-2, and § 8-10-3 (1891), and extending through the time of the enactment in 1907 of what is now § 6-5-60, the United States Supreme Court had clearly held that the regulation of interstate commerce was within the exclusive domain of Congress. It is also significant that a federal **antitrust law** (the Sherman Antitrust Act) was already in effect at the time of the enactment of what are now § 8-10-1, § 8-10-2, and § 8-10-3. Thus, under the rationale of *Siegelman*, we must entertain a strong presumption that the Alabama Legislature was aware toward the end of the 19th century and at the beginning of the 20th century, when it first enacted these antitrust statutes, that its ability to regulate antitrust activity was limited in that it did not have the power to directly regulate transactions involving interstate commerce. The United States Supreme Court had clearly signaled, however, that the regulation of intrastate commerce [**66] at the turn of the century was still largely within the exclusive domain of the states.

This presumption that the Legislature intended to limit the scope of its antitrust laws to transactions involving intrastate commerce is strengthened by several additional factors. First, the Illinois statute that formed the basis for what are now § 8-10-1, § 8-10-2, and § 8-10-3, was held early on by the Illinois Supreme Court to be limited to transactions involving intrastate commerce. See *People ex rel. Akin v. Butler Street Foundry & Iron Co., 201 Ill. 236, 66 N.E. 349 (1903)*. Second, Act No. 202, § 1 (the predecessor of § 8-10-1), as originally enacted by the Legislature in 1891, read as follows:

"Section 1. Be it enacted by the General Assembly of Alabama, That any person, corporation or association of persons who shall, *within this state*, engage or agree with other persons, corporations or association of persons, or enter into, either directly [sic], any combination, [*989] pool, trust or confederation to regulate or fix the price of any article or commodity to be sold within this state for speculation; and any person, corporation or association of persons [**67] who shall enter into, become a member of a party to, any pool, agreement, combination or confederation to fix or limit the amount or quantity of any article or commodity to be produced or

other things, the extensive legislative history of the Alabama statutes that we have set out, including the critical limiting words contained in Act No. 202 -- "within this state." The Seventh Circuit apparently ruled without the benefit of this legislative history or this Court's decisions referenced above. We also note that the Seventh Circuit expressed concern that "if the statute is limited today as it once was to commerce that is not within the regulatory power of Congress under the commerce clause, it is a dead letter because there are virtually no sales, in Alabama or anywhere else in the United States, that are intrastate in that sense." *123 F.3d at 613*. However, the statutes, as we interpret them, may yet have a field of operation because they continue to reach transactions within this state, in the geographic sense, even though such transactions may affect interstate commerce as currently defined by federal law. See *Cantor v. Detroit Edison Co., 428 U.S. 579, 633, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)* (Stewart, J., dissenting) (recognizing that when Congress passed the Sherman Antitrust Act, state efforts to restrain monopolies were "restricted to the geographic boundaries of the several states").

manufactured, mined or sold in this state, shall be guilty of a misdemeanor, and subject to indictment and punishment as herein provided."

(Emphasis added.) Although this fact is certainly not conclusive, this section, as originally worded, suggests that the Legislature intended to limit the scope of Alabama's antitrust regulations to transactions involving intrastate commerce. Although the Code commissioner deleted the words "within this state" from § 5557 during his compilation of the 1896 Code, we find in our research no indication that he had the authority or the intent to make any substantive changes to Act No. 202, or that the Legislature, by adopting the 1896 Code with the commissioner's suggested change to § 5557, contemplated that the deletion of the words would effect the kind of substantive change that the plaintiff suggests was intended -- to expand the scope of the statute to encompass transactions involving interstate commerce. We find it more probable (although we certainly [**68] can never know for sure) that the commissioner deleted the words, and that the Legislature accepted that change, out of an understanding or belief that the state lacked extraterritorial authority over commerce and, therefore, that the words were not necessary. Third, and perhaps most important, the Court of Appeals stated in 1913, shortly after these statutes were enacted, that the Legislature's regulatory power over antitrust violations did not extend to transactions involving interstate commerce, specifically recognizing that the regulation of such transactions had been undertaken by Congress pursuant to the Sherman Antitrust Act. The understanding of the Court of Appeals in this respect has been echoed by this Court on every occasion on which it has considered the matter. Fourth, the Legislature, with presumptive knowledge of the interpretation placed on Alabama's antitrust laws by Alabama appellate courts, has made no substantive changes to any of Alabama's antitrust laws since their original enactment.

As previously noted, when circumstances surrounding the enactment of laws, such as the antitrust statutes at issue here, cast doubt on the otherwise clear language of the statutes [**69] themselves, we must look to other factors in determining legislative intent. *Siegelman, supra*. In an effort to avoid indulging in conjecture or searching for imaginary purposes with respect to these antitrust statutes, we have followed the well-settled rule of statutory construction "that HN22[ it is permissible in ascertaining [the purpose and intent of a statute] to look to the history of the times, the existing order of things, the state of the law when the instrument was adopted, and the conditions necessitating such adoption." *In re Upshaw*, 247 Ala. at 223, 23 So. 2d at 863. Having done that, we hold, based on the above, that § 6-5-60 does not provide a cause of action for damages allegedly resulting from an agreement to control the price of goods shipped in interstate commerce. We reiterate what we stated in *Siegelman, supra*:

"This Court's role is not to displace the legislature by amending statutes to make them express what we think the legislature should have done. Nor is it this Court's role to assume the legislative prerogative to correct defective legislation or amend statutes."

575 So. 2d at 1051. [**70] We hold only that the field of operation of Alabama's antitrust statutes, specifically § 6-5-60, is no greater today than it was when the laws were first enacted. Thus, these statutes regulate monopolistic activities that occur [*990] "within this state" -- within the geographic boundaries of this state -- even if such activities fall within the scope of the Commerce Clause of the Constitution of the United States.⁶ We leave to the Legislature the policy decision of whether to expand the reach of Alabama's antitrust statutes to activities that cross state boundaries.

The trial court's order denying the defendants' motion to dismiss is reversed, [**71] and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hooper, C. J., and Maddox, Houston, See, and Brown, JJ., concur.

⁶ Of course, Alabama's antitrust statutes may not be applied in a manner that discriminates against or unduly burdens interstate commerce. See *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977).

Cook and Johnstone, JJ., dissent.

Lyons, J., recuses himself.

See, J., files statement of nonrecusal.

SEE, Justice (statement of nonrecusal).

The plaintiff, Seven Up Bottling Company of Jasper, Inc. ("Seven Up"), through its attorney, has moved for my recusal in this case. Because, when I first considered the motion, I thought further information would be useful in resolving the recusal issue, the clerk of this Court sent my response to the recusal motion to counsel for all parties involved in this case. That response requested that the law firm of Walston, Wells, Anderson & Bains ("Walston Wells") provide me with the following information by way of affidavit:

- (a) Mr. Larry Childs's interest in Walston Wells;
- (b) the materiality of a particular client involved in this appeal, Archer Daniels Midland Company, to Walston Wells;
- (c) the effect the result of this appeal will have on Walston Wells;
- (d) the effect the result of this appeal will have on Mr. Childs's **[**72]** interest in Walston Wells;
- (e) whether Mr. Childs will receive a commission, contingency fee, or bonus from this case, or from all of the firm's cases for a particular time period, that is dependent in any way on the outcome of this appeal;
- (f) whether Mr. Childs will receive a compensation increase when the firm reaches a certain dollar amount of income in a given time period, and whether, and to what extent, the outcome of this appeal will affect the dollar amount of that income; and
- (g) the number and identity of the cases Walston Wells currently has before this Court.

After making an *in camera* examination of the affidavits provided by Walston Wells, I have determined that Mr. Childs has no interest in Walston Wells that will be substantially affected by the outcome of this case.⁷ Because Mr. Childs's interest will **[*991]** not be substantially affected, and because there are no other grounds asserted for questioning my impartiality, it is my constitutional duty to decide this case. I, therefore, decline to recuse myself.

[73]** I.

Seven Up has moved for my recusal based on the fact that Larry Childs is my brother-in-law and is a partner in the law firm of Walston Wells, and the fact that Walston Wells is lead counsel for one of the defendants, Archer Daniels Midland Company ("ADM"). Mr. Childs did not appear as counsel. Nonetheless, because he is a partner in Walston Wells, it is possible to conceive of circumstances under which he might benefit to some degree from his firm's representation of one of the defendants. Therefore, I will address the concerns raised by Seven Up in its motion for my recusal.

II.

⁷ Because this case presents the same issues as *Abbott Laboratories v. Durrett* (No. 1960464), another case presently pending before this Court, I have also taken into account the effect the result of that case will have on Mr. Childs's interest in Walston Wells. I note that the plaintiffs in *Durrett* argue that my recusal decision should also take into account other cases not presently before this Court in which, they assert, Walston Wells is involved and which, they assert, may be affected by the outcome of this case. "Where a party seeks to create an artificial appearance of bias, ... recusal will generally not be required, because the duty of the judge to decide that case outweighs the appearance of partiality." *Dunlop Tire Corp. v. Allen*, 725 So. 2d 960, 977 (Ala. 1998) (See, J., statement of nonrecusal) (discussing whether a lawyer's threat to file a separate lawsuit against the judge creates an appearance of partiality). "To hold otherwise would allow a litigant to control judicial proceedings whenever a litigant becomes dissatisfied with the course of the proceedings." *Id.* A party cannot be permitted to "judge-shop" by seeking out information unknown to the judge, and then disclosing that information to the judge in order thereby to create an appearance of bias that will allow the party selectively to disqualify a judge the party believes will decide a case in a particular way. I will not recuse myself based on those cases not before this Court.

Seven Up argues that I am required to recuse on the basis that Mr. Childs's association with Walston Wells mandates my per se disqualification under the Canons of Judicial Ethics.⁸ The defendants respond with the argument that I am not required to recuse, because Mr. Childs has no association with the case other than the fact that he is a partner in a law firm involved in the case. They argue that under Alabama law that circumstance alone does not require recusal.

[**74] "The law of recusal reflects two fundamental judicial policies: First, it is the [*992] duty of a judge to decide cases.⁹ [**75] Second, a judge should be a neutral, or impartial, decision-maker."¹⁰ [Dunlop Tire Corp. v. Allen](#).

⁸ Seven Up also maintains that my impartiality might reasonably be questioned by members of the public because I failed "to expressly disclose the existence of [my] relationship [to Mr. Childs] to Seven Up" Seven Up cites an advisory opinion of the Judicial Inquiry Commission ("JIC") that states:

"In all ... cases in which a party is represented by a member of a law firm of which the judge's sister-in-law is a partner, the judge should disclose the existence of the relationship to the parties and their attorneys. The general rule is that 'it is the judge's obligation to disclose all possibly disqualifying facts.'"

Ala. Jud. Inquiry Comm'n Adv. Op. 97-653 (June 27, 1997) (quoting J. Shaman et al., *Judicial Conduct and Ethics*, § 5.26 (1990)).

First, I have disclosed "Larry B. Childs, Esq., of Walston, Wells, Anderson & Bains--Birmingham" continuously on my recusal list, filed with the Supreme Court clerk's office, since February 5, 1997, shortly after I assumed my position on this Court. Second, Canon 3D, which the JIC was interpreting, does not require disclosure in every instance in which the law firm of a lawyer relative is before the judge. Rather, it is the purpose of Canon 3D to permit a judge who is *already disqualified* by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) to avoid withdrawing from the proceedings, through disclosure and consent of the parties and their attorneys. Cannon 3D provides:

"A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose in the record the basis of his disqualification. If based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement signed by all parties and lawyers shall be incorporated in the record of the proceeding."

Accordingly, the disclosure requirement imposed by the Canons of Judicial Ethics and discussed in the JIC opinion would not be effective until and unless the circumstances of the case otherwise required my recusal.

⁹ I have written in a statement of nonrecusal:

"The Constitution of the United States and the Constitution of Alabama of 1901 impose on judges the duty to decide cases. See [U.S. Const. art. III, § 1](#) (vesting the 'judicial Power of the United States ... in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish');

id. at art. VI ('All ... judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution');

[Plaut v. Spendthrift Farm, Inc.](#), 514 U.S. 211, 218-19, 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995) ('Article III establishes a "judicial department" with the "province and duty" ... to decide "cases."') (quoting [Marbury v. Madison](#), 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)) (*emphasis added*)); [Marbury](#), 5 U.S. at 180 (stating that a judge's oath to support the Constitution requires that he exercise the judicial power and decide cases in a manner consistent with fundamental law); [Pierson v. Ray](#), 386 U.S. 547, 554, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967) ('It is a judge's duty to decide all cases within his jurisdiction');

Ala. Const. 1901 amend. 328, § 6.01(a) ('The judicial power of the state shall be vested exclusively in a unified judicial system which shall consist of a supreme court');

id. at § 279 (requiring 'all officers, executive and judicial, ... [to] take the following oath or affirmation: "I, solemnly swear ... that I will support the Constitution of the United States, and the Constitution of the State of Alabama ... and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter"'); [Federated Guaranty Life Ins. Co. v. Bragg](#), 393 So. 2d 1386, 1389 (Ala. 1981) ("It is the duty of the judge to adjudicate the decisive issues involved in the controversy ... and to make binding declarations concerning such issues, thus putting the controversy to rest") (citation omitted)."

[Dunlop Tire Corp. v. Allen](#), 725 So. 2d 960, 976 (Ala. 1998) (See, J., statement of nonrecusal).

¹⁰ I also wrote the following in my statement of nonrecusal in *Dunlop*:

725 So. 2d 960, 976 (Ala. 1998) (See, J., statement of nonrecusal). The policies underpinning a judge's duty to vote on cases before him and a judge's duty to uphold the actual and apparent impartiality of the judiciary are embodied in Alabama's Canons of Judicial Ethics. Canon 3, Ala. Can. Jud. Eth. With respect to recusal, Canon 3C provides in pertinent part:

[**76]

"(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law^[11] or his impartiality [***993**] might reasonably be questioned, including but not limited to instances where:

"....

"(d) He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

"(i) Is named a party to the proceeding, or an officer, director, or trustee [****77**] of a party;

"(ii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

"(iii) Is to the judge's knowledge likely to be a material witness in the proceeding."

There is no allegation that I have a personal bias for or against Seven Up. Mr. Childs is not a party to this proceeding; he is not an officer, a director, or a trustee of any party; and there is no indication that Mr. Childs is likely to be a material witness in the proceeding. Moreover, Mr. Childs does not himself represent any party in this case.¹²

"The Due Process Clauses of the Constitution of the United States and of the Alabama Constitution require that a judge be a neutral decision-maker. U.S. Const. amend. XIV, § 1 ('No State shall ... deprive any person of life, liberty, or property, without due process of law....'); Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 617, 124 L. Ed. 2d 539, 113 S. Ct. 2264 (1993) ('Due process requires a "neutral and detached judge"'); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986) (examining due process ramifications of a state Justice's financial interest in the outcome of a case on which he had ruled); Stallworth v. City of Evergreen, 680 So. 2d 229, 233-34 (Ala.) ('An unbiased and impartial decision-maker is one of the most, if not the most, fundamental ... requirements of fairness and due process.'), cert. denied, 519 U.S. 1007, 136 L. Ed. 2d 399, 117 S. Ct. 509 (1996); Ala. Const. 1901, § 6 ('In all criminal prosecutions, the accused ... shall not be ... deprived of life, liberty, or property, except by due process of law'); *id.* at § 13 ('Every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law'); Ex parte Wilkey, 233 Ala. 375, 377, 172 So. 111, 113 (1937) (recognizing that §§ 6 and 13 of the Constitution of Alabama of 1901 require courts to be 'impartial tribunals').

"Thus, the recusal law embodied in statutes, court decisions, and codes of ethics reflects both the duty to decide cases and the requirement of impartiality. See, e.g., 28 U.S.C. § 455 (requiring federal judges to recuse themselves from any proceeding in which their 'impartiality might reasonably be questioned'); Ala. Code 1975, § 12-1-12 (prescribing general grounds for disqualification of Alabama judges from the trial of cases)."

Dunlop Tire Corp., 725 So. 2d at 976 (See, J., statement of nonrecusal).

¹¹ Ala. Code 1975, § 12-1-12, states:

"No judge of any court shall sit in any case or proceeding in which he is interested or related to any party within the fourth degree of consanguinity or affinity or in which he has been of counsel or in which is called in question the validity of any judgment or judicial proceeding in which he was of counsel or the validity or construction of any instrument or paper prepared or signed by him as counsel or attorney, without the consent of the parties entered of record or put in writing if the court is not of record."

¹² Of course, if Mr. Childs did represent a party before this Court, my recusal would be required. Ala. Jud. Inquiry Comm'n Adv. Op. 97-653 (June 27, 1997) ("A judge is disqualified under Canon 3C(1)(d) in any proceeding in which an attorney is related to the judge within the fourth degree of consanguinity or affinity."). The Judicial Inquiry Commission has based that disqualification on Canon 3C(1)(d)(i):

[**78] Although the courts of Alabama have not addressed whether a judge must recuse himself because his relative is affiliated with a law firm that represents a party before him, the Commentary to Canon 3C(1)(d) states:

"The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that 'his impartiality might be reasonably questioned' under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceedings' under Canon 3C(1)(d)(ii) may require his disqualification."

The Judicial Inquiry Commission has stated:

"The mere fact that a lawyer representing a party to a proceeding 'is affiliated with a law firm with which a lawyer-relative [of the judge] is affiliated' does not cause the judge's disqualification. It is thus the opinion of the Commission that the mere existence of the uncle's partnership interest is not a disqualifying factor."

Ala. Jud. Inquiry Comm'n Adv. Op. 88-338 (September 30, 1988).

"However, [**79] the judge is disqualified if other circumstances exist under which the judge's 'impartiality might reasonably be questioned' (Canon 3C(1)), if she has a personal bias or prejudice concerning [*994] a party as a result of the fact that a party is represented by this law firm (Canon 3C(1)(a)), or if the judge's sister-in-law is known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceeding.' Canon 3C(1)(d)(ii)."

Ala. Jud. Inquiry Comm'n Adv. Op. 97-653 (June 27, 1997).

The JJC has suggested a process for a judge to consider when he presides over a case in which a lawyer representing a party is affiliated with a law firm with which a lawyer relative of the judge is also affiliated:

"1. ... The judge should disclose the existence of the relationship to the parties and their attorneys even though the mere fact of the relationship is not a basis for disqualification. ...

"2. The judge must then determine whether there exist any factors, other than the relationship, which, in conjunction with the relationship, would cause the judge's impartiality to be reasonably questioned. ...

"....

[**80]

"3. Finally, the judge should determine whether the lawyer-relative has an interest in the law firm that could be 'substantially affected by the outcome of the proceedings' under Canon 3C(1)(d)(ii). ...

"... The judge is accountable only for those facts of which the judge has personal knowledge or of which he should have known. ... A judge need not initiate investigation to determine whether or not his relative has an interest in the law firm that could be substantially affected by the outcome of the proceedings unless the judge has reason to believe that such an interest exists.

"... There are no precise and rigid formulas which may be applied in these circumstances. However, the good faith and conscientious application of the principles set out above should enable a judge to determine whether disqualification is required."

Ala. Jud. Inquiry Comm'n Adv. Op. 93-500 (August 31, 1993).

Richard Flamm has discussed that provision of the ABA Model Canons of Judicial Ethics that is substantially similar to Canon 3C(1)(d), Ala. Can. Jud. Eth. He explains:

"Canon 3C(1)(d)(i) provides that a judge is disqualified when, *inter alia*, a person within the fourth degree of relationship to the judge or his spouse is an officer, director, or trustee of a party. This provision has always been interpreted to require disqualification of a judge where a party's attorney is related to either the judge or the judge's spouse within the fourth degree, either by consanguinity or affinity."

Ala. Jud. Inquiry Comm'n Adv. Op. 97-637 (March 14, 1997). The JJC has also relied on Canon 3C(1)(d)(ii), which requires a judge to disqualify himself if "he or his spouse, or a person within the fourth degree of relationship to either of them, ... is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding" See Ala. Jud. Inquiry Comm'n Adv. Op. 89-356 (April 4, 1989).

"Courts generally have reasoned that the mere fact that a judge's relative is somehow affiliated with [**81] a law firm representing a party in a proceeding pending before him does not constitute good cause for concluding that the judge is disqualified per se."

"It is generally agreed that when a case is being handled by an attorney other than a sitting judge's relative herself, the judge's impartiality may reasonably be questioned only when the judge's relative has an interest in the law firm that could be 'substantially affected' by the outcome of the proceeding. However, determining whether a judge's attorney-relative possesses such an interest is not always simple.

"The interest of a judge's relative is most likely to be substantially affected by a judge's decision when that interest is a direct, pecuniary one; concerns of this nature are most likely to arise in circumstances in which judges are called on to make attorney fee awards, and the income of the judge's relative is somehow dependent on the nature of that award." ¹³

[**82] [*995] Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, §§ 8.5.3 and 8.5.4 (1996). Thus, Alabama's rejection of a per se recusal rule based on a lawyer relative's affiliation with a law firm is consistent with the general rule.

The United States Court of Appeals for the Second Circuit reasons that "it would simply be unrealistic to assume ... that partners in today's law firms invariably 'have an interest that could be substantially affected by the outcome of' any case in which any other partner is involved." *Pashaiyan v. Ecclestan Properties, Ltd.*, 88 F.3d 77, 83-84 (2d Cir. 1996) (quoting [28 U.S.C. § 455\(b\)\(5\)\(iii\)](#)). ¹⁴ In determining that recusal was not required in the case before it, the Second Circuit relied heavily on the fact that the trial judge, whose recusal was being sought, had considered, from information provided under seal, the gross revenue of his relative's law firm; the extent to which his relative, as a partner in the law firm, participated in the net income of the law firm; and whether his relative's interest in the firm would be "substantially affected" by the outcome of the specific [**83] case before the judge. ¹⁵ [**85] The Second

¹³ Flamm continues, pointing out that there is authority to the contrary:

"[A] number of courts and commentators have concluded that when the judge's relative is a partner in a firm appearing in a matter presently pending before him, judicial disqualification is mandated, but disqualification of the judge is not necessarily mandated when the judge's relative is merely an associate."

Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, § 8.5.5 (1996). He also notes:

"While judicial disqualification is sometimes sought on the ground that a party to a proceeding is a client of a judge-relative's firm, it is ordinarily insufficient to establish merely that the party is just any client; rather, it may be necessary to show that the client is a 'material' client. The loss of a nonmaterial client--by definition--would not 'substantially affect' most law firms and, hence, would not substantially affect the interest of the judge's attorney-relative."

Id. at § 8.5.6.

¹⁴ The statute quoted, [28 U.S.C. § 455\(b\)\(5\) \(1976\)](#), requires that any justice, judge, magistrate, or referee "shall ... disqualify himself ... [where] he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

- "(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
- "(ii) Is acting as a lawyer in the proceeding;
- "(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- "(iv) Is to the judge's knowledge likely to be a material witness in the proceeding."

¹⁵ The Second Circuit also noted that the judge

"[took] judicial notice of those matters that add to the reputation of major law firms in the City of New York and concluded that insofar as the reputation of [the relative's law firm] is concerned, this matter is not of that significance to either add [to] or detract from its reputation in the City of New York"

Circuit determined that the trial judge's conclusion that his relative's interest would not be substantially affected "should not be ignored in favor of an unrealistic generalization that in our view is not supported, much less compelled, by the text of § 455(b)(5)(iii)." *Id. at 84*. Accord "Statement of Recusal Policy [of Seven Justices]," Supreme Court of the United States, November 1, 1993 ("We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court. Given the size and number of today's national law firms, and the frequent appearance before us of many of them in a single case, recusal might become a common occurrence, and opportunities would be multiplied for 'strategizing' recusals, that is, selecting law firms with an eye to producing the recusal of particular Justices."). Although it may be that some jurisdictions may automatically disqualify a judge from cases involving **[**84]** his brother-in-law's law firm,¹⁶ **[**86]** it is the Second Circuit's **[*996]** rationale that is consistent with the current state of Alabama law.¹⁷

Pashaian, 88 F.3d at 84.

¹⁶ The United States Court of Appeals for the old Fifth Circuit required recusal when a judge's relative was a partner in a law firm involved in a case pending before the judge. That court stated:

"We hold that when a partner in a law firm is related to a judge within the third degree, that partner will always be 'known by the judge to have an interest that could be substantially affected by the outcome' of a proceeding involving the partner's law firm."

Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1113 (5th Cir. 1980) (basing its decision on *28 U.S.C. § 455(b)(5)(iii)*, which is identical to Canon 3C(1)(d)(ii), Ala. Can. Jud. Eth.).

On the other hand, the present Fifth Circuit has refused to apply this rationale to a claim that, because the judge's husband was a partner in a law firm that had represented a party on numerous occasions, the judge's impartiality was called into question. *In re Billeddeaux*, 972 F.2d 104, 105-06 (5th Cir. 1992) (finding the interest to be "too remote and speculative to support or suggest recusal"). In *Billeddeaux*, the relative's law firm was not involved in the case then before the judge. The argument for recusal was that the law firm represented one of the parties before the judge on an ongoing basis and was receiving fees from those representations at the time the case was before the judge. *Id.*

The Second Circuit specifically rejected the rule of automatic recusal as set forth in *Potashnick*. *Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77 (2d Cir. 1996).

¹⁷ Finally, I note that although the United States Supreme Court has not issued an opinion resolving the conflict between the rationales of the Second and Fifth Circuits, seven Justices of that Court released a "Statement of Recusal Policy" on November 1, 1993. In that statement, the seven Justices set forth personal recusal policies that they would follow in certain circumstances. The Justices stated:

"A relative's partnership status, or participation in earlier stages of the litigation, is relevant ... only under one of two less specific provisions of § 455, which require recusal when the judge knows that the relative has 'an interest that could be substantially affected by the outcome of the proceeding,' *[28 U.S.C.] § 455(b)(5)(iii)*, or when for any reason the judge's 'impartiality might reasonably be questioned,' § 455(a). We think that a relative's partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not *automatically* trigger these provisions. If that were the intent of the law, the *per se* 'lawyer-related recusal' requirement of § 455(b)(5)(ii) would have expressed it. *Per se* recusal for a relative's membership in the partnership appearing here, or for a relative's work on the case below, would render the limitation of § 455(b)(5)(ii) to *personal* work, and to *present* representation, meaningless."

"Statement of Recusal Policy," Supreme Court of the United States, November 1, 1993 (emphasis in original). Although the Justices are not automatically recused, they stated that they would personally recuse themselves from cases involving a law firm in which a relative is a partner who shares profits. The Justices explained:

"It seems to us that in virtually every case before us with retained counsel there exists a genuine possibility that success or failure will affect the amount of the fee, and hence a genuine possibility that the outcome will have a substantial effect upon each partner's compensation. Since it is impractical to assure ourselves of the absence of such consequences in each individual case, we shall recuse ourselves from all cases in which appearances on behalf of parties are made by firms in

[**87] In my review of this Court's cases, I have noted, for example, that two former Justices recused themselves from cases involving the law firm where their children were partners, but that when this Court, on July 31, 1998, initially issued an opinion in *Abbott Laboratories v. Durrett* (No. 1960464) (withdrawn this date on rehearing *ex mero motu*, and opinion substituted; see So. 2d), another Justice did not recuse under similar circumstances. The former situations involved a law firm with four partners and two lawyers of counsel. Thus, absent special provisions in the partnership agreement, any case could have a direct and substantial pecuniary impact on every partner. On the other hand, the law firm involved in the latter situation had [*997] over 300 lawyers, with almost 100 partners in the office where the child practices.¹⁸ The likelihood that a single case would have a substantial effect on the interest of a partner in such a firm is slight. Walston Wells is a law firm with 21 partners, 1 lawyer of counsel, and 10 associates. Although one could imagine situations where the interest of a partner of Walston Wells could be substantially affected by the outcome [**88] of a case, the information contained in the affidavits provided by Walston Wells establishes that no interest Mr. Childs has in Walston Wells will be substantially affected by the outcome of this case.

"The Canon 3C(1) recusal test is: 'Would a person of ordinary prudence in the judge's position knowing all the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?'" Ala. Jud. Inquiry Comm'n Adv. Op. 93-500 (August 31, 1993) (quoting *In re Sheffield*, 465 So. 2d 350, 356 (Ala. 1984)). After examining the particular facts of this case, I am aware of no factors, other than the relationship, that might reasonably cause my impartiality to be questioned.¹⁹

[**89] Normally, a judge need not initiate an investigation into whether his lawyer relative has an interest that could be substantially affected by the outcome of a case before him. See Ala. Jud. Inquiry Comm'n Adv. Op. 93-500 (August 31, 1993) ("A judge need not initiate investigation to determine whether or not his relative has an interest in the law firm that could be substantially affected by the outcome of the proceedings unless the judge has reason to believe that such an interest exists."). However, because Seven Up has questioned whether the Canons of Judicial Ethics prohibit me from voting in this case, and because Mr. Childs is a partner in Walston Wells, I have investigated his interest in the firm, and whether the case before this Court will substantially affect that interest. After making an *in camera* examination of the affidavits provided by Walston Wells, I have determined that Mr. Childs has no interest in Walston Wells that will be substantially affected by the outcome of this case. Because no interest of Mr. Childs will be substantially affected, and because there are no other grounds asserted for questioning my impartiality, it is my constitutional duty to decide [**90] this case. I, therefore, decline to recuse myself.

Hooper, C.J., and Maddox, Houston, Kennedy,²⁰ Cook, Brown, and Johnstone, JJ., concur.

Dissent by: COOK; JOHNSTONE

which our relatives are partners, unless we have received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares."

Id. Thus, although the seven Justices rejected a per se recusal policy like that set forth in *Potashnick*, 609 F.2d 1101 (5th Cir. 1980), they decided, in the interest of practicality, that they would recuse themselves from all such cases unless they "received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from [their] relatives' partnership shares." "Statement of Recusal Policy," *supra*.

¹⁸ It may also be that there is a difference in the nature of the fee arrangements. For example, contingent fees are dependent on the outcome of litigation, while noncontingent fixed or hourly fees are not.

¹⁹ The JIC has listed the following as "other factors" to be considered:

"Whether the lawyer-relative would receive a commission, contingency, or bonus from the instant case, or all of the firm's cases for a time period; whether the relative would receive a salary increase when the firm reaches a certain dollar amount in a given time period; the degree of kinship between the judge and the relative; the number of cases the firm has before the judge; and any other connections, dealings or relationships of the judge to other members of the relative's law firm."

Ala. Jud. Inquiry Comm'n Adv. Op. 93-500 (August 31, 1993).

²⁰ Justice Kennedy's vote regarding the motion to recuse was made prior to his resignation on June 11, 1999.

Dissent

COOK, Justice (dissenting).

I respectfully dissent, for the reasons expressed in my dissent in [*Abbott Laboratories v. Durrett, \[Ms. 1960464, June 25, 1999\] 1999 Ala. LEXIS 196, So. 2d \(Ala. 1999\)*](#).

JOHNSTONE, Justice (dissenting).

I respectfully dissent, for the reasons stated in my dissent in [*Abbott Laboratories v. Durrett, \[Ms. 1960464, June 25, 1999\] 1999 Ala. LEXIS 196, So. 2d \(Ala. 1999\)*](#).

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Cardtoons, L.C. v. Major League Baseball Players Ass'n

United States Court of Appeals for the Tenth Circuit

June 29, 1999, Filed

No. 98-5061

Reporter

182 F.3d 1132 *; 1999 U.S. App. LEXIS 14618 **; 51 U.S.P.Q.2D (BNA) 1253 ***; 1999 Colo. J. C.A.R. 4105

CARDOONS, L.C., an Oklahoma Limited Liability Company, Plaintiff - Appellant, v. MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, an unincorporated association, Defendant - Appellee.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Oklahoma. (D.C. No. 93-CV-576-E). D.C. Judge JAMES O. ELLISON.

Disposition: AFFIRMED.

Core Terms

immunity, threats, prelitigation, petitions, sham, probable cause, rights, infringement, baseless, cards, district court, players, threat of litigation, correspondence, lawsuit, antitrust, enjoyed, incidental use, parody, libel, actual litigation, summary judgment, private party, good faith, threatening, good-faith, discovery, proximate, baseball, likeness

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN1 Antitrust & Trade Law, Regulated Industries

The Noerr-Pennington doctrine provides general immunity from antitrust liability to private parties who petition the government for redress, notwithstanding the anticompetitive purpose or consequences of their petitions.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN2 Noerr-Pennington Doctrine, Sham Exception

Although broad and extensive, Noerr-Pennington immunity is not a shield for a petitioner whose conduct, although 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.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN3 Exemptions & Immunities, Noerr-Pennington Doctrine

The court has established 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 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. 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.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN4 Exemptions & Immunities, Noerr-Pennington Doctrine

To ascertain "baselessness," a court must consider whether the litigant had "probable cause" to initiate the legal action. If there is probable cause, the defendant automatically enjoys Noerr-Pennington immunity, and the second, subjective motivation prong of the Professional Real Estate test becomes irrelevant. Probable cause to sue may exist when the law is unsettled or when an action is arguably warranted by existing law or at the very least is based on an objectively good faith argument for the extension of existing law.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN5 Exemptions & Immunities, Noerr-Pennington Doctrine

Pre-litigation threats of suit enjoy the same immunity as litigation itself, so long as the threats are not shams.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN6 Noerr-Pennington Doctrine, Sham Exception

Whether or not pre-litigation threats are consummated, such threats enjoy the same level of protection from liability as litigation itself. In addition, when considering whether pre-litigation threats enjoy Noerr-Pennington immunity, the court concludes that a court must apply the two-part sham test.

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

182 F.3d 1132, *1132L 1999 U.S. App. LEXIS 14618, **1L51 U.S.P.Q.2D (BNA) 1253, ***1253

Civil Procedure > ... > Discovery > Methods of Discovery > 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 > 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

HN7 [down] **Standards of Review, De Novo Review**

The court reviews the grant or denial of summary judgment de novo, applying the same legal standard used by the district court pursuant to [Fed. R. Civ. P. 56\(c\)](#). Summary judgment is appropriate 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\(c\)](#).

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN8 [down] **Exemptions & Immunities, Noerr-Pennington Doctrine**

In the Noerr-Pennington context, a court may decide probable cause as a matter of law at the summary judgment stage when a defendant raises Noerr-Pennington immunity as a defense and the predicate facts are undisputed.

Torts > ... > Invasion of Privacy > Appropriation > General Overview

HN9 [down] **Invasion of Privacy, Appropriation**

The law recognizes an incidental use exception to its right of publicity law that applies when a person's name or likeness is used for purposes other than taking commercial advantage of his reputation, prestige, or other value associated with him.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > ... > Freedom of Speech > Defamation > General Overview

Torts > ... > Defenses > Privileges > Absolute Privileges

Torts > Intentional Torts > Defamation > Libel

HN10 [down] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A defendant who has probable cause to threaten litigation and makes no assertion beyond the legal and factual bases for the threats, may enjoy *Noerr-Pennington* immunity from a claim of libel.

Counsel: James W. Tilly (Craig A. Fitzgerald with him on the briefs), Tilly & Associates, Tulsa, Oklahoma, for Plaintiff - Appellant.

Russell S. Jones, Jr. (William E. Quirk and Leslie A. Greathouse of Shughart Thomson & Kilroy, Kansas City, Missouri, and James E. Weger of Jones, Givens, Gotcher & Bogan, Tulsa, Oklahoma, with him on the brief), Shughart Thomson & Kilroy, Kansas City, Missouri, for Defendant - Appellee.

Judges: Before EBEL, McWILLIAMS and LUCERO, Circuit Judges. EBEL, Circuit Judge, dissenting.

Opinion by: LUCERO

Opinion

[***1254] [*1134] LUCERO, Circuit Judge.

This case requires us to decide whether *Noerr-Pennington* immunity can attach to threats of litigation made with probable cause. Applying the "objectively baseless" test articulated in *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993), the district court concluded that the non-consummated threats of a lawsuit made by the Major League Baseball Players Association to Cardtoons and Champs Marketing, Inc., enjoys *Noerr-Pennington* [**2] protection. We exercise jurisdiction pursuant to *28 U.S.C. § 1291*, and affirm.

I

Cardtoons, L.C. ("Cardtoons"), produces parody trading cards that feature caricatures of active major league baseball players.¹ Cardtoons contracted with Champs Marketing, Inc. ("Champs"), an Ohio corporation, to print the cards. Major League Baseball Players Association ("MLBPA"), the exclusive collective bargaining agent for all active major league baseball players, is the assignee of the publicity rights of current players and handles licensing agreements authorizing the use of their identities.

In a letter to Cardtoons dated June 18, 1993 ("Cardtoons letter"), MLBPA claimed that by producing and selling the cards, Cardtoons was "violating the valuable property rights of MLBPA [**3] and the players." The MLBPA threatened to "pursue its full legal remedies" if Cardtoons refused to cease production and sale of the cards. Appellant's App. at 8-9. In a similar letter dated the same day ("Champs letter"), MLBPA also threatened Champs with litigation if it did not stop "participating in Cardtoons's illegal activities." Appellant's App. at 10. Upon receipt of the letter, Champs notified Cardtoons that it intended to stop printing the cards.

Four days later, Cardtoons filed suit in federal district court for a declaratory judgment on the issue of whether its cards violated MLBPA's publicity and intellectual property rights. Also seeking injunctive relief,² Cardtoons asked the court to bar MLBPA from interfering with Champs and other third parties involved in the production and sale of the cards. Additionally, the suit alleged that MLBPA had tortiously interfered with Cardtoons's contractual relations with Champs. MLBPA moved to dismiss the complaint for lack of subject matter jurisdiction, and filed counterclaims

¹ A more thorough description of the humorous cards, as well as the less humorous litigation surrounding the cards' production, can be found in *Cardtoons, L.C. v. Major League Baseball Players Assoc.*, 95 F.3d 959, 962-64 (10th Cir. 1996).

² As part of its request for injunctive relief, Cardtoons sought a temporary restraining order and preliminary injunction to prevent MLBPA from interfering with Cardtoons's contractual relations with Champs. Cardtoons subsequently withdrew its request for these additional remedies when they were rendered moot by Champs's decision to stop producing the cards.

seeking declaratory judgment, injunctive relief, and damages under Oklahoma's publicity rights statute, [Oklahoma Stat. tit. 21 § 839.1](#) and [839.2](#) (1993).

[**4] Unless Cardtoons was entitled to produce and sell the cards, as alleged in the claim for declaratory judgment, it could not recover damages on the tortious interference claims. Therefore, the parties agreed that before the [***1255] adjudication of Cardtoons's tort claim, a magistrate judge should conduct an evidentiary hearing and issue a report limited to Cardtoons's declaratory judgment claim and MLBPA's counterclaims.

[*1135] Concluding that Cardtoons's activities violated the baseball players' rights of publicity under Oklahoma law, the magistrate recommended judgment on these claims in favor of MLBPA. The district court initially adopted the recommendation. See *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 838 F. Supp. 1501 (N.D. Okla. 1993). Following the Supreme Court's decision in [Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 127 L. Ed. 2d 500, 114 S. Ct. 1164 \(1994\)](#), however, the district court concluded that the parody cards enjoyed [First Amendment](#) protection against MLBPA's infringement claims. Accordingly, the court vacated its initial decision and entered judgment for Cardtoons. See [Cardtoons, L.C. v. Major League Baseball Players Ass'n, 868 F. Supp. 1266 \(N.D. Okla. 1994\)](#) ("Cardtoons I"). We affirmed, holding that the parody cards are "an important form of entertainment and social commentary that deserve [First Amendment](#) protection." [Cardtoons, L.C. v. Major League Baseball Players Assoc., 95 F.3d 959, 976 \(10th Cir. 1996\)](#) ("Cardtoons II").

Having prevailed on the declaratory judgment claim, Cardtoons returned to the district court to pursue its claims for damages against MLBPA. In addition to the claim for tortious interference with contract, Cardtoons asserted new claims for prima facie tort, libel, and negligence, all stemming from the allegations contained in the Cardtoons and Champs letters. Concluding that both letters were immune from liability under the "Noerr-Pennington" doctrine, the district court granted summary judgment for MLBPA and dismissed all of Cardtoons's state law claims. See [Cardtoons, L.C., v. Major League Baseball Players Ass'n, 1998 U.S. Dist. LEXIS 22242](#), No. 93-C-576-E (N.D. Okla. Mar. 12, 1998) ("Cardtoons III"). Cardtoons challenges the court's application of the *Noerr-Pennington* doctrine and appeals the grant of summary judgment.³ Cardtoons also appeals the court's decision to stay discovery pending [**6] its ruling on MLBPA's motion for summary judgment.

II

As originally articulated, [HN1](#) the *Noerr-Pennington* doctrine provides general immunity from antitrust liability to private parties who petition the government for redress, notwithstanding the anticompetitive purpose or consequences of their petitions. See [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-38, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#) (establishing immunity for petitions to state legislature); see also [United Mine Workers of America v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#) (extending *Noerr* immunity to petitions of public officials). The Court later extended *Noerr-Pennington* immunity to the right of access to courts. See California [**7] [Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#) (citations omitted). Moreover, because it emanates from the [First Amendment](#) right of petition, see [Bright v. Moss Ambulance Service, Inc., 824 F.2d 819, 821 n.1 \(10th Cir. 1987\)](#) (quoting [City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 399, 55 L. Ed. 2d 364, 98 S. Ct. 1123 \(1978\)](#)), *Noerr-Pennington* immunity stands independent of its aborigine roots in antitrust, see, e.g., [Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 742-43, 76 L. Ed. 2d 277, 103 S. Ct. 2161 \(1983\)](#) (immunizing employer from prosecution for unfair labor practice even if an otherwise valid suit against employee is driven by a retaliatory motive); [NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913-14, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 \(1982\)](#) (immunizing a nonviolent business boycott seeking to vindicate economic and equal rights); [South Dakota v. Kansas City Southern Indus., Inc., 880 F.2d 40, 50 \(8th Cir. 1989\)](#) (immunizing defendant from claim of interference with contractual relations).

³ In its briefs, Cardtoons seems to appeal the grant of summary judgment only with respect to the Champs letter. We note, however, that our conclusions would not change if the appeal also involved the Cardtoons letter.

[*1136] [HN2](#) Although broad and extensive, *Noerr-Pennington* immunity is [***8] not a shield for a petitioner whose conduct, although "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." [Noerr, 365 U.S. at 144.](#) [HN3](#) The Supreme Court has established 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, [***1256] the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor," [Noerr, 365 U.S. at 144](#), through the "use [of] the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon," [Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 113 L. Ed. 2d 382, 111 S. Ct. 1344 \(1991\)](#). 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.

[Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc., 508 U.S. 49, 60-61, 123 L. Ed. 2d 611, 113 S. Ct. 1920 \(1993\).](#) [HN4](#)

To ascertain "baselessness," a court must consider whether the litigant had "probable cause" to initiate the legal action. [Id. at 62](#). If there is probable cause, the defendant automatically enjoys *Noerr-Pennington* immunity, and the second, subjective motivation prong of the *Professional Real Estate* test becomes irrelevant. See [id. at 63](#). Probable cause to sue may exist when the law is unsettled or when an "action [is] arguably 'warranted by existing law' or at the very least [is] based on an objectively 'good faith argument for the extension . . . of existing law.'" [Id. at 65](#) (quoting [Fed. R. Civ. P. 11](#)).

Neither the Supreme Court nor this circuit has directly addressed the issue of whether *Noerr-Pennington* immunity attaches to the mere threat of a law [***10] suit. Confronted with this issue, however, three other circuits have concluded that [HN5](#) prelitigation threats of suit enjoy the same immunity as litigation itself, so long as the threats are not shams. See [McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1558-60 \(11th Cir. 1992\)](#); [CVD, Inc. v. Raytheon Co., 769 F.2d 842, 850-51 \(1st Cir. 1985\)](#); [Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1367 \(5th Cir. 1983\)](#). In so holding, the Fifth Circuit reasoned that "it would be absurd to hold that [petitioning immunity] does not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning." [Coastal States, 694 F.2d at 1367](#). Commentators have agreed with this extension and have further developed the policy rationales behind it. See, e.g., Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 205e at 237 (rev. ed. 1997) (withholding immunity from prelitigation communication would curb practices that "provide useful notice and facilitate the resolution of controversies"); Herbert Hovenkamp, *Federal Antitrust Policy* § 18.3d at 644 (1994) (immunizing prelitigation threats [***11] is vital to "our entire dispute resolution process[, which] is designed to encourage people to resolve their differences if possible before litigating").

Applying *Noerr-Pennington* protection to prelitigation threats is especially important in the intellectual property context, where warning letters are often used as a deterrent against infringement. See, e.g., [Matsushita Electronics Corp. v. Loral Corp., 974 F. Supp. 345, 359 \(S.D.N.Y. 1997\)](#) (concluding that policing letters sent to suspected patent infringers enjoyed *Noerr-Pennington* immunity); [Thermos Co. v. Igloo Products Corp., 1995 U.S. Dist. LEXIS 14221, 1995 WL 842002](#), *4 (N.D. Ill. Sept. 27, 1995) (same, for policing letters to alleged trademark infringers); see generally Ronald B. Colley, *Notifications of Infringement and Their Consequences*, 77 J. Pat. & Trademark Off. Soc'y 246, 246 (1995) (describing notification of suspected intellectual property infringers as a "common reaction" of rights holders).

[*1137] We adopt the legal and policy rationales [***12] that have informed other circuits' extension of *Noerr-Pennington* immunity to prelitigation threats, and hold that [HN6](#) whether or not they are consummated, such threats enjoy the same level of protection from liability as litigation itself. In addition, when considering whether

prelitigation threats enjoy *Noerr-Pennington* immunity, we conclude that we must apply the two-part sham test of *Professional Real Estate*.

The dissent would bifurcate the test for granting *Noerr-Pennington* immunity by applying the more lenient *Professional Real Estate* standard when a party files suit, while requiring a party who merely issues a threat to demonstrate that he acted both in "good-faith" and as a "proximate prologue to actual or imminent litigation." Diss. Op. at 6. This approach creates an incentive to litigate, and would not, as the dissent maintains, protect poorly financed entities like Champs from "private bullying communication." Diss. Op. at 4. Instead, such companies would become more vulnerable to ruinous lawsuits, as the threatening letter takes the form of a legal complaint.

[**13]

All of the prelitigation cases from other circuits were decided before *Professional Real Estate*, and provide us with no uniform standard to determine when a threat to litigate is worthy of *Noerr-Pennington* protection. See, e.g., [McGuire Oil, 958 F.2d at 1560-61](#) & n.12 (applying subjective test and objectively baseless test); [CVD, 769 F.2d at 851](#) (applying both a "bad faith" test and a test for clear and convincing evidence that the defendant's claim was objectively baseless); *but see Coastal States, 694 F.2d at 1372* ("A litigant should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for judicial relief is a significant motivating factor underlying the suit."). We note, however, that to the extent these cases are inconsistent with *Professional Real Estate*, they are unfaithful to the *Noerr-Pennington* doctrine. See [Professional Real Estate, 508 U.S. at 57, 60](#) (describing the "objective reasonableness" test as part of the "original formulation" of the *Noerr-Pennington* sham exception, and declaring that "fidelity to precedent compels us to reject a purely subjective definition of 'sham'"). Indeed, the Eleventh Circuit, when applying a test for sham litigation after the Supreme Court had granted certiorari but before it had decided *Professional Real Estate*, implied that whatever test the Supreme Court articulates for granting immunity for litigation under *Noerr-Pennington* must similarly apply to prelitigation threats. See [McGuire Oil, 958 F.2d at 1560-61](#) & n.12.

[**14]

[***1257] III

"[HN1](#)[↑] We review the grant or denial of summary judgment de novo, applying the same legal standard used by the district court pursuant to [Fed. R. Civ. P. 56\(c\)](#)." [Kaul v. Stephan, 83 F.3d 1208, 1212 \(10th Cir. 1996\)](#) (citation and internal quotation omitted). Summary judgment is appropriate "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\(c\)](#). [HN8](#)[↑] In the *Noerr-Pennington* context, "a court may decide probable cause as a matter of law" at the summary judgment stage when a defendant raises *Noerr-Pennington* immunity as a defense and the predicate facts are undisputed. [Professional Real Estate, 508 U.S. at 63](#).

A

If MLBPA had probable cause to threaten Champs with litigation, the Champs letter enjoys *Noerr-Pennington* immunity under the *Professional Real Estate* test. To determine whether there was probable cause, we must first consider the validity of the underlying threatened action--the infringement suit against Cardtoons for its [**15] parody cards--and then turn to the validity of a cause of action against Champs as the printer of the cards.

[*1138] Prior to our decision in *Cardtoons II*, the only federal appellate court decision addressing the constitutional tensions inherent in a celebrity parody provided some legal support for MLBPA's allegations against Cardtoons. See [Cardtoons II, 95 F.3d at 970](#) (discussing [White v. Samsung Electronics America, Inc., 971 F.2d 1395 \(9th Cir. 1992\)](#)). At the time of its prelitigation threats against Champs, MLBPA therefore had probable cause to believe that Cardtoons's parody cards infringed its publicity rights. Furthermore, as

182 F.3d 1132, *1138 (1999 U.S. App. LEXIS 14618, **15 L 51 U.S.P.Q.2D (BNA) 1253, ***1257

Cardtoons II demonstrates, MLBPA's infringement claim was premised on a reasonable argument that its publicity rights outweighed Cardtoons's free speech rights. See [*Cardtoons II, 95 F.3d at 970-76*](#) (applying balancing test and concluding that Cardtoons's speech rights prevail over MLBPA's property rights). Therefore, although MLBPA's infringement claim did not prevail, our prior adjudication shows that "a similarly situated reasonable litigant could have perceived some likelihood of success." [*Professional Real Estate, 508 U.S. at 65*](#). As [**16] such, the district court could reasonably conclude that MLBPA's threats against Cardtoons were "an objectively plausible effort to enforce rights" and deserved *Noerr-Pennington* protection. *Id.*

Cardtoons argues that even if MLBPA's threats against Cardtoons enjoy immunity, our decision in *Cardtoons II* does not resolve the issue of whether *Noerr-Pennington* immunity attaches to the Champs letter. In *Cardtoons II*, we applied Oklahoma's statutory right of publicity law. Here, Cardtoons asserts, Ohio's common law of publicity rights controls because Ohio is the locus of Champs's conduct and its state of residence, and therefore has the most significant contacts to the torts alleged. Ohio's "incidental use" exception to the right of publicity, Cardtoons contends, provides MLBPA with less protection for its publicity rights than it enjoyed under Oklahoma law. Under Ohio law, therefore, MLBPA lacked probable cause for its threats against Champs.

HNg[] Ohio law recognizes an incidental use exception to its right of publicity law that applies when a person's name or likeness is used "for purposes other than taking [commercial] advantage of his reputation, prestige, [**17] or other value associated with him." [*Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 351 N.E.2d 454, 459 n.4*](#) (Ohio), *rev'd on other grounds*, [*433 U.S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849 \(1977\)*](#) (quotation and internal citation omitted). In our prior adjudication, we specifically noted that Oklahoma's right of publicity statute also contains a provision that is analogous to the concept of "incidental use." See [*Cardtoons II, 95 F.3d at 968*](#). We discern no marked difference between the incidental use exception in Oklahoma and Ohio. In both states the applicability of the exception turns on the degree to which a defendant derives commercial benefit from its use of the plaintiff's name or likeness. See 12 Okla. Stat. tit. § 1449(E) (1999) (stating that whether the use of a person's "likeness [is] so directly [***1258] connected with commercial" activity as to constitute a violation of the right of publicity presents a question of fact); [*Zacchini, 351 N.E.2d at 458 n.4*](#) (stating that although the incidental use exception under Ohio law does not apply to the commercial exploitation of another's likeness, the mere fact that a defendant "seeks to make profit" from [**18] his endeavor is not enough to establish commercial use).

Moreover, MLBPA had a colorable claim for infringement under Ohio law. One Ohio court has applied the incidental use exception in a situation in which the defendant used an Olympic athlete's name and likeness in the context of accurate, historical information on disposable drinking cups. See [*Vinci v. American Can Co., 69 Ohio App. 3d 727, 591 N.E.2d 793, 794 \(Ohio Ct. App. 1990\)*](#). Because this use was not meant to support or promote the cups, the court found it to be merely incidental. See *id.* In our conclusion in *Cardtoons II* that the Oklahoma incidental use exception was inapplicable to the parody cards, we noted that "the players were specifically [*1139] selected for their wide market appeal," and the use of their likeness was "directly connected with a proposed commercial endeavor." [*Cardtoons II, 95 F.3d at 968*](#). Accordingly, MLBPA's claim would not have been foreclosed under Ohio law.

Even if MLBPA had probable cause to assert a claim of infringement against Champs in Ohio, Cardtoons argues, MLBPA lacked probable cause for the Champs letter because as a printer, Champs was a passive actor and is liable as a contributory [**19] tort infringer only if it knew or had reason to know that it was aiding and abetting an infringement. See, e.g., [*Misut v. Mooney, 124 Misc. 2d 95, 475 N.Y.S.2d 233, 236 \(N.Y. Sup. Ct. 1984\)*](#); [*Maynard v. Port Publications, Inc., 98 Wis. 2d 555, 297 N.W.2d 500, 507 \(Wis. 1980\)*](#). The Champs letter, however, provided the very notice that *Misut* and *Maynard* require. Cardtoons cannot argue that Champs was not liable unless it had notice of an infringement, while also contending that MLBPA rendered itself ineligible for *Noerr-Pennington* immunity by providing the required notice.

Moreover, the law of contributory infringement in the publicity rights context is not so settled that it would foreclose MLBPA from making a good faith argument for the extension of existing law by asserting a claim against Champs. See 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 3.7[E] (1999) (arguing that

contributory infringement of a publicity right by a "passive actor" is a colorable claim for which there should be liability).

[**20]

We therefore need not resolve the conflict of law and publicity rights issues that Cardtoons raises, because under either potentially controlling legal regime, MLBPA would have had probable cause on its infringement claim against Champs. Accordingly, the Champs letter enjoyed *Noerr-Pennington* immunity as a threat of litigation.

B

Cardtoons contends that *Noerr-Pennington* immunity does not extend to its libel claim against MLBPA, which is based not on the MLBPA's threat of litigation but on the allegations in the Champs letter that Cardtoons violated the law. Specifically, the Champs letter states, "[MLBPA] believes that the activities of [Cardtoons] violate the valuable property rights of publicity of the MLBPA and the players themselves." Appellant's App. at 10. The letter contains no further statements of fact or law concerning Cardtoons and its activities, except to characterize them as "illegal." *Id.*

We hold that [HN10](#) a defendant like MLBPA, who has probable cause to threaten litigation and makes no assertion beyond the legal and factual bases for the threats, may enjoy *Noerr-Pennington* immunity from a claim of libel. This holding is not inconsistent [\[**21\]](#) with [*McDonald v. Smith, 472 U.S. 479, 86 L. Ed. 2d 384, 105 S. Ct. 2787 \(1985\)*](#). There, the Court held that the [*First Amendment*](#) does not provide absolute immunity for petitions to the government that express libelous and damaging falsehoods. See [*id. at 485*](#). In so holding, the Court relied on the principle at the core of the *Noerr-Pennington* doctrine that "baseless litigation is not immunized by the [*First Amendment*](#) right to petition." [*Id. at 484*](#) (quoting [*Bill Johnson's Restaurants, 461 U.S. at 743*](#)).

We have already concluded that MLBPA's threats of litigation were not baseless because it had probable cause to assert a publicity rights infringement claim against Cardtoons. The statements that Cardtoons labels as libelous are coextensive with the threats of litigation to which we have already attached *Noerr-Pennington* immunity. If Cardtoons's argument prevails, a defendant would be exposed to libel claims even if his litigation or threat to litigate were supported by probable cause. By allowing an alternative cause of action against petitions that are otherwise eligible for immunity, the argument renders *Noerr-Pennington* a nullity.

[*1140] IV [\[**22\]](#)

Cardtoons argues that it was prejudiced by the district court's stay of discovery pending [\[***1259\]](#) its adjudication of MLBPA's summary judgment motion. It claims the stay barred it from attempting to discover whether MLBPA had any intent to pursue legal action against Champs, and whether MLBPA had performed any research on potential legal claims prior to issuing the threatening letters. Furthermore, Cardtoons claims that it hoped to discover evidence of MLBPA's subjective intent to dissuade Champs from performing its legitimate duties under its contract with Cardtoons.

Under the *Professional Real Estate* test, however, MLBPA's subjective intent would have been relevant only if its threats were objectively baseless. MLBPA presented sufficient predicate facts to demonstrate to the district court that as a matter of law, MLBPA had probable cause to threaten suit against Cardtoons and Champs, and that therefore its threats were not objectively baseless. Having affirmed the district court's conclusion that MLBPA is immune from all of Cardtoons's state law claims, we must affirm the district court's stay of discovery. See [*Professional Real Estate, 508 U.S. at 65-66*](#) (holding that without [\[**23\]](#) proof that defendant's infringement action was objectively baseless, circuit court correctly denied request for further discovery).

The district court's opinion is **AFFIRMED**.

Dissent by: EBEL

Dissent

EBEL, Circuit Judge, dissenting

Although I agree with much of the majority opinion, I respectfully dissent from its holding that (1) prelitigation threats, "whether or not they are consummated . . . enjoy the same level of protection from liability as litigation itself" under the [First Amendment](#) doctrine of *Noerr-Pennington*; and (2) "when considering whether prelitigation threats enjoy *Noerr-Pennington* immunity . . . we must apply the two-part sham test" of [Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc. \(PRE\)](#), 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993). Maj. Op. at 9. The first holding is flawed because it assumes that all threats of litigation between *private parties* constitute petitions to the government (which is solely what *Noerr-Pennington* protects). The second holding is flawed because *PRE* determines only whether an acknowledged governmental petition is a sham undeserving of *Noerr-Pennington* immunity, but [**24] does not determine whether purely private communications that never go to the government should be considered a governmental petition in the first place. Therefore, granting *Noerr-Pennington* immunity to all prelitigation threats that satisfy *PRE*'s sham test wrongly extends *Noerr-Pennington* by immunizing a whole host of prelitigation threats that cannot meet even the threshold criteria of facially presenting a petition to the government. Considered together, the majority's holdings may be read to stand for the proposition that all private correspondence between private parties that threaten objectively reasonable litigation shall be deemed to be petitions to government entitled to *Noerr-Pennington* immunity. To state this proposition is to refute it.

Starting with fundamentals, the *Noerr-Pennington* doctrine, which provides immunity for petitions to the government, derives from the [First Amendment](#) right "to petition the government for a redress of grievances." U.S. Const. amend. I (emphasis added). The Supreme Court has established that actual litigation is a form of petitioning the government protected by the [First Amendment](#). See [California Motor Transport](#) [**25] [Co. v. Trucking Unlimited](#), 404 U.S. 508, 510-11, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1971) (defendants entitled to *Noerr-Pennington* for instituting state and federal proceedings because right to petition includes "right of access to the courts"); *PRE*, 508 U.S. at 60 (litigation is protected under *Noerr-Pennington* if it is not sham). However, it is an unwarranted leap neither compelled by the text of the [First Amendment](#), [*1141] nor the *Noerr-Pennington* line of cases from the Supreme Court or our circuit, to conclude that all purely private correspondence threatening suit constitutes a "petition [to] the government" under the [First Amendment](#).¹

Indeed, the facts of this case belie any suggestion that the MLBPA actually petitioned the government with regard to the threatening letter at issue [**26] here--specifically, the letter to Champs. The MLBPA's cease-and-desist letter to Champs threatening suit was never sent to the government; did not ask the government for any response or "redress of grievances"; was not even known to the government prior to Cardtoons' declaratory judgment action against the MLBPA; and did not ever result in any litigation. It seems an unreasonable stretch to shield this purely private correspondence between the MLBPA and Champs under the *Noerr-Pennington* aegis as a petition to the government.

Besides this textual problem, according *Noerr-Pennington* immunity to purely private [**1260] correspondence poses practical problems. First, the government has supervisory power to prevent the misuse of actual petitions to the government. With litigation, for example, a district court has power under [Fed. R. Civ. P. 11](#) to supervise pleadings, motions, and other representations "presented to the court," and to issue sanctions for violations of the rule. In contrast, the government has much more limited power to regulate the misuse of purely private correspondence because such correspondence will seldom be brought to the government's attention.

¹ In fact, the majority admits that "neither the Supreme Court nor this circuit has directly addressed the issue of whether *Noerr-Pennington* immunity attaches to the mere threat of a law suit." Maj. Op. at 8.

Second, the majority's [**27] extension of *Noerr-Pennington* immunity to prelitigation threats will prove difficult to implement. How far back in time should *Noerr-Pennington* immunity extend prior to an actual petition to the government? Litigation is often preceded by lengthy communications of an increasingly acrimonious nature. How early into the process would the majority extend immunity? Would the majority go back to include the first tentative statement of disagreement over the interpretation of a contract, perhaps even before litigation is contemplated? Would it apply *Noerr-Pennington* even earlier to the structuring of business deals in the first instance, where considerations of potential litigation are often spoken or unspoken factors? Does the word "litigation" have to be explicitly mentioned in the communication in order for it to be privileged, or may it be implied?

Here, all these difficult questions are enormously compounded because no litigation ever actually resulted between the MLBPA and Champs. The threatening cease-and-desist letter from the MLBPA did not at any time--even to today--culminate in an actual petition to the government against Champs. Indeed, Cardtoons suggests that the [**28] MLBPA commonly uses such threats of expensive litigation to bully poorly-financed entities who might tarnish the image of professional baseball players -- regardless of whether the MLBPA has any intention to petition the government with a follow-up lawsuit. If this claim can be proven, then it escapes me why such private bullying communication should receive *Noerr-Pennington* immunity as if it were a petition to the government just because it may state some theoretical but objectively supported claim. When a large company has a practice of threatening others in purely private correspondence without any intent or custom to follow through with actual litigation, there is no basis for awarding *Noerr-Pennington* immunity under the fiction that the company has petitioned the government. Granting *Noerr-Pennington* immunity to this type of correspondence declares open season for companies to engage in libelous, anticompetitive, or otherwise unlawful communications without fear of legal repercussion.

[*1142] These textual and practical problems illustrate the imprudence of extending *Noerr-Pennington* immunity to all prelitigation threats. Simply put, if all such threats between private [**29] parties constitute petitions to the government, as the majority premises, then the *First Amendment's* protection of the right "to petition the government" is transmogrified into a generalized constitutional immunity for private disputes not involving the government in any form. Rather than suffer such a revision of the First *Amendment*, I would revise the majority's premise.

Noerr-Pennington should protect only prelitigation threats that have a strong and compelling nexus to actual litigation such that the threat may be considered an incipient part of a petition to the government. To prove this nexus, I would require the party invoking *Noerr-Pennington* to show that its prelitigation threat was a (1) good-faith, (2) objectively reasonable, and (3) proximate prologue to actual or imminent litigation.²

[**30] Each element of this three-part test is essential to properly limit the reach of *Noerr-Pennington* with respect to prelitigation threats. *First*, the prelitigation threat must be in good faith to ensure that *Noerr-Pennington* immunity would not protect a private party who sends a threatening communication without any actual bona-fide intent to petition the government. This good-faith requirement is consistent with all circuit cases applying *Noerr-Pennington* to threats of litigation, as these cases implicitly require such threats to be in good-faith. See *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1559-60 (11th Cir. 1992) (stating that sham exception subjects to antitrust liability defendant whose activities, including threats of litigation, "are not genuinely aimed at procuring favorable government action at all" (emphasis added; quotations omitted)); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985) ("We hold that the threat of unfounded trade secrets litigation *in bad faith* is sufficient to [***1261] constitute a cause of action under the antitrust laws, provided that the other essential elements of a violation are proven." (emphasis added)); [**31] *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367, 1372-73 (5th Cir. 1983) (finding threats of litigation and ensuing litigation protected by petitioning immunity because they were in good faith); *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1200, 1203 (8th Cir. 1982) (refusing to grant *Noerr-Pennington* immunity to "a broad pattern of litigation threats and harassment" where they were not "in good faith"

² This test differs from the majority's test because the majority would grant *Noerr-Pennington* immunity solely on the ground of an objectively reasonable basis for the threat without also requiring that the threat be in good faith and proximate to actual or imminent litigation.

but rather "clearly constituted *bad faith* unlawful harassment" (emphasis added); cf. [American Potato Dryers v. Peters, 184 F.2d 165, 173 \(4th Cir. 1950\)](#) (in pre-*Noerr-Pennington* case, holding that "threats of suit . . . made in *good faith*" were not antitrust violations (emphasis added)).

Furthermore, contrary to what the majority intimates, see Maj. Op. at 9-10 n.5, 16-17, this requirement is consistent with *PRE*'s two-part sham test. That test engages in a subjective inquiry only if the litigation first is determined to be objectively baseless. See *PRE*, 508 U.S. at 60. By its facts and terms, however, *PRE* applies to *litigation*, i.e., an actual lawsuit. See *id.* ("We now outline a two-part definition of 'sham' [*32] *litigation*. First, the *lawsuit* must be objectively baseless . . . Only if the challenged *litigation* is objectively meritless may a court examine a *litigant's* subjective motivation." (emphasis added).) *PRE*'s sham litigation test determines whether a petition to the government (in lawsuit form) qualifies for *Noerr-Pennington* immunity. However, *PRE* provides no guidance on whether or when a *prelitigation threat* between private parties constitutes as a petition to the government. Hence, before we can apply *PRE* to determine which prelitigation [*1143] threats, as petitions to the government, merit *Noerr-Pennington* immunity, we first must decide which prelitigation threats amount to petitioning activity. Requiring good-faith in this threshold inquiry, therefore, does not conflict with *PRE*, as *PRE* does not come into play until after the prelitigation threat is determined to be a petition to the government.³ On the other hand, granting *Noerr-Pennington* immunity to all prelitigation threats that satisfy *PRE*, without winnowing out threats that cannot qualify as petitions to the government, erroneously extends *Noerr-Pennington* immunity beyond [*33] [First Amendment](#) activity.

Second, the objectively reasonable test is necessary to prevent *Noerr-Pennington* immunity from attaching to prelitigation threats that would have no basis as an actual petition, and therefore should not receive protection as petitioning activity. This element is coextensive with the objective prong of *PRE*.

Third, the proximity element ensures that *Noerr-Pennington* would immunize only those communications that are attendant to imminent or actual litigation and consequently may be considered [*34] an initial part of the petitioning process. If no petition actually results, it should be more difficult to establish proximity because the party claiming immunity should have to show some intervening cause that aborted an otherwise imminent petition.

Applied to the instant case, the three-part test cannot be met. Although I agree with the majority that the prelitigation threat in the MLBPA's letter to Champs had an objective basis, I do not believe the record in its undeveloped state allows us to determine whether the MLBPA's correspondence with Champs was in good-faith or proximate to actual litigation. As Cardtoons complains, the district court stayed discovery on the MLBPA's subjective intent regarding its threats pending summary judgment. I therefore would reverse the district court's entry of summary judgment in favor of the MLBPA on the ground that the MLBPA enjoyed *Noerr-Pennington* immunity, and remand to allow Cardtoons to proceed with discovery on the MLBPA's subjective intent in threatening Champs with litigation, and the proximity of that threat to actual litigation.

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³ As a result, the majority is wrong to imply that *PRE* contradicts the earlier circuit cases requiring threats of litigation to be in good faith in order to receive *Noerr-Pennington* immunity. While *PRE* may limit those cases to the extent that they also require actual litigation to be brought in good faith without first inquiring into objective baselessness, *PRE* does not touch upon the subjective test for whether threats of litigation should receive petitioning immunity.



Full Draw Prods. v. Easton Sports, Inc.

United States Court of Appeals for the Tenth Circuit

June 29, 1999, Filed

No. 98-1026

Reporter

182 F.3d 745 *; 1999 U.S. App. LEXIS 14616 **; 1999-2 Trade Cas. (CCH) P72,563

FULL DRAW PRODUCTIONS, a Colorado corporation, Plaintiff-Appellant, v. EASTON SPORTS, INC., a California corporation; PAPES, INC., a Kentucky corporation; BROWNING ARMS COMPANY, a Utah corporation; PRECISION SHOOTING EQUIPMENT, a Delaware corporation; HOYT U.S.A., INC., a California corporation; BEAR ARCHERY, INC., a Delaware corporation; ACI CONSOLIDATED, INC., a Michigan corporation; OUTTECH, INC., a New Jersey corporation; EHLERT PUBLISHING COMPANY, a subsidiary of Affinity Group, Inc.; ARCHERY MANUFACTURING AND MERCHANTS ORGANIZATION, a Florida Trade Association; SAUNDERS ARCHERY CO., INC., a Nebraska corporation; NEW ARCHERY PRODUCTS CORPORATION, an Illinois corporation; DARTON ARCHERY, a Michigan corporation; and BEMANS U.S.A., INC., a Utah corporation, Defendants-Appellees.

Prior History: [**1] Appeal from the United States District Court for the District of Colorado. (D.C. No. 97-WY-1121-CB). D.C. Judge CLARENCE A. BRIMMER, JR.

Disposition: Reversed and remanded.

Core Terms

boycott, trade show, archery, antitrust, alleges, defendants', competitor, second amended complaint, Sherman Act, district court, consumers, space, group boycott, monopolize, customers, anti trust law, anticompetitive, exhibition, suppliers, producer, exhibitors, relevant market, manufacturers, output, manufacturers and distributors, distributors, conspiracy, quotations, boycotted, destroy

LexisNexis® Headnotes

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

HN1 [down arrow] Motions to Dismiss, Failure to State Claim

In an appeal from a dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#), the court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN2 [down arrow] Jurisdiction, Jurisdictional Sources

See [28 U.S.C.S. § 1337](#).

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

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

HN3 [down arrow] Standards of Review, De Novo Review

An appellate court reviews de novo a district court's dismissal of a cause of action for failure to state a claim upon which relief can be granted. The court upholds a dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#) only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN4 [down arrow] Regulated Practices, Price Fixing & Restraints of Trade

Sherman Act [§ 1](#), [15 U.S.C.S. § 1](#), prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

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 > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN5 [down arrow] Scope, Monopolization Offenses

Sherman Act [§ 2](#), [15 U.S.C.S. § 2](#), prohibits monopolizing, or attempting to monopolize, or combining or conspiring with any other person or persons, to monopolize any part of the trade or commerce among the several states.

Antitrust & Trade Law > Clayton Act > Claims

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

HN6 **Clayton Act, Claims**

Clayton Act § 4, [15 U.S.C.S. § 15\(a\)](#), creates a private cause of action for any person who has been injured in his business or property by reason of anything forbidden in the antitrust laws, and provides for treble damages.

Antitrust & Trade Law > Clayton Act > Claims

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN7 **Clayton Act, Claims**

To recover damages under the Clayton Act § 4, [15 U.S.C.S. § 15\(a\)](#), a private plaintiff must show more than injury causally linked to an illegal presence in the market. Rather, the plaintiff 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 defendant's 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 > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > 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 > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN8 **Horizontal Refusals to Deal, Sherman Act**

Classic group boycotts involving conspirators whose market position are horizontal to each other and who cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, are generally per se illegal under the Sherman Act [§ 1, 15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Clayton Act > Scope

[HN9](#)[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Customers can unlawfully boycott to drive out a producer.

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

[HN10](#)[] Private Actions, Remedies

Where an alleged loss stems from a competition-reducing aspect or effect of defendant's behavior, such loss is antitrust injury.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

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

[HN11](#)[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The mere fact that the number of competitors after the boycott matches the number before the boycott does not cure the anticompetitive effect of the boycott, which is the elimination of a competitor by means other than the economic freedom of participants in the relevant market.

Civil Procedure > Pleading & Practice > Pleadings > General Overview

[HN12](#)[] Pleading & Practice, Pleadings

Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief. A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. Conclusory allegations that the defendant violated those laws are insufficient. In the end, what is determinative is whether it cannot be said that the defendant did not have fair notice of the plaintiff's claims.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN13 [blue download icon] **Regulated Practices, Price Fixing & Restraints of Trade**

To state a claim for a violation of the Sherman Act [§ 1, 15 U.S.C. § 1](#), the plaintiff must allege facts which show that the defendant entered a contract, combination, or conspiracy that unreasonably restrains trade in the relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN14 [blue download icon] **Attempts to Monopolize, Elements**

To state a claim for attempted monopolization under the Sherman Act [§ 2, 15 U.S.C. § 2](#), the plaintiff must plead: (1) relevant market, including geographic market and relevant product market; (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt. Factors to be considered in determining dangerous probability include the defendant's market share, the number and strength of other competitors, market trends, and entry barriers.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN15 [blue download icon] **Antitrust & Trade Law, Sherman Act**

To state a claim for conspiracy to monopolize under the Sherman Act [§ 2, 15 U.S.C. § 2](#), the plaintiff must plead: conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy.

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

HN16 [blue download icon] **Monopolies & Monopolization, Actual Monopolization**

To state a monopolization claim under Sherman Act [§ 2, 15 U.S.C. § 2](#), the plaintiff must plead: (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.

Counsel: James A. Jablonski (Harry L. Pliskin with him on the briefs), of Gorsuch Kirgis LLP, Denver, Colorado, for Plaintiff-Appellant.

John M. Peterson (Jonathan T. Howe with him on the brief), of Howe & Hutton, Ltd., Chicago, Illinois, for Defendants-Appellees.

Judges: Before TACHA, EBEL and KELLY, Circuit Judges.

Opinion by: EBEL

Opinion

[*747] **EBEL**, Circuit Judge.

Full Draw Productions ("Full Draw"), an archery trade show promoter, brought an antitrust suit against Easton Sports, Inc., and other co-defendants, who are archery manufacturers and distributors, a publishing company, a representative for archery manufacturers, and an archery trade association (collectively, "defendants"). Full Draw brought a private antitrust suit under Clayton Act § 4, alleging violations of Sherman Act [§§ 1 & 2](#) from defendants' alleged group boycott of Full Draw's Bowhunting Trade Show ("BTS"). [*748] In addition, Full Draw claimed violations of Colorado antitrust laws and common-law tortious interference. The district court dismissed both federal and state antitrust claims under [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim upon which relief can be granted, on the grounds that (1) Full Draw failed to allege antitrust injury, and (2) Full Draw failed to plead sufficiently the elements of Sherman Act offenses. The district court then dismissed the pendent state tortious interference claim. We reverse and remand.

BACKGROUND

Facts

Since this is [HN1](#) an appeal from a dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#), we must "accept[] the well-pleaded allegations of the complaint as true and construe[] them in the light most favorable to the plaintiff." [Yoder v. Honeywell, Inc.](#), 104 F.3d 1215, 1224 (10th Cir.) (quotations and citation omitted), cert. denied, 118 S. Ct. 55 (1997). In that regard, we draw the facts from Full Draw's second amended complaint.¹

Full Draw, a Colorado corporation, was formed to organize and present [*3] a trade show for the archery industry. In 1990, Full Draw held its first BTS, which at the time was the only merchandise mart devoted solely to archery equipment. Archery manufacturers and distributors purchased exhibition space and dealers paid a fee to attend. The corporate defendants (all defendants except the Archery Manufacturing & Merchants Organization ("AMMO")) were, for the most part, the large manufacturers (and some distributors) of archery equipment, and they all rented space and participated in the BTS.

That same year, Full Draw entered into a five-year agreement with AMMO, a trade association to which the other defendants belonged, and in which they actively participated. Under the agreement, Full Draw paid AMMO 10% of its BTS gross revenues in exchange for AMMO's endorsement of the show.

In 1994, with support from other defendants, AMMO sought to increase to 30% its revenue share from the BTS. AMMO also discussed buying the show from Full Draw. During and subsequent to the negotiations, AMMO and other defendants threatened to boycott the BTS unless Full Draw sold the show to AMMO on terms AMMO offered. Full Draw and AMMO failed to reach an agreement.

In 1995, following [*4] the failed negotiations, AMMO and other defendants decided that AMMO would present its own archery trade show, to be held one week after the 1997 BTS. Defendants also decided to boycott the BTS in order to eliminate it as a competitor to AMMO's new trade show. In support of the boycott, defendants (1) advertised that they would attend only the AMMO trade show in 1997; (2) informed others at the 1996 BTS that they

¹ As explained *infra*, Full Draw's second amended complaint was the final complaint it filed and the one ruled upon by the district court.

would attend only the AMMO trade show; (3) persuaded other entities into participating in the AMMO show rather than the BTS by repeatedly stating that key manufacturers and distributors would not attend the 1997 BTS, and that the BTS would be a failure and probably not even occur; (4) created "a climate of fear of retribution and loss of business" for attending the BTS, and retaliated in various ways against certain businesses which attended the 1997 BTS; (5) agreed among themselves and caused other AMMO members to agree not to attend the 1997 BTS; and (6) actually boycotted the 1997 BTS.

As a result of defendants' boycotting efforts, the 1997 BTS failed financially and was eliminated as a competitor to future AMMO shows, leaving AMMO as the only supplier in the alleged market [\[*5\]](#) of archery trade shows in the United States.

[*749] Procedural History

Full Draw filed a complaint against defendants on May 30, 1997, alleging violations of Sherman Act [§§ 1 & 2](#) as well as a supplemental Colorado state law claim for tortious interference with prospective business advantage. Plaintiff subsequently amended its complaint to include additional monopoly claims and state antitrust claims. On August 18, 1997, defendants moved to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). On October 16, 1997, Full Draw sought to amend its complaint again to add four new defendants and to add allegations against existing defendants.

² Existing defendants objected to the new allegations against them, so Full Draw filed a new second amended complaint limiting its new allegations to the new defendants. Nevertheless, according to both Full Draw and defendants, the district court stated that it would consider the new allegations with respect to all defendants for purposes of the motion to dismiss, and we therefore consider all the new allegations in the second amended complaint to be directed against all defendants.

[\[*6\]](#) On December 23, 1997, the district court granted defendants' motion to dismiss. The court found that Full Draw failed adequately to allege antitrust injury. The court stated:

Simply put, Plaintiff has alleged that Defendants' competitive acts drove it out of business, but has not alleged that those same acts caused harm to consumers or competition--and this is unsurprising where Defendants are many of the relevant consumers and their acts increased, albeit temporarily, competition. By definition, it would seem that where a majority of consumers believe that a monopoly producer is not performing adequately and decide to provide an alternative for themselves and other consumers, there can be no antitrust injury, particularly where, as here, there have been no allegations that harm was caused to any other consumers (e.g., the other exhibitors or the attendees of the shows) by reduced output or increased prices.

The district court further noted that Full Draw failed to make specific factual allegations defining the relevant product and geographic markets, the number of market participants and their relevant market shares, or defendants' market power, all of which the court [\[*7\]](#) considered requisite elements of Sherman Act [§§ 1 & 2](#) offenses. The court then dismissed the state antitrust claims, finding federal and Colorado antitrust laws sufficiently analogous. Finally, because the court dismissed all federal claims over which it had original jurisdiction, the court exercised its discretion under [28 U.S.C. § 1367\(c\)\(3\)](#) to dismiss the remaining state claim of tortious interference.

Full Draw appeals.

DISCUSSION

² The new defendants were Saunders, NAP, Darton, and Bermans. It should be noted that, on appeal, Full Draw omits to place these defendants' names in the caption of its opening brief. Consequently, Darton submits a brief pursuant to [10th Cir. R. 31.3](#), arguing that Full Draw should be deemed to have abandoned its appeal against Darton. However, Full Draw points out that it included Darton in its notice of appeal, and that its omission of Darton from the caption of its opening brief was inadvertent. We decline to find that Full Draw abandoned its appeal against Darton because of a mere scrivener's error in the caption of Full Draw's opening brief.

The district court had original jurisdiction over the antitrust claims pursuant to [28 U.S.C. § 1337](#),³ and supplemental jurisdiction pursuant to [28 U.S.C. § 1337](#). We have jurisdiction under [28 U.S.C. § 1291](#).

[*750] [HN3](#) "We review de novo a district court's dismissal of a cause of action for failure [**8] to state a claim upon which relief can be granted." [Chemical Weapons Working Group, Inc. v. United States Dep't of the Army](#), 111 F.3d 1485, 1490 (10th Cir. 1997). Furthermore,

we uphold a dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#) only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff.

[Yoder](#), 104 F.3d at 1224 (quotations and citation omitted).

On appeal, Full Draw argues that it adequately alleged antitrust injury and the requisite elements of Sherman Act offenses. We agree, and address each issue in turn.

I. Antitrust Injury

A. General Legal Standard

[HN4](#) Sherman Act [§ 1](#) 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](#). [HN5](#) Sherman Act [§ 2](#) prohibits "monopolizing, or attempting to monopolize, or combining or conspiring with any other person or persons, to monopolize any part of the trade or commerce among the several States." [15 U.S.C. § 2](#). [HN6](#) Clayton Act § 4 creates a private cause of action for any person who has been "injured in his business or property by reason of anything forbidden in the antitrust laws," and provides for treble damages. [15 U.S.C. § 15\(a\)](#).

[HN7](#) To recover damages under § 4 of the Clayton Act, a private plaintiff must show "more than injury causally linked to an illegal presence in the market." [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.](#), 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). Rather, the plaintiff

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.

Id. (emphasis original); accord [Atlantic Richfield Co. v. USA Petroleum Co.](#), 495 U.S. 328, 339, 344, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990); [Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.](#), 131 F.3d 874, 882 (10th Cir. 1997); see also Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#), P 362, at 210 (1995) (purpose of [**10] antitrust injury requirement is to "force[] antitrust courts to connect the alleged injury to the purposes of the antitrust laws").

B. Application

The injury Full Draw complains of--elimination from the archery trade show business as a result of defendants' alleged boycott--is "the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." [Brunswick](#), 429 U.S. at 489; [Sports Racing](#), 131 F.3d at 882.

³ This section states, in relevant part: [HN2](#) "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies . . ." [28 U.S.C. § 1337\(a\)](#).

1. Illegality of Group Boycott. As an initial matter, we conclude that the second amended complaint alleges a group boycott in violation of [§ 1](#) of the Sherman Act. [HN8](#) [↑] Classic group boycotts involving conspirators whose market position are horizontal to each other and who "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete," are generally *per se* illegal under [§ 1](#). [Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.](#), 472 U.S. 284, 294, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985); see [Klor's v. Broadway-Hale Stores, Inc.](#), 359 U.S. 207, 212, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959) (finding agreement among multiple manufacturers and [**11] distributors and one retailer to boycott another retailer to be *per se* violation); [TV Communications](#) [*751] [Network, Inc. v. Turner Network Television, Inc.](#), 964 F.2d 1022, 1027 (10th Cir. 1992) ("A group boycott is another *per se* violation of section one. However, a group boycott can only exist between conspirators who compete at the same market level." (citation omitted)); [Coffey v. Healthtrust, Inc.](#), 955 F.2d 1388, 1392 (10th Cir. 1992) (same). "While the competitors need not be at the same market level as the plaintiff, there must be concerted activity between two or more competitors at [the] same market level." [Coffey](#), 955 F.2d at 1392 (quotations and citation omitted).⁴

[**12] In this case, defendants' alleged boycott of the BTS involved an agreement among, *inter alia*, members of AMMO--archery manufacturers and distributors--whose market positions are horizontal to each other as buyers of exhibition space at archery trade shows competing for dealer business. In addition, defendants allegedly controlled the essential supply of major manufacturing and distributing exhibitors necessary to enable an archery trade show to survive competitively. Further, defendants allegedly cut off this essential supply of manufacturing and distributing exhibitors for the naked purpose of destroying Full Draw as a competitor to AMMO.⁵ Construing these allegations in the light most favorable to Full Draw, as we must, we conclude that they state a violation of [§ 1](#) of the Sherman Act.

[**13] Nevertheless, both the district court and defendants discredited Full Draw's allegations of antitrust injury because the alleged boycott, as characterized by defendants and the district court, was by customers against a producer--by buyers of archery trade show exhibition space against an archery trade show producer. Admittedly, the second amended complaint focuses on Full Draw as a supplier of exhibitor space, and one of the ways the second amended complaint characterizes the manufacturers and distributors is as customers of Full Draw who purchased that exhibition space. Viewed in that light, Full Draw's antitrust injury was experienced as a producer or supplier. The district court therefore concluded that no antitrust injury was alleged because "[a] producer's loss . . . is no concern of the antitrust laws--the antitrust laws serve to protect consumers from suppliers, rather than suppliers from one another." Defendants add that "plaintiff's theory makes no economic sense because the parties harmed by the alleged violation would be the Defendants' [sic] themselves" as buyers of exhibition space, and "Defendants would . . . not subject themselves to market power or an unreasonable [**14] restraint on competition." In essence, this argument asks why the defendants would conspire to destroy one of their two sources of suppliers of exhibition space (the BTS), leaving them with only one supplier (AMMO). Of course, that question is answered by the second amended complaint, which alleges that defendants controlled or influenced AMMO and, if AMMO were the only supplier of archery trade show distribution space, defendants could ensure that the shows would be favorable to their interests.

As an initial matter, if we view the alleged group boycott as a customer boycott, [*752] that would not insulate it from the proscriptions of [§ 1](#) of the Sherman Act. We acknowledge that it is unusual for customers to boycott to drive out producers, and that "whenever producers invoke the antitrust laws and consumers are silent," our antitrust

⁴ Not all group boycotts are necessarily *per se* violations. See [FTC v. Indiana Federation of Dentists](#), 476 U.S. 447, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986); [Northwest Wholesale Stationers v. Pacific Federation & Printing Co.](#), 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985). For a discussion of when group boycotts are considered *per se* violations of Sherman Act [§ 1](#) and when they are reviewed under a rule of reason, see ABA Section of [Antitrust Law](#). [Antitrust Law Developments](#) 100-110 (4th ed. 1997).

⁵ Although the second amended complaint sometimes describes defendant manufacturers and distributors as customers, it also alleges that they supply an essential product needed to make an archery trade show successful -- manufacturers and distributors displaying products at the show to attract retail dealers to attend the show.

inquiry "becomes especially pressing." *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994) (quotations and citation omitted). However, it is clear that [HN9](#) customers can unlawfully boycott to drive out a producer. See *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) (Clayton Act § 4 "does [**15] not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." (quotations and citation omitted)); *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 962-63 (10th Cir. 1990) ("In any event, as the Supreme Court has specifically held, an antitrust plaintiff need not necessarily be a competitor or consumer. Where the plaintiff's injury is so 'inextricably intertwined' or 'so integral an aspect of the conspiracy alleged' plaintiff has established an antitrust injury." (quoting *McCready*, 457 U.S. at 479 (citations omitted)); see also Ernest H. Schopler, *Refusals to Deal as Violations of the Federal Antitrust Laws*, 41 A.L.R. Fed. 175, 224-25 (1979) (collecting cases finding customers unlawfully boycotted producers or other suppliers).⁶

[**16] In an analogous case, *Taxi Weekly, Inc. v. Metropolitan Taxicab Bd. of Trade, Inc.*, 539 F.2d 907 (2d Cir. 1976), owners of taxi fleets boycotted the leading newspaper for the New York taxi industry by, *inter alia*, canceling their fleet subscriptions to that newspaper and supporting the formation of a rival trade paper. See [id. at 908-09](#). The group boycott ultimately caused the demise of the once successful publication. See *id.* The Second Circuit upheld antitrust liability against the fleet owners under §§ 1 & 2 of the Sherman Act, finding that the fleet owners "did not simply switch their business from *Taxi Weekly* in search of better service; they wanted to destroy *Taxi Weekly*." See [id. at 913](#).

Similarly, in the instant case, it is alleged that the archery manufacturers and distributors did not simply switch their business from the BTS to the AMMO show for legitimate business reasons, but did so out of a desire to destroy the BTS. It also was alleged that defendant manufacturers and distributors acted in combination with AMMO to boycott and destroy the BTS because Full Draw refused to sell the BTS to AMMO; defendant manufacturers and [\[*753\]](#) distributors did not [\[**17\]](#) want the competitive situation of two trade shows; and defendant manufacturers were large entities which wanted to control the trade show market in order to favor themselves over small manufacturers. A group boycott such as this, by large customers to destroy one producer of trade show services in favor of another over which it had influence and could obtain advantage at the expense of other consumers, states a violation of the Sherman Act. See [id. at 913](#).

We observe, further, that the characterization of the boycott as a customer boycott is not the only interpretation that could be given to Full Draw's second amended complaint. This case alleges a complex, often symbiotic set of relationships between Full Draw and defendants that cannot be as easily cabined as the district court and defendants have done, particularly when viewing the second amended complaint most favorably to the plaintiff. In one regard, defendant manufacturers and distributors could be viewed as suppliers and Full Draw as a customer. That is, defendant manufacturers and distributors were the suppliers of exhibitors, a commodity essential to the successful operation of a trade show. Although Full Draw did not [\[**18\]](#) directly buy this commodity (indeed, the

⁶The district court's reliance on *Stamatakis Indus., Inc. v. King*, 965 F.2d 469 (7th Cir. 1992), and *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir. 1988), is misplaced. Although the Seventh Circuit stated in *Stamatakis* that "a producer's loss is no concern of antitrust laws," it does not preclude a producer from alleging antitrust injury as a result of customer activity. See [965 F.2d at 471](#). Instead, *Stamatakis* requires that "the plaintiff . . . show actual or potential injury to consumers." [Id. at 472](#). As quoted *infra* Part I.B.2., Full Draw alleged that the boycott injures consumers as well as itself by the non-competitive elimination of the BTS as AMMO's sole rival. Thus, we do not believe *Stamatakis* would preclude Full Draw's allegation of antitrust injury, even if the case were controlling authority, which it is not.

Oahu Gas also does not undermine Full Draw's allegation of antitrust injury. There, the Ninth Circuit found, *inter alia*, that a propane gas seller did not prove any anticompetitive effects from a competitor's offer of sham low prices to the plaintiff's customers knowing that the effort would cause the plaintiff to meet the sham offer and consequently lose profits. The court found that the plaintiff did not allege anticompetitive effects from the competitor's offers of low but non-predatory prices, because the marketing scheme had the effect of increasing price competition. See [838 F.2d at 368, 370](#). As is apparent, *Oahu Gas* offers neither analogy nor language that precludes Full Draw's allegation of antitrust injury.

manufacturers and distributors paid Full Draw for the privilege of being exhibitors), the manufacturers and distributors were paid in the currency of a forum for access to retail dealers who might purchase their archery products. Viewing the relationship between Full Draw and defendants in this light, Full Draw's alleged injury from defendant's unlawful group boycott exists at the customer level--and defendants do not dispute that a customer's injury can be antitrust injury.

Alternatively, another characterization of the second amended complaint could focus on AMMO's role in defendants' alleged group boycott. After all, the boycott of the BTS was alleged to have involved not only defendant manufacturers and distributors whom defendants and the district court characterize as customers of the BTS. The boycott also involved defendant AMMO--a direct competitor to Full Draw in the archery trade show market--and apparently other non-customer defendants (e.g., a trade publication) who had employees active in AMMO or otherwise assisted in the boycott. Defendants do not contend that a boycott by a direct competitor and others essential to the operations [\[**19\]](#) of the plaintiff cannot be unlawful, and we do not believe they could make such an argument. See [Northwest Wholesale, 472 U.S. at 293](#) ("Cases to which this Court has applied the *per se* approach have generally involved 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." (quotations and citation omitted)); [Klor's, 359 U.S. at 209, 212](#) (finding *per se* illegal group boycott involving a "wide combination consisting of manufacturers, distributors, and a retailer," brought about by the retailer against a competing retailer). Once again, even if the district court correctly stated the law regarding customer boycotts of a *producer*, Full Draw's second amended complaint would state a cause of action for antitrust injury to a *competitor* of defendant AMMO.

2. Injury Reflects Anticompetitive Effects of Group Boycott. In its second amended complaint, Full Draw made the following allegation of antitrust injury:

The actions of Defendants unduly restrain, hinder and suppress competition between FDP [Full [\[**20\]](#) Draw] and Defendant AMO [sic] trade show in the trade show business and interstate commerce. The actions of Defendants have directly and proximately caused "anti-trust injury" because they have resulted in elimination of FDP as an exhibitor, thereby directly and substantially reducing "output" of exhibitor space and directly and [\[*754\]](#) substantially reducing the ability of the consumers of such space to purchase exhibitor space and display their products and services, and archery dealers from purchasing admission to such an exhibition for the purpose of viewing products and services and otherwise transacting business. Because FDP produced one of only two archery business trade shows in the United States, the purposeful and wrongful destruction of FDP's business by Defendants directly injured competition as well as injuring FDP.

This allegation adequately states that Full Draw's injury "reflects the anticompetitive effect" of the illegal boycott, being "the type [of injury] the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." [Brunswick, 429 U.S. at 489](#); accord [Sports Racing, 131 F.3d at 882](#). The allegation describes the [\[**21\]](#) anticompetitive effect of the boycott to be the loss of competition through the elimination of AMMO's sole archery trade show competitor and the resultant loss in exhibition space output. See Herbert Hovenkamp, [Antitrust Law](#), PP 1901a & 1901d, at 184-87 (1998) ("market output--assuming it can be determined--is a good measure of the amount of competition").⁷ The second amended complaint further alleges harm to consumers from the drop in exhibition space output (reducing choice for exhibitors) and shows (reducing choice for dealers). See [SCFC, 36 F.3d at 965](#) ("To be judged anticompetitive, the agreement must actually or potentially harm consumers.")⁸

⁷ This allegation answers the district court's statement that Full Draw failed to allege "any harm to consumers or competition through reduced output or increased prices."

⁸ Of course, in the words of SCFC, an agreement need not "actually" harm consumers directly to be considered anticompetitive. [SCFC, 36 F.3d at 965](#). An agreement that harms a producer may "potentially harm[] consumers" downstream, *id.*, and thus may be anticompetitive.

[**22] We have no doubt that alleging the loss of one of two competitors in this case alleges injury to competition. While it is axiomatic that the antitrust laws "were enacted for 'the protection of competition not competitors,'" *Brunswick*, 429 U.S. 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 instant case is not one in which it is alleged that a competitor fell prey to competition; it is one in which it is alleged that competition fell prey to a competitor. The competitor was AMMO, which through an alleged boycott by the trade association and various of its members reduced the number of competitors in the market from two to one, thereby decreasing competition and harming consumers.

In particular, as alleged in the second amended complaint, from 1995 to 1997, both AMMO and the BTS competed for customers for their 1997 trade shows. Thus, from the market's perspective, there were actually two competitors during that period. As a direct result of defendants' boycott, Full Draw was driven from the market in 1997, thereby depriving consumers of their pre-existing choices in that market. Because defendants' alleged boycott [**23] reduced a competitive market of two producers to a market of one monopolist, Full Draw quite clearly alleged substantial injury to competition from defendants' group boycott.

What is more, we find it hard to imagine a closer connection between anticompetitive effect and injury than the destruction of the BTS (Full Draw's injury) and the loss of competition in the archery trade show market (the anti-competitive effect of defendants' boycott). [HN10](#)[↑] Full Draw's alleged loss "stems from a competition-reducing aspect or effect of defendant's behavior," and accordingly is antitrust injury. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990).

[*755] We are not persuaded by the arguments to the contrary. The district court and defendants state that Full Draw did not allege any anticompetitive effect from the group boycott because the number of competitors before and after the boycott remained the same, and therefore consumers were no worse off from defendants' boycott. We disagree. [HN11](#)[↑] The mere fact that the number of competitors after the boycott matches the number before the boycott does not cure the anticompetitive effect of the boycott, which [**24] is the elimination of a competitor by means other than "the economic freedom of participants in the relevant market." *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); see *Taxi Weekly*, 539 F.2d at 912-13 (rejecting argument that "no diminution of competition resulted from the demise of *Taxi Weekly*" merely because, after the boycott of the paper in favor of a rival publication, "the New York taxi industry had the same number of trade publications as before, i.e., one"). There is no antitrust safe harbor for violations that happen to conserve the pre-offense number of competitors. Regardless of such conservation, consumers suffer because the market make-up changed as a result of inefficient anticompetitive means.

In a related point, the district court and defendants reason that defendants' alleged activities were not anticompetitive because defendants actually increased the output of exhibition space, albeit briefly, and because the output of exhibition space merely returned to the pre-boycott level after the BTS failed (i.e., exhibition space offered by one show per year). Again, [**25] we disagree. The effect of defendants' alleged boycott was not to increase competition between the two trade shows, but rather to distort and ultimately reduce competition by destroying one source of output (the BTS) and thereby limiting consumer choice to the other source of output (AMMO's show). Of course, pursuant to our reasoning above, the bare fact that the output of exhibition space before and after the alleged boycott stayed the same says nothing about whether the process in between was anticompetitive, which it allegedly was.

Therefore, we hold that Full Draw adequately alleged antitrust injury as a result of defendants' alleged group boycott. Our finding inures to Full Draw's Sherman Act § 1 claim as well as to its § 2 claims, because both sets of claims arise from the same alleged boycotting activities and involve the same alleged source of injury to Full Draw and to competition--the unnatural demise of the BTS at the hands of defendants.

II. Sherman Act Pleading Requirements

As noted, the district court dismissed Full Draw's second amended complaint on another ground: "Plaintiff has failed to make specific factual allegations defining the relevant product and [**26] geographic market, the number of

market participants and their relative shares, or Defendants' market power." Finding these shortcomings, the district court concluded that Full Draw failed to plead the requisite elements of Sherman Act §§ 1 & 2 offenses. Although Full Draw's second amended complaint is hardly a model of clarity or thoroughness, we disagree with the district court and hold that Full Draw adequately pled the requisite elements of its Sherman Act claims.

In *TV Communications*, we stated:

HN12 [↑] Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief. A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. Conclusory allegations that the defendant violated those laws are insufficient.

[964 F.2d at 1024](#) (citation omitted). In the end, "what is determinative is whether . . . it cannot be said that defendants did [*756] not have fair notice of [the plaintiff's] claims." [Monument Builders of Greater Kansas City, Inc. v. American Cemetery Assn. of Kansas, 891 F.2d 1473, 1481 \(10th Cir. 1989\)](#). We now address in turn the pleadings [**27] underlying each of Full Draw's Sherman Act claims.

First, **HN13** [↑] to state a claim for a Sherman Act § 1 violation, "the plaintiff must allege facts which show: the defendant entered a contract, combination or conspiracy that unreasonably restrains trade in the relevant market." *TV Communications*, 964 F.2d at 1027. We find that Full Draw sufficiently pled its Sherman Act § 1 claim. As detailed *supra* Part I, the second amended complaint factually alleges that defendants conspired and combined in various ways to boycott the BTS and thus unreasonably restrain trade in the archery trade show market in the United States. This is sufficient to state a § 1 claim. [Id. at 1027](#).

Second, **HN14** [↑] to state a claim for attempted monopolization under Sherman Act § 2, the plaintiff must plead: "(1) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt." [Id. at 1025](#) (quotations and citations omitted). We find that Full Draw sufficiently pled the elements of attempted monopolization under Sherman Act § 2. The second [**28] amended complaint alleges the relevant market to be archery trade shows in the United States. This claim is supported by factual allegations detailing the distinct nature of the archery trade shows, their difference from gun shows, which focus only in limited part on archery, and their ability to draw a customer base of archery manufacturers, distributors, and dealers over the years. In addition, the second amended complaint alleges a dangerous probability of success in monopolizing the relevant market. Factors to be considered in determining dangerous probability include the defendant's market share, "the number and strength of other competitors, market trends, and entry barriers." [Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 894 \(10th Cir. 1991\)](#). The allegation that defendants' boycott eliminated the only competitor to defendant AMMO's trade show demonstrates a significant entry barrier in the boycott itself, and confirms the dangerous probability of success from defendants' alleged attempt to monopolize the market. The second amended complaint also alleges specific intent on the part of defendants to monopolize the relevant market, in order to destroy the BTS and [*29] create a monopoly for AMMO. Finally, the second amended complaint alleges conduct in furtherance of the attempt, namely, the defendants' boycotting activities. Together, these allegations sufficiently plead the requisite elements of attempted monopolization.

Third, **HN15** [↑] to state a claim for conspiracy to monopolize under Sherman Act § 2, the plaintiff must plead: "conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy." [Monument Builders, 891 F.2d at 1484](#). We find Full Draw sufficiently pled its conspiracy to monopolize claim. The second amended complaint alleges that defendants agreed to eliminate the BTS through a group boycott and other conspiratorial actions so that AMMO alone could produce archery trade shows, and that defendants participated in boycotting and other anticompetitive activities in furtherance of their conspiracy.

Fourth, **HN16** [↑] to state a monopolization claim under Sherman Act § 2, the plaintiff must plead: "(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 **[**30]** accident." *TV Communications*, 964 F.2d at 1025 (quotations and citations omitted). We find Full Draw sufficiently pled its monopolization claim. The second **[*757]** amended complaint alleges that defendants obtained monopoly power. Monopoly power requires proof of both power to control prices and power to exclude competition. See *Reazin*, 899 F.2d at 967; *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc.*, 783 F.2d 159, 163-64 (10th Cir. 1986). The second amended complaint's allegation that defendants' boycott successfully drove Full Draw from the market illustrates defendants' ability to exclude competition against AMMO's trade show. Additionally, because AMMO is now the sole producer of archery trade shows, AMMO and its members have the power to control prices in the market. Thus, the second amended complaint alleges that defendants possess the components of monopoly power. Finally, the second amended complaint alleges that defendants wilfully obtained that power as a consequence of their unlawful boycott and other wrongful conduct rather than a superior product, business acumen, or historic accident. As a result, Full Draw has adequately pled its monopolization claim.

CONCLUSION

[31]** Because we hold that Full Draw has alleged antitrust injury for purposes of Clayton Act § 4 and has adequately pled the requisite elements of its Sherman Act claims, we REVERSE the district court's dismissal of Full Draw's federal antitrust claims. Furthermore, because the district court dismissed Full Draw's state antitrust claims pursuant to its federal antitrust analysis, we REVERSE the district court's dismissal of Full Draw's state antitrust claims. Lastly, because the district court dismissed Full Draw's state tortious interference claim under the assumption that all the federal claims over which it had original jurisdiction had been disposed of, we REVERSE the district court's dismissal of Full Draw's tortious interference claim. We REMAND the case for proceedings consistent with this opinion.

End of Document

R.J. Reynolds Tobacco Co v. Phillip Morris Inc.

United States District Court for the Middle District of North Carolina

June 29, 1999, Decided ; June 29, 1999, Filed

CIVIL NO. 1:99CV00185, CIVIL NO. 1:99CV00207, CIVIL NO. 1:99CV00232

Reporter

60 F. Supp. 2d 502 *; 1999 U.S. Dist. LEXIS 9926 **; 1999-2 Trade Cas. (CCH) P72,599

R. J. REYNOLDS TOBACCO COMPANY, Plaintiff, v. PHILIP MORRIS INCORPORATED, Defendant. LORILLARD TOBACCO COMPANY, Plaintiff, v. PHILIP MORRIS INCORPORATED, Defendant. BROWN & WILLIAMSON TOBACCO CORPORATION, Plaintiff, v. PHILIP MORRIS INCORPORATED, Defendant.

Disposition: [**1] Plaintiff's joint motion for a preliminary injunction [Doc. # 2 in RJR 1:99CV185; Doc. # 2 in Lorillard 1:99CV207 and Doc. # 2 in B&W 1:99CF232] granted.

Core Terms

Retail, brand, display, cigarette, fixture, space, manufacturers, advertising, market share, signage, outlets, permanent, preliminary injunction, sales, injunction, market power, competitors, hardships, serious question, public interest, visibility, pack, pro-competitive, compete, smokers, merits, adult, likelihood of success, above-counter, interbrand

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN1 [] **Injunctions, Preliminary & Temporary Injunctions**

A preliminary injunction is an extraordinary remedy and the court should grant such relief only when a plaintiff clearly establishes entitlement to such relief. The court identified the four factors, known as the balance of hardships test, which must be analyzed in determining whether to issue a preliminary injunction. These factors are: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with the injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2 [] **Injunctions, Preliminary & Temporary Injunctions**

60 F. Supp. 2d 502, *502LÁ1999 U.S. Dist. LEXIS 9926, **1

Under the Blackwelder test a plaintiff must first make a clear showing that it will suffer irreparable harm without the injunction before any other inquiry is made. If the plaintiff makes a clear showing of irreparable harm, the court must then balance the likelihood of irreparable harm to plaintiff without the injunction against the likelihood of harm to the defendant if the injunction is issued.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3 [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

After balancing the hardships, the court then proceeds to evaluate the plaintiff's likelihood of success on the merits. The balancing of hardships step must precede evaluation of the likelihood of success on the merits because the outcome of the hardship test fixes the degree of proof required for establishing the likelihood of success by the plaintiff. If the hardship balance tilts sharply and clearly in the plaintiff's favor, the required proof of likelihood of success is substantially reduced. Similarly, if the hardship to plaintiff is minimal or non-existent, then the burden on the plaintiff to establish likelihood of success on the merits becomes considerably greater.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4 [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

Where the balance tips decidedly in favor of the plaintiff, a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for litigation and thus for more deliberate investigation. As the balance of hardships shifts away from the plaintiff, a higher threshold showing on the merits is required. Thus, where the plaintiff fails to establish that the balance tips decidedly in its favor, the plaintiff must make a strong showing of likelihood of success, establish a substantial likelihood of success, or present clear and convincing evidence of success.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN5 [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

Plaintiff must establish that the public interest favors the issuance of a preliminary injunction. However, this factor does not appear always to be considered at length in preliminary injunction analysis and is rarely determinative.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6 [down arrow] **Sherman Act, Claims**

Establishing a [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#) violation proceeds in three steps: (1) the plaintiff must carry the initial burden of showing the challenged conduct has an actual adverse effect on competition as a whole in a relevant market; (2) the defendant must then demonstrate that its conduct has pro-competitive redeeming virtues;

and (3) even if the defendant sustains that burden the plaintiff can still prevail by showing that the same pro-competitive benefit could be achieved through an alternative means that is less restrictive of competition.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN7 Antitrust & Trade Law, Sherman Act

With respect to the first step, the court has held that a threshold inquiry is whether the defendant has market power in the relevant product and geographic markets.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN8 Monopolies & Monopolization, Attempts to Monopolize

Market power for § 1 of the Sherman Act, 15 U.S.C.S. § 1, purposes is a lesser degree of power than necessary to prove a § 2 of the Sherman Act, 15 U.S.C.S. § 2, offense of monopolization.

Counsel: For R. J. REYNOLDS TOBACCO COMPANY, plaintiff: DANIEL R. TAYLOR, JR., KILPATRICK STOCKTON, L.L.P., WINSTON-SALEM, NC. DARRYL R. MARSCH, R. J. REYNOLDS TOBACCO COMPANY LAW DEPT., WINSTON-SALEM, NC. RANDOLPH S. SHERMAN, MICHAEL MALINA, DAVID S. COPELAND, ERIC AARONSON, KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, NEW YORK, NY. RICHARD M. COOPER, STEVEN R. KUNEY, JOHN E. SCHMIDTLEIN, WILLIAMS & CONNOLLY, WASHINGTON, DC.

For PHILIP MORRIS INCORPORATED, defendant: LARRY B. SITTON, SMITH HELMS MULLISS & MOORE, GREENSBORO, NC. MATTHEW W. SAWCHAK, SMITH HELMS MULLISS & MOORE, RALEIGH, NC. ROBERT R. MARCUS, SMITH HELMS MULLISS & MOORE, GREENSBORO, NC. JEROME I. CHAPMAN, HADRIAN R. KATZ, RICHARD L. ROSEN, L. ELIZABETH BOWLES, AMY E. RALPH, ARNOLD & PORTER, WASHINGTON, DC.

For LORILLARD TOBACCO COMPANY, plaintiff: JAMES T. WILLIAMS, JR., BROOKS PIERCE MCLENDON HUMPHREY & LEONARD, GREENSBORO, NC. JENNIFER VAN ZANT, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, GREENSBORO, NC. IRVING SCHER, BRUCE S. MEYER, AUGUST T. HORVATH, WEIL GOTSHAL **[**2]** & MANGES, LLP, NEW YORK, NY.

For PHILIP MORRIS INCORPORATED, defendant: LARRY B. SITTON, SMITH HELMS MULLISS & MOORE, GREENSBORO, NC. MATTHEW W. SAWCHAK, SMITH HELMS MULLISS & MOORE, RALEIGH, NC. ROBERT R. MARCUS, SMITH HELMS MULLISS & MOORE, GREENSBORO, NC. JEROME I. CHAPMAN, HADRIAN R. KATZ, RICHARD L. ROSEN, L. ELIZABETH BOWLES, AMY E. RALPH, ARNOLD & PORTER, WASHINGTON, DC.

For BROWN & WILLIAMSON TOBACCO CORPORATION, plaintiff: NORWOOD ROBINSON, ROBINSON & LAWING, WINSTON-SALEM, NC. ROBERT B. BELL, WILEY REIN & FIELDING, WASHINGTON, DC. RONALD S. ROLFE, VICTOR L. HOU, CRAVATH SWAINE & MOORE, NEW YORK, NY.

For PHILIP MORRIS INCORPORATED, defendant: LARRY B. SITTON, SMITH HELMS MULLISS & MOORE, GREENSBORO, NC. MATTHEW W. SAWCHAK, SMITH HELMS MULLISS & MOORE, RALEIGH, NC. ROBERT R. MARCUS, SMITH HELMS MULLISS & MOORE, GREENSBORO, NC. JEROME I. CHAPMAN, HADRIAN R. KATZ, RICHARD L. ROSEN, L. ELIZABETH BOWLES, AMY E. RALPH, ARNOLD & PORTER, WASHINGTON, DC.

Judges: FRANK W. BULLOCK, JR., United States District Judge.

Opinion by: FRANK W. BULLOCK, JR.

Opinion

[*504] MEMORANDUM OPINION

BULLOCK, Chief Judge

This matter is before the court on Plaintiffs' motion for a preliminary injunction [*3] pursuant to [Rule 65 of the Federal Rules of Civil Procedure](#) to enjoin Defendant from implementing a retail merchandising program which allegedly violates federal antitrust and state unfair trade practice laws. The court conducted an evidentiary hearing on June 9 and 10, 1999. The parties presented witnesses and exhibits and designated affidavits for the court's consideration. After careful consideration of the exhibits, affidavits, and the testimony of witnesses, including their demeanor, opportunity to acquire knowledge of the facts about which they testified, and their interest in the case, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiffs in these consolidated actions--R.J. Reynolds Tobacco Company (Reynolds), Lorillard Tobacco Company (Lorillard), and Brown & Williamson Tobacco Corporation (B&W)--all filed complaints against Defendant Philip Morris Incorporated (PM) seeking injunctive and declaratory relief and damages for alleged violations of [Sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1](#) and [2](#), and [North Carolina General Statutes §§ 75-1](#), [75-2](#), and [75-2.1](#). Plaintiffs have also filed motions for a preliminary injunction [*4] against PM seeking an order enjoining PM from continuing to implement certain provisions of its "Retail Leaders" retail merchandising program.
2. Reynolds, Lorillard, and B&W are all engaged in the manufacture and distribution of cigarettes. Reynolds' primary brands include Winston, Camel, and Doral, the nation's leading discount brand. Lorillard's primary brands include Newport, the nation's second leading premium brand. B&W's primary brands include Kool and GPC. Defendant PM is also engaged in the manufacture and distribution of cigarettes. PM's primary brands include Marlboro, the nation's leading premium brand, Merit, and Basic.
3. It is undisputed that the relevant product market for the purpose of this litigation is all cigarette sales through retail outlets and that the relevant geographic market is the United States. Historically, cigarette manufacturing has been a highly concentrated industry in the United States. Recent market share figures illustrate this point. In 1998 the four leading cigarette manufacturers--PM, Reynolds, Lorillard, and B&W respectively accounted for approximately 97% of all domestic cigarette sales.
4. In addition to being highly concentrated, the [*5] cigarette manufacturing industry is also characterized by high barriers to entry. These high barriers are evidenced by the fact that there has not been a significant new entrant into the market in over eighty years. Moreover, given the current economic, political, and regulatory environment, it is unlikely that any significant [*505] new entrants will emerge in the foreseeable future.
5. Within this industry, PM enjoys a significant market share advantage over its competitors. In 1998 PM reported that approximately 53% of retail cigarette sales within the United States were of PM brands. This is roughly twice

the market share of Reynolds, PM's next closest competitor, which had a 1998 market share of approximately 25%. B&W and Lorillard trailed PM and Reynolds with 1998 approximate market shares of 15% and 8% respectively. The gap between PM and Reynolds and B&W, its closest competitors, has steadily increased since 1993.

6. PM's leading market share position is driven primarily by its Marlboro brand, which is the dominant brand in the industry. In 1998 Marlboro sales accounted for approximately 34% of all retail cigarette sales in the United States. The next closest brands, Reynolds' Doral [**6] and Lorillard's Newport, accounted for approximately 6.4% and 5.8% of the market respectively.

7. The market for retail cigarette sales is diminishing as the population of adult smokers decreases. Thus, in competing with each other, cigarette manufacturers seek to maintain brand loyalty with respect to their existing customers while also inducing purchases by adult smokers of other manufacturers who occasionally buy different brands, or who do not have a usual brand preference at the time of purchase. While most adult smokers claim to have a "usual" brand, a significant percentage of adult smokers buy other brands on an "occasional" basis. Moreover, over time adult smokers who are loyal to a particular brand switch to a different usual brand. In the last two years, approximately 6 million adult smokers, representing approximately 14% of that population, have switched their usual brand.

8. The competition for switchers and occasional use purchasers occurs primarily in so-called pack outlets, which are comprised of convenience stores and gas stations, where approximately 60% of all cigarettes are sold. This is because adult smokers are more likely to purchase a non-usual brand by the [**7] pack rather than by the carton.

9. In the competition for brand loyalty, product visibility and advertising at the point of purchase are essential to remaining competitive. Visibility and advertising at the point of purchase are critical to both the development and maintenance of a particular brand equity and also to price and promotional competition among manufacturers.

While visibility and advertising are important in most if not all product categories in the retail store environment, they are uniquely critical in the cigarette industry. First, unlike other product categories sold in the convenience store/grocery store environment, cigarette manufacturers face severe limitations with respect to advertising. Television and radio have long been off limits to cigarette manufacturers. Moreover, as a result of the recent tobacco litigation settlements, outdoor advertising on billboards, distribution of logoed merchandise, and advertising at sports and other public events have also been severely limited or entirely eliminated. Cigarette manufacturers are thus left with only three basic channels to communicate with adult smokers: print media, direct mail, and the point of purchase.

[**8] A further unique aspect to the cigarette industry is that because of concern about youth smoking there has been a recent shift in display space location at the point of sale from self-service, counter-top displays to a non-self-service, back bar display behind a sales counter. In this environment, a customer approaches a counter and asks the clerk for the pack or carton of his choice from the display fixture on the back bar. Counter-top, end-of-aisle, or other self-service type displays that are often used in other categories, such as soda or snacks, are, for the most part, no longer available to cigarette manufacturers. For example, eight states and hundreds of municipalities have already [**506] banned self-service displays and numerous other states are considering similar prohibitions. Thus, a manufacturer who cannot obtain quality display space on the back bar fixture will not be able to compensate by purchasing, for example, an end-of-aisle type display.

Another characteristic of the back bar environment is that approximately half of the display space available to the cigarette category will be below counter level and therefore out of the consumer's primary line of sight. In the past, [**9] when self-service counter-top displays were the customary method of displaying the category, the entire display space for the cigarette category was generally either on the counter-top or in above-counter displays on the back bar. In either location a manufacturer could easily communicate its brand equity and price message to the consumer. In contrast, the new back bar fixtures typically rise from the floor to a height of six-to-eight feet. The display space on the lower half of the fixture is often obstructed by the sales counter, making it difficult for manufacturers on the lower half of the fixture to communicate brand equity and price messages.

10. The critical importance of brand visibility and display space at the point of purchase in the cigarette industry is not disputed. It is evidenced by the fact that all four of the major manufacturers involved in this litigation have vigorously competed with each other for in-store display space and advertising through the payment of retail display allowances (RDA's). Because of the significance of pack outlets in the competition for brand loyalty and occasional use purchases, manufacturers have usually offered greater RDA's to pack outlets **[**10]** as compared with predominantly "carton outlets" such as supermarkets and cigarette and tobacco stores.

These RDA payments are essential to a pack outlet's ability to compete in a cigarette category. Excluding the sale of gas, cigarette sales represent perhaps the most important product category to convenience stores and gas stations. For example, Jack Barger, Chief Operating Officer of Morgan Oil Co., which operates twenty-two convenience stores in western North Carolina under the trade name "Convenience King," testified that cigarette sales represent 30% of his company's product sales.

The RDA payments from cigarette manufacturers are typically passed on to consumers in the form of price discounts. Thus, a retailer under a contract receiving RDA payments from PM will be able to offer consistently lower prices on PM brands such as Marlboro than a retailer who is not under contract. Moreover, because the cigarette category is so important to pack outlets and because the Marlboro brand is dominant in the category, a pack outlet receiving little or no RDA allowances from PM will not be able to compete in the cigarette category with pack outlets receiving substantial RDA's from PM. Inability **[**11]** to compete in the cigarette category, in turn, makes it unlikely that convenience stores or gas stations will be able to survive in the market place given the significance of cigarette sales to their business.

12. In or about October 1998, PM announced that it was implementing "Retail Leaders," a new retail merchandising program to replace its "Retail Masters" program, which had been in existence since 1992. After a transitional period, during which participating retailers could be under either a Retail Leaders or Retail Masters contract, the Retail Masters program was to be terminated. The termination date for Retail Masters was originally March 31, 1999, but has since been extended by PM until June 30, 1999. Although certain isolated provisions from the Retail Masters program are carried over to the Retail Leaders program, there are important aspects of the Retail Leaders program which distinguish it from Retail Masters.

First, the prior Retail Masters program included participation levels which enabled **[*507]** retailers to obtain significant promotional discounts from PM while still enabling them to negotiate promotional agreements with at least two competing manufacturers. With opportunities **[**12]** for at least three manufacturers to obtain significant in-store visibility and signage, all Plaintiffs had an effective opportunity to compete at the point of sale. In contrast, under Retail Leaders, there is a strong likelihood only one competing manufacturer will be able to obtain above-counter display space and signage. This is because the promotional payments are structured so that nearly all retailers will choose to sign a Retail Leaders contract at a level of participation, known as a "category performance level" (CPL), which will leave above-counter display space for only one or two competing brands. Retail Leaders has four CPL's, known as CPL Base, CPL 1, CPL 2, and CPL 3. However, the disparity between the promotional payments at CPL Base and CPL 1, on the one hand, and CPL 2 and CPL 3 on the other means that the retailers only viable choice is to sign on at CPL 2 or CPL 3. As Jack Barger credibly explained, it will be a competitive necessity for pack outlets to sign a Retail Leader contract at CPL 2 because they cannot survive without the PM promotional payments of offered at that level. Barger's testimony is supported by the fact that, of all the Retail Leaders contracts **[**13]** entered into to date, all but 1% to 2% have signed on at CPL 2 or CPL 3.

Second, at these higher levels of Retail Leaders, PM introduces a so-called "industry fixture" which is to be placed in the boat display position in the store. Ordinarily this will be on the back bar behind a primary cash register. At CPL 2 the industry fixture must occupy 50% of the total display space for the cigarette category. PM brands are required to be placed on the top half of the industry fixture loaded horizontally, assuming a PM market share of 50%. Moreover, only PM can place permanent signage on the industry fixture. Thus, Retail Leaders would prohibit a retailer from entering into an agreement with a competing manufacturer to place a permanent sign on that manufacturer's own portion of the industry fixture.

At CPL 2 the remaining 50% of display space will ordinarily be divided into two additional fixtures. The first fixture, known as the PM "prime" fixture, will constitute approximately 25% of the overall space. Only PM brands and signage may be displayed on the prime fixture. The prime fixture must be placed in the second best visibility location. The last fixture, known as the "retailer's choice" [**14] fixture, will occupy the remaining 25% of the category space. The retailer can display competing manufacturers' brands and signage in this location.

The practical effect of the industry fixture at CPL 2 is to provide PM with 75% of the above-counter display space and 75% of the permanent in-store signage, percentages well in excess of its market share. This will likely leave above-counter display space for perhaps one or two competing brands at most. While PM includes below-counter space in calculating its market-share-to-shelf-space percentages to conclude that it is only asking for its market share, PM's vice president of trade/marketing, Barry Hopkins, conceded at the evidentiary hearing that he would not pay for below-counter "display" space.

The industry fixture also allows PM to regulate how a competitor may display and advertise its own brand in its own space on the industry fixture. Thus, PM is not simply paying for the best display space for its own brands, but also exercising unprecedented control over how competitors may advertise and display their own brands.

At CPL 3 the industry fixture accounts for 100% of the category display space. Thus PM demands 100% of the above-counter [**15] display space and 100% of the permanent in-store signage. Moreover, competitors are not allowed to purchase permanent signage to place on their respective portions of the industry fixture. Nevertheless, while there is substantial evidence [*508] in the record which indicates that most retailers will have no economic choice other than to sign a CPL 2 contract, there is no evidence that, as between CPL 2 and CPL 3, retailers will be coerced into choosing CPL 3.

13. By its own estimates, PM expects approximately 75% of its total sales volume to be generated through stores under a Retail Leaders contract which, as noted, will almost always be at CPL levels 2 or 3. Also as noted, the vast majority of these contracts will be at CPL 2.

14. Retailer response to the Retail Leaders program has been slow during the current transitional period between Retail Masters and Retail Leaders. Barger, whose Convenience King chain of stores is currently under a Retail Masters contract, testified that this was because the promotional structure of the Retail Leaders program was going to compel Convenience King to enter into a Retail Leaders contract at CPL 2, which would force him to abandon his current relationship [**16] with B&W. Barger stated that he has tried to obtain concessions from PM that would enable Convenience King to maintain its relationship with B&W, but had been unsuccessful. For example, B&W had agreed to pay for a permanent sign to be placed on its portion of the industry fixture, but PM refused to allow the sign. Thus, Barger is waiting until the Retail Masters program expires on June 30, 1999, before signing on to a Retail Leaders contract.

15. The Retail Leaders program is likely to be particularly devastating to B&W and Lorillard as they will presumably be the "odd man out" at the point of purchase. Lorillard, for example, has already lost approximately 4,000 promotional contracts with retailers due at least in part to the impact of Retail Leaders. It is noteworthy that in the Retail Masters environment, Lorillard was routinely able to obtain counter-top displays at the point of purchase for its Newport brand, the second-leading premium brand in the country. In the Retail Leaders environment, however, Lorillard's Newport brand will be shifted to a location near the floor behind the counter.

16. Other than minor short-term difficulties, PM has not presented any evidence that it [**17] will be significantly harmed by the issuance of an injunction. Barry Hopkins, PM's vice president of trade and marketing, admitted that he had not given much thought about a contingency plan in the event that this court entered an injunction. PM's only significant source of identified harm would result only if this court ordered it to not require that its product be shelved horizontally. Such an order would force PM to go back and re-shelf product in the approximately 20,000 stores already signed to Retail Leaders contracts. PM presented no evidence that allowing competitors to place permanent signage in their respective portions of the industry fixture, or allowing competitors to contract for permanent signage and temporary signage at other locations in the store, subject to PM being allowed to maintain

corresponding signage at its market share levels, would disadvantage PM in the market place or adversely affect PM's advertising opportunities, brand goodwill, or market share.

DISCUSSION

HN1 A preliminary injunction is an extraordinary remedy and the court should grant such relief only when a plaintiff clearly establishes entitlement to such relief. See *Direx Israel, Ltd. v. Breakthrough I***18] *Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991)*. In *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189 (4th Cir. 1977), the Fourth Circuit identified the four factors, known as the balance of hardships test, which must be analyzed in determining whether to issue a preliminary injunction. These factors are: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with the injunction; (3) the plaintiff's likelihood of success on the merits; [*509] and (4) the public interest. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985).

HN2 Under the *Blackwelder* test a plaintiff must first make a clear showing that it will suffer irreparable harm without the injunction before any other inquiry is made. *Direx*, 952 F.2d 802 at 812. If the plaintiff makes a clear showing of irreparable harm, the court must then balance the likelihood of irreparable harm to plaintiff without the injunction against the likelihood of harm to the defendant if the injunction is issued. *Blackwelder*, 550 F.2d at 195.

HN3 After balancing the hardships, the court then proceeds [*19] to evaluate the plaintiff's likelihood of success on the merits. The balancing of hardships step must precede evaluation of the likelihood of success on the merits because

the outcome of the hardship test fixes the degree of proof required for establishing the likelihood of success by the plaintiff. If the hardship balance tilts sharply and clearly in the plaintiff's favor, the required proof of likelihood of success is substantially reduced. Similarly, if the hardship to plaintiff is minimal or non-existent . . . then the burden on the plaintiff to establish likelihood of success on the merits becomes considerably greater.

Direx, 952 F.2d at 817. In particular, **HN4** where "the balance 'tips decidedly' in favor of the plaintiff . . . a preliminary injunction will be granted if 'the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for litigation and thus for more deliberate investigation.'" *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991) (citations omitted). As the balance of hardships shifts away from the plaintiff, a higher threshold showing on the merits is [*20] required. *Id.* Thus, where the plaintiff fails to establish that the balance tips decidedly in its favor, the plaintiff must make a strong showing of likelihood of success, establish a substantial likelihood of success, or present clear and convincing evidence of success. See *Direx*, 952 F.2d at 818.

Finally, **HN5** Plaintiff must establish that the public interest favors the issuance of a preliminary injunction. However, this factor "does not appear always to be considered at length in preliminary injunction analysis" and is rarely determinative. *Rum Creek Coal Sales*, 926 F.2d at 366.

Plaintiffs have made a clear showing of irreparable injury in the absence of injunctive relief. In particular, as found above, Plaintiffs have demonstrated that PM's control of display space and signage under Retail Leaders will cause all Plaintiffs to suffer irreparable injury in the form of lost goodwill and lost advertising opportunities, and incalculable harm to their respective competitive positions, including threatened loss of market share and threatened loss of existing and potential customers. These types of injury or threatened injury have all been held to satisfy the irreparable injury [*21] requirement. See, e.g., *Philip Morris Inc. v. Pittsburgh Penguins, Inc.*, 589 F. Supp. 912, 920 (W.D. Pa. 1983), aff'd mem., 738 F.2d 424 (3d Cir. 1984) (plaintiff prevailed on a preliminary injunction motion against the defendant's threatened removal of cigarette advertising displays because the loss of potential customers who would be persuaded by the advertising was a loss which could not be calculated in money damages); see also *Multi-Channel TV Cable Co. c. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("when the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill the irreparable injury prong is satisfied"); *Medtronic, Inc. v. Catalyst Research Corp.*, 664 F.2d 660, 663 (8th Cir. 1981) (loss of market share constituted irreparable injury).

PM will not suffer any substantial hardship if an injunction is issued. PM's current marketing vice president Barry Hopkins [***510**] cited concerns only about short-term "administrative chaos" associated with having to send out representatives into retail stores already on Retail Leaders contracts in order to re-stack the display [****22**] fixtures. Hopkins did not assert that PM would suffer any long-term harm or that its brands would suffer lost market share, goodwill, or brand equity dilution. Thus, the court concludes that, on balance, the hardships tip decidedly in Plaintiffs' favor. Indeed, in the absence of the re-shelving issue, the balance tips overwhelmingly in favor of Plaintiffs.

Because Plaintiffs have established that the balance of hardships tips decidedly in their favor, Plaintiffs must establish only that a serious and substantial question exists with respect to the merits. See *Merrill Lynch, Pierce, Fenner & Smith, 756 F.2d at 1055*. The court finds that Plaintiffs have established that a serious and substantial question does exist with respect to their Section 1 claim.¹

The Retail Leaders program is a vertical restraint and its legality under Section 1 should [****23**] be analyzed under a traditional rule of reason standard. See *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc., 889 F.2d 524, 527 (4th Cir. 1989)*. **HN6**[] Establishing a Section 1 violation proceeds in three steps: (1) the plaintiff must carry the initial burden of showing the challenged conduct has "an actual adverse effect on competition as a whole in [a] relevant market"; (2) the defendant must then demonstrate that its conduct has "pro-competitive 'redeeming virtues'"; and (3) even if the defendant sustains that burden the plaintiff can still prevail by showing that the same pro-competitive benefit "could be achieved through an alternative means that is less restrictive of competition." *K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995)* (citations omitted).

HN7[] With respect to the first step, the Fourth Circuit has held that "[a] threshold inquiry . . . is whether the defendant has market power" in the relevant product and geographic markets. *Murrow Furniture Galleries, 889 F.2d at 528*. As noted, the parties agree that the relevant product and geographic markets in this case is the retail sale of cigarettes in the United [****24**] States.

As for market power, the court finds that Plaintiffs have raised a serious question as to whether PM has market power. The Supreme Court has indicated that **HN8**[] market power for Section 1 purposes is a lesser degree of power than necessary to prove a Section 2 offense of monopolization. See *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*. Here, PM's market share in excess of 50%, combined with the dominant presence of its Marlboro brand, the concentrated nature of the industry, and high barriers to entry, raises a serious question as to whether PM possesses market power. The Retail Leaders program itself is an indication of PM's market power. By structuring RDA payments in such a way as to prevent non-CPL 2 or 3 outlets from effectively competing with CPL 2 or 3 outlets on PM brands, including Marlboro, PM will obtain a minimum of 75% of the above-counter display space and in-store signage, a figure well in excess of its market share and likely to cause significant and incalculable harm to Plaintiffs. As Plaintiffs' economic expert Professor George Hay explained,

The Retail Leaders program is a classic [****25**] example of market power to gain a significant competitive advantage by handicapping rivals and diminishing their ability to compete. The [Retail Leaders] program is compelling to retailers precisely because of PM's existing dominance. No firm without PM's dominant market share could hope to succeed in making significant numbers of retailers accept a similar program. Yet few retailers [***511**] can afford *not* to enroll in the PM Leaders Program as long as their competitors are doing so. Because the cost of not signing up is that virtually all PM promotional monies and other benefits will be withdrawn, the pressure to accept the program is clear-retailers who do not enroll in the PM Retail Leaders program will not be able to compete with other retailers who are receiving promotional discounts on Marlboro and the other PM brands. Further, there is no viable fallback option for a retailer that wants to work with several

¹ Because the court finds a serious question with respect to Plaintiffs' Section 1 claim, it will not discuss Plaintiffs' Section 2 claim or state law claims.

of the other major manufacturers and allow each a degree of visibility roughly commensurate with presence in the market. PM is thus using market power to confront retailers with the 'choice' of CPL 2 or 3 on the one hand and nothing on the other. And it is doing so in order **[**26]** to demand a share of the visible retail space that is likely to have a dramatic impact on the ability of its rivals to compete effectively.

(Hay Decl. P 25).

Because Plaintiffs seek an injunction prior to full implementation of the Retail Leaders program, Plaintiffs obviously cannot show an actual adverse effect on competition and must instead satisfy this burden by establishing that PM possesses market power "plus some other ground for believing that the challenged behavior could harm competition in the market, such as the inherent anti-competitive nature of the defendant's behavior or the structure of the interbrand market." [Tops Mkts. Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97 \(2d Cir. 1998\)](#). The court has already found that Plaintiffs have raised a serious question as to PM's market power. The court also finds that Plaintiffs have raised a serious question as to the anti-competitive effect of Retail Leaders. In particular, Retail Leaders poses a serious threat to interbrand competition by severely limiting and regulating in-store displays and advertisements of competing manufacturers. It also appears that Retail Leaders will have an adverse effect upon consumer choice.

[27]** As for the redeeming pro-competitive virtues of Retail Leaders, PM has offered none. Indeed, James Mortensen, the former vice-president of marketing at PM, could not identify any justification for PM's exclusion of competitive permanent signage on the industry fixture. Vertical restraints relating to display space and advertising at the point of purchase are often viewed as pro-competitive because they enhance interbrand competition, even though they may inhibit intrabrand competition. See, e.g., [Jays Foods, Inc. v. Frito-Lay, Inc., 664 F. Supp. 364 \(N.E. Ill. 1987\)](#), aff'd mem., 860 F.2d 1082 (7th Cir. 1988), cert. denied, 489 U.S. 1014 (1989); [Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1134 \(S.D.N.Y. 1986\)](#). This is because interbrand competition, and not intrabrand competition, is a primary concern of **antitrust law**. See [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#).

Earlier cases involving shelf space agreements are readily distinguishable from this case, however, in that a serious question as a defendant's power to coerce retailers was not present in those cases. Moreover, visibility and advertising **[**28]** at the point of purchase are uniquely critical to competition in the cigarette industry as competitors lack significant alternative advertising channels to compensate for the lack of visibility at the point of purchase. Thus, even if the "interbrand competition" rationale was offered by PM, there is a significant likelihood in this case that Retail Leaders will have the effect of stifling interbrand competition, not enhancing it. Accordingly, the court concludes that Plaintiffs have, at a minimum, raised a serious question as to their threshold burden of demonstrating an anti-competitive effect of the Retail Leaders program. The court further concludes that a serious question exists as to whether PM can satisfy its burden of establishing pro-competitive benefits which offset the anti-competitive effect. Even if PM could establish pro-competitive benefits, there is a serious **[*512]** question as to whether Retail Leaders exceeds what is reasonably necessary to achieve any legitimate pro-competitive objective.

Finally, the court will consider the public interest. As previously noted, the public interest factor is seldom discussed at length in preliminary injunction analysis. *Rum Creek Coal* **[**29]** [Sales, 926 F.2d at 366](#). Plaintiffs contend that the public interest favors it because it is suing to vindicate the public's interest in effective enforcement of antitrust laws which, in turn, advance competition in the marketplace. Defendant contends that the public interest favors it because Plaintiffs are attempting to utilize this court to obtain a competitive advantage it could not achieve in the marketplace. The court does not find that the public interest factor alters the conclusion drawn from analysis of the other factors. Each side asserts that they are aligned with the public's interest in a competitive marketplace. "In this case, as in many, it is difficult to ascertain where the public interest rests. . . . Both sets of parties assert basic rights fundamental to our nation. . . . In short, the court cannot easily align the parties so as to place one on the side of the public interest." [Virginia Chapter, Associated Gen. Contractors v. Kreps, 444 F. Supp. 1167, 1185-86 \(W.D. Va. 1978\)](#).

CONCLUSIONS OF LAW

1. The Retail Leaders program will cause all Plaintiffs to suffer irreparable harm in the form of loss of advertising opportunities, goodwill, brand equity, and the **[**30]** potential for permanent loss of customers.
2. The issuance of an injunction will not cause Defendant to suffer any significant harm to its advertising opportunities, market share, goodwill, or brand equity. The potential for any significant harm to PM can be obviated by not requiring PM to reshelf its product vertically as opposed to horizontally.
3. The balance of hardships tips decidedly in favor of Plaintiffs.
4. Plaintiffs have raised a substantial and serious question as to the merits of their claim under Section 1 of the Sherman Act. In particular, Plaintiffs have raised a serious question as to PM's market power and as to whether Retail Leaders will have an anti-competitive effect on the interbrand market which will outweigh any pro-competitive benefits of the program.
5. While fair and vigorous competition is in the public interest, this factor does not substantially affect the court's determination that it is appropriate to enter a preliminary injunction in this case.

CONCLUSION

For the foregoing reasons, the court will grant Plaintiff's joint motion for a preliminary injunction [Doc. # 2 in RJR 1:99CV185; Doc. # 2 in Lorillard 1:99CV207; and Doc. # 2 in B&W 1:99CV232].

[31]** An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

FRANK W. BULLOCK, JR.

United States District Judge

June 29, 1999

ORDER and PRELIMINARY INJUNCTION

BULLOCK, Chief Judge

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS HEREBY ORDERED that Plaintiffs' joint motions for preliminary injunction [Doc. # 2 in RJR 1:99CV185; Doc. # 2 in Lorillard 1:99CV207; and Doc. # 2 in B&W 1:99CV232] are **GRANTED**.

IT IS THEREFORE FURTHER ORDERED that, during the pendency of this action, Defendant Philip Morris Incorporated, its officers, employees, agents and those acting in concert with it, shall not, by contract, mutual understanding, or otherwise, directly or indirectly, in connection with the Retail Leaders program or any other merchandising program,

1. In CPL 2 contracts prohibit any retail outlet from installing any permanent or other signage (of whatever size, subject to Paragraph 2) in that section of a fixture that displays or holds packages of cigarettes manufactured by a firm other than Philip Morris;
2. In CPL 2 contracts require any retail outlet to allocate to Philip Morris **[**32]** a percentage of the cigarette-related permanent signage (computed without excluding from the calculation any permanent Philip Morris signage) greater than Philip Morris's market share in the local market area or of the retailer's total cigarette sales (whichever is greater); or
3. Prohibit any retail outlet from advertising or conducting at any time any promotional program relating to cigarettes manufactured by a firm other than Philip Morris.

60 F. Supp. 2d 502, *512L^A999 U.S. Dist. LEXIS 9926, **32

FRANK W. BULLOCK, JR.

United States District Judge

June 29, 1999

End of Document



Solla v. Aetna Health Plans of New York, Inc.

United States Court of Appeals for the Second Circuit

June 29, 1999, Decided

No. 98-9181

Reporter

1999 U.S. App. LEXIS 14628 *; 1999-2 Trade Cas. (CCH) P72,570

Dr. Phillip J. Solla, Dr. Andrew Lacerenza, and Dr. Nicholas Napolitano, individually and on behalf of all others similarly situated, Plaintiffs-Appellants, v. Aetna Health Plans of New York, Inc.; ChoiceCare Long Island, Inc.; Cigna Healthcare of New York, Inc.; Empire Blue Cross and Blue Shield; Health Insurance Plan of Greater New York; Managed Health, Inc.; Metlife Healthcare Network of New York, Inc.; Oxford Health Plans (NY), Inc.; Prudential Health Care Plan of New York, Inc.; Sanus Health Plan of Greater New York, Inc.; Travelers Health Network of New York, Inc.; and U.S. Healthcare, Inc. Defendants-Appellees.

Notice: [*1] RULES OF THE SECOND 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: [1999 U.S. App. LEXIS 23554](#).

Disposition: AFFIRMED.

Core Terms

conspiracy, district court, chiropractic, chiropractors, material fact, Sherman Act, under-referral, conspirators, restraint of trade, claim for relief, concerted action, summary judgment, anti trust law, personal stake, impermissible, plaintiffs', antitrust, decisions, enrollees, intra-HMO, referral

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

International Trade Law > General Overview

[HN1](#) [PDF] Antitrust & Trade Law, Sherman Act

[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, or with foreign nations, is hereby declared to be illegal. [15 U.S.C.S. § 1](#). The "contract, combination ... or conspiracy" language of [§ 1](#) requires concerted

activity involving more than one actor. Moreover, a plaintiff alleging a violation of [§ 1](#) must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

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

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

HN2 [+] **Private Actions, Remedies**

To survive a motion for summary judgment in an antitrust action, plaintiff must establish a genuine issue of material fact that: (1) defendants violated the antitrust laws; and (2) the violation caused plaintiffs actual injury.

Counsel: Appearing for Appellants: Laurence P. Meyer, Weber & Weber, Hauppauge, N.Y.

Appearing for Appellees: Bruce H. Schneider, David A. Markowitz, Stroock & Stroock & Lavan, LLP, New York, NY, for Managed Health, Inc. and Health Insurance Plan of Greater New York, Inc. Susan G. Fillichio, Sedgwick, Detert, Moran & Arnold, New York, NY, for ChoiceCare Long Island, Inc. Bryan Dunlap, Winthrop, Stimson, Putnam & Roberts, New York, NY, for Oxford Health Plans (NY), Inc. Kenneth J. Kelly, Epstein, Becker & Green, New York, NY, for Prucare of New York, Inc. and U.S. Healthcare, Inc. . Craig P. Murphy, Windels, Marx, Davies & Ives, New York, NY, for Travelers Health Network of New York, Inc. Kevin D. McDonald, Jones, Day, Reavis & Pogue, Washington, D.C. for Cigna Healthplan of New York. William J. O'Shaughnessy, McCarter & English, Newark, NJ, for Aetna Health Plans of New York, Inc. Debra J. Pearlstein, Weil, Gotshal & Manges, New York, NY, for Empire Blue Cross and Blue Shield. Mitchell C. Shapiro, Constantine [*2] & Partners, New York, NY, for Sanus Health Plan of Greater New York, Inc. Carl J. Schaerf, Lester, Schwab Katz & Dwyer, New York, NY, for MetLife Healthcare Network of New York, Inc.

Judges: Present: Honorable Pierre N. Leval, Circuit Judge Honorable Sonia Sotomayor, Circuit Judge Honorable Frederick J. Scullin, Jr., District Judge ¹

Opinion

SUMMARY ORDER

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York (Nina Gershon, Judge), **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the judgment of the district court is **AFFIRMED**.

Plaintiffs, a group of chiropractic physicians who are licensed to practice in New York, appeal from Judge Gershon's grant of summary judgment to defendant Health Maintenance Organizations ("HMOs"). The Fourth Amended Complaint asserts, in relevant part, three antitrust violations under the [§ 1](#) of the Sherman Act, [15 U.S.C. § 1](#), as well as corresponding claims under New York's Donnelly Act, [N. Y. Gen. Bus. Law § 340 \(1\)](#). [*3] In their first claim, plaintiffs assert that the failure of HMO representatives to authorize chiropractors as providers rendered each HMO a combination in restraint of trade. In their second claim, plaintiffs allege that two forms of unlawful conspiracy existed within each of the defendant HMOs: (A) a conspiracy by HMO persons in power to establish coverage

¹ Honorable Frederick J. Scullin, Jr., United States District Judge for the Northern District of New York, sitting by designation.

policies which operated to exclude or restrict chiropractic services; and (B) a conspiracy by certain Primary Care Practitioners ("PCPs") within the respective HMOs, each having an impermissible personal stake in the outcome, to under-refer their HMO enrollees to chiropractors. Finally, in their third claim, plaintiffs maintain that representatives of some or all of the HMO's conspired with each other to tolerate the intra-HMO conspiracies. While their notice of appeal is not so limited, in their briefs to this Court, plaintiffs state that they are restricting their appeal to the district court's dismissal of their first claim for relief. Although purporting not to dispute dismissal of their second claim, plaintiffs challenge as erroneous the district court's findings relating to that claim which plaintiffs state were "uncritically [*4] carried forward" to analysis of their first claim. Accordingly, given these facts, we consider only those arguments made by plaintiffs relative to their first claim for relief.

HN1[] [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, or with foreign nations, is hereby declared to be illegal." [15 U.S.C. § 1](#). The Supreme Court has interpreted the "contract, combination . . . or conspiracy" language of [§ 1](#) to require concerted activity involving more than one actor. See [Copperweld Corp. v. Independence Tube Corp.](#), [467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#). Moreover, a plaintiff alleging a violation of [§ 1](#) must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. [Monsanto Co. v. Spray-Rite Serv. Corp.](#), [465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#). Put another way, plaintiffs were required to introduce at least some evidence that the inference of a [§ 1](#) violation is reasonable given the competing inferences of independent action or collusive action that could [*5] not have harmed plaintiffs. See [First Nat'l Bank of Ariz. v. Cities Serv. Co.](#), [391 U.S. 253, 280, 20 L. Ed. 2d 569, 88 S. Ct. 1575 \(1968\)](#).

HN2[] To survive a motion for summary judgment in an antitrust action, plaintiffs were required to establish a genuine issue of material fact that: (1) defendants violated the antitrust laws; and (2) the violation caused plaintiffs actual injury. See [New York v. Hendrickson Bros.](#), [840 F.2d 1065, 1076 \(2d Cir. 1988\)](#) (citing [J. Truett Payne Co. v. Chrysler Motors Corp.](#), [451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 \(1981\)](#)).

On appeal, plaintiffs claim that the district court erred in finding that the personal interests of the PCPs did not diverge from the interests of defendant HMOs and that the PCPs were therefore legally incapable of conspiring for the purpose of non-referral or under-referral of HMO enrollees to chiropractors. See Brief for Appellants at 5. However, plaintiffs have misstated the district court's finding. What the district court said was that [§ 1](#) of the Sherman Act did not apply to unilateral conduct on the part of a single person or enterprise and therefore plaintiffs' claim of intra-HMO illegal conduct to [*6] restrict chiropractic services must be dismissed absent a showing that HMO policy makers or PCPs had a personal stake in the outcome of relevant decisions. Judge Gershon then held that plaintiffs failed to carry their evidentiary burden in establishing a question of material fact as to this issue. See [Copperweld](#), [467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#). Upon review of the record below, we find no error in the district court's analysis.

We also reject plaintiffs' argument that, given the presumed cost effectiveness of chiropractic care, the existence of under-referral alone bears witness to concerted action. [Antitrust law](#) curbs the breadth of permissible inferences from ambiguous evidence in a [§ 1](#) case. See [Monsanto](#), [465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 \(1984\)](#). Accordingly, even if referrals to medical doctors were construed as under-referrals to chiropractors, such conduct would not necessarily "cast[] doubt on inferences of independent (not combined) action or proper conduct by defendants." [Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.](#), [996 F.2d 537, 545 \(2d Cir. 1993\)](#). Plaintiffs simply did not shoulder their burden of presenting a question of material fact that [*7] chiropractic referral decisions were motivated by impermissible conduct by any of the actors identified in their complaint. See [Capital Imaging](#), [996 F.2d at 542](#); [Michelman v. Clark-Schwebel Fiber Glass Corp.](#), [534 F.2d 1036, 1043 \(2d Cir. 1976\)](#).

Finally, plaintiffs suggest that there is a distinction between combination and conspiracy for purposes of a [§ 1](#) claim and that there is no unity of purpose requirement in order to establish an illegal "combination." This Circuit has yet to address the issue of a distinction between a combination and a conspiracy insofar as it might impact the degree of proof necessary to establish a [§ 1](#) violation. We note that other circuits have rejected the notion that a "combination" is distinct from a "conspiracy" under [§ 1](#). See [Orson, Inc v. Miramax Film Corp.](#), [79 F.3d 1358, 1366](#)

(*3d Cir. 1996*); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1455 (11th Cir. 1991). However, we need not decide this issue, because plaintiffs, although required to offer at least some evidence of concerted action, failed to offer any evidence in this regard. See *Capital Imaging*, 996 F.2d at 545. Moreover, we are unable to discern that plaintiffs proffered [*8] any evidence as to when or whether the doctors and HMOs who are defendants in this action were independent of each other.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

End of Document



Callahan v. A.E.V.

United States Court of Appeals for the Third Circuit

March 25, 1999, Argued ; June 30, 1999, Filed

NO. 98-3456

Reporter

182 F.3d 237 *; 1999 U.S. App. LEXIS 14649 **; 1999-2 Trade Cas. (CCH) P72,567; 52 Fed. R. Evid. Serv. (Callaghan) 916

MICHAEL W. CALLAHAN; PERRY BEER INC.; PETER G. PETOUSIS; NORMAN BERNARDI; KATHLEEN A. KAPRES; PETE'S BEER INC.; LISA MARTIN; ANTHONY SANTAGUIDA; THOMAS SANTAGUIDA; A. L. ABROMOVITZ; CARL N. ALTENHOF; DOUGLAS J. BERTHOLD; BREW-THRU, INC.; ALLEN E. BRAUN; SPIKE'S BEER DISTRIBUTOR, INC.; DINO A. DEFLAVIO; CAROLE A. DEMARCO; FRED DEMSHER; E & C PRICE DISTRIBUTING, INC.; FRISCH DISTRIBUTING CO. INC.; SARA J. KELLY; MARY LOU LIBELL; THE BEER WAREHOUSE; ARMANDO NOVELLI; MARTIN P. PEKOR; T.C. VALLEY BEER & POP COMPANY, INC.; LORETTA J. PERRI; GREEN VALLEY DISTRIBUTING CO., INC.; MARYANNE SANTAGUIDA; INGEBORG G. SCHINDLER; DENNIS SENNEWAY; MICHAEL T. VOELKER; VOELKER DISTRIBUTING, INC., Appellants v. A.E.V., INC., a corporation; BEER AND POP WAREHOUSE, INC., a corporation; BRANDT DISTRIBUTORS OF PITTSBURGH, a corporation; EARL BRANDT, an individual; FRANK B. FUHRER WHOLESALE COMPANY, a corporation; FRANK B. FUHRER, JR., an individual; JET DISTRIBUTORS, INC., a corporation; ALFRED M. LUTHERAN DISTRIBUTORS, INC., a corporation; JAMES LUTHERAN, an individual; Q.F.A., INC., a corporation; RED SKY, INC., a corporation; RETAIL SERVICES AND SYSTEMS, INC., a corporation; DAVID J. TRONE, an individual

Subsequent History: [**1] As Corrected July 23, 1999.

Prior History: On Appeal From the United States District Court For the Western District of Pennsylvania. (D.C. Civ. No. 92-cv-00556). District Judge: Honorable Donetta W. Ambrose.

Disposition: Judgment of the District Court reversed to the extent that it granted summary judgment to the defendants on the plaintiffs' antitrust claims, but affirmed in all other respects, and case remanded to the District Court for further proceedings in accordance with this opinion.

Core Terms

Beer, plaintiffs', customers, defendants', discount, district court, distributor, causation, losses, wholesalers, damages, antitrust violation, proximate causation, factors, Liquor, antitrust, antitrust claim, purchasing, vindicate, retailers, reasons, prices, licenses, sales, sufficient evidence, fact of damage, racketeering, summary judgment motion, cases, injuries

LexisNexis® Headnotes

HN1 State & Territorial Governments, Licenses

See [Pa. Stat. Ann. tit. 47, §§ 4-438, 4-443, 4-438\(b\), 4-436\(e\), 4-436\(f\)](#).

Civil Procedure > ... > Discovery > Methods of Discovery > 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

HN2 Discovery, Methods of Discovery

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\(c\)](#).

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN3 Summary Judgment, Burdens of Proof

Although the plaintiffs must prove loss, causation and specific damages, at the summary judgment stage, the court's main concern should be with determining loss and causation in general, rather than proof of specific amounts of damages. At this procedural juncture, reviewing the district court's grant of summary judgment, the court is not, as it would be upon reviewing a jury verdict, determining whether a plaintiff has brought sufficient evidence to justify the actual damages awarded. All the court is concerned with is whether a plaintiff has established that the defendants' illegal conduct was a material cause of the plaintiff's injury.

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN4 Standards of Review, De Novo Review

On appeal, review of a district court's grant of summary judgment is plenary. The reviewing court evaluates the evidence using the same standard the district court applied in reaching its decision.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN5**](#) [down] Robinson-Patman Act, Claims

Price discrimination simpliciter, even when it violates the Robinson-Patman Act, is usually not a Sherman Act violation. But this does not necessarily mean that the plaintiffs are barred from bringing a price discrimination claim under the Sherman Act, [15 U.S.C.S. §§ 1-2](#). Price discrimination, under appropriate circumstances, can be part of an agreement in restraint of trade or a monopolization attempt. So long as the price discrimination involves a conspiracy to restrain trade or create a monopoly in some market, along with a substantial effect on competition in the market, it would violate the Sherman Act. The proper evidence might support the conclusion that this constitutes a conspiracy or agreement to restrain trade or create a monopoly.

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

[**HN6**](#) [down] Private Actions, Remedies

A plaintiff must prove a causal connection between the antitrust violation and actual damage suffered. To recover damages, an antitrust plaintiff must prove causation, described in Third Circuit jurisprudence as fact of damage or injury. The plaintiff must show actual injury that was caused by the violation.

Evidence > ... > Exceptions > State of Mind > Proof of Earlier Acts

Evidence > ... > Hearsay > Exceptions > General Overview

Evidence > ... > Exceptions > State of Mind > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Hearsay > Rule Components > Declarants

Evidence > ... > Hearsay > Rule Components > Statements

Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

[**HN7**](#) [down] State of Mind, Proof of Earlier Acts

[Fed. R. Evid. 803\(3\)](#) provides that the following is not excluded by the hearsay rule, even though the declarant is available as a witness: A statement of declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. Statements that are considered under the exception to the hearsay rule found at [Fed. R. Evid. 803\(3\)](#) cannot be offered to prove the truth of the underlying facts asserted. Statements of a customer as to his reasons for not dealing with a supplier are admissible for the limited purpose of proving customer motive, but not as evidence of the facts recited as furnishing the motives.

Evidence > ... > Exceptions > Spontaneous Statements > General Overview

Evidence > ... > Statements as Evidence > Hearsay > General Overview

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Evidence > ... > Hearsay > Exceptions > General Overview

Evidence > ... > Exceptions > State of Mind > General Overview

Evidence > ... > Hearsay > Rule Components > Statements

HN8[] Exceptions, Spontaneous Statements

The admissibility of customers' statements under the [Fed. R. Evid. 803\(3\)](#) hearsay exception does not depend on their being identified. Knowing the specific identity of the declarant will not make the statements more trustworthy evidence of the declarants' descriptions of their states of mind, the primary concern in interpreting hearsay exceptions. With respect to a state-of-mind statement, it is only important that the declarant be the person whose state of mind the statement concerns, which is true by definition.

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > ... > Hearsay > Exceptions > General Overview

Evidence > ... > Exceptions > State of Mind > General Overview

HN9[] Private Actions, Remedies

Plaintiffs' testimony that certain customers no longer purchased from them, coupled with their testimony concerning the customers' statements of their motive, which is admissible hearsay under [Fed. R. Evid. 803\(3\)](#), are together evidence of the fact of damage.

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

HN10[] Private Actions, Remedies

In order to establish antitrust liability and damages, all the plaintiffs must show is that they suffered an economic loss as a result of the defendants' antitrust violations, not that the defendants benefitted from that loss directly. A plaintiff, in order to recover on an antitrust claim, must prove an antitrust violation and that the plaintiffs were injured as a proximate result of that violation. As long as the plaintiffs can prove that they lost business, and that this loss was a result of the defendants' antitrust violations, they can bring a successful antitrust claim.

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

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

HN11[] Private Actions, Remedies

On review of a grant of summary judgment, the court should focus on whether there is sufficient evidence of the fact of damage in general, not on the sufficiency of the evidence of a specific amount of damages. Accordingly, the lack of specific evidence of the total amount of lost sales does not preclude an ultimate conclusion that the customer evidence, especially in conjunction with expert evidence, is sufficient to meet the plaintiffs' burden of producing evidence of fact of damage.

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

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

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN12[**Private Actions, Remedies**

Sufficient evidence of causation exists to defeat a motion for summary judgment where an expert report rests on assumptions that are based on past performance, not guesses as to the future. An opinion may be based on the assumption that the plaintiffs' performance in the years before defendants entered the market provides an appropriate benchmark for their performance thereafter.

Civil Procedure > Discovery & Disclosure > Disclosure > General Overview

Evidence > Types of Evidence > Testimony > General Overview

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

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

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN13[**Discovery & Disclosure, Disclosure**

Labeling of a witness as a rebuttal expert does not preclude consideration of his testimony to defeat a motion for summary judgment. The Federal Rules of Civil Procedure, and *Fed. R. Civ. P. 26(a)(2)* governing the disclosure and discovery of expert witnesses in particular, make no distinction between the permissible uses of regular experts and rebuttal experts.

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN14[**Private Actions, Remedies**

In addition to establishing that the defendants' unlawful actions in fact caused the plaintiffs' losses, the plaintiffs must also establish proximate causation, showing that this causal connection is not too remote. A causal connection simpliciter between the defendants' actions and the plaintiffs' injuries is insufficient to give rise to a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. § 1341](#). The plaintiff must show that the connection is proximate, that is, not too remote.

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

[HN15](#) [blue download icon] Private Actions, Remedies

Three key factors determine whether a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. § 1341](#), is based on an injury too remote from the alleged racketeering activity. First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other independent factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

[HN16](#) [blue download icon] Private Actions, Remedies

The less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation as distinct from other independent factors. The more difficult it is to distinguish between the effects of the defendants' legitimate activities and their alleged racketeering actions on the plaintiffs, the more likely the court is to conclude that proximate causation is lacking.

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

[HN17](#) [blue download icon] Private Actions, Remedies

Recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. As a result, where granting plaintiffs relief would require apportionment of that relief among numerous plaintiffs of different standing, the court is inclined to find an absence of proximate causation for those less directly involved.

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

[HN18](#) [blue download icon] Private Actions, Remedies

A searching inquiry into causation and apportionment of damages among plaintiffs is unjustified where the central focus of the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. § 1341](#), in deterring unlawful conduct can be vindicated by other means. Where a more directly affected party is available to vindicate the public interest in enforcing the law, the court has less need to stretch the limits of proximate causation in RICO cases.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN19 [blue download icon] **Private Actions, Racketeer Influenced & Corrupt Organizations**

See [18 Pa. Cons. Stat. § 911](#).

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN20 [blue download icon] **Private Actions, Remedies**

A civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. § 1341](#), is not specifically required to vindicate the general deterrence interest. Although not providing for treble damages, the prospect of state criminal racketeering charges provides an adequate deterrent to lawless conduct.

Governments > State & Territorial Governments > Licenses

HN21 [blue download icon] **State & Territorial Governments, Licenses**

[Pa. Stat. Ann. tit. 47, §§ 1-104\(d\), 1-104\(a\)](#) (1997).

Counsel: H. LADDIE MONTAGUE, JR., ESQUIRE, JEROME M. MARCUS, ESQUIRE, (ARGUED) BART D. COHEN, ESQUIRE, Berger & Montague, P.C., Philadelphia, PA Counsel for Appellants.

ROSLYN M. LITMAN, ESQUIRE, (ARGUED) MARTHA S. HELMREICH, ESQUIRE, Litman, Litman, Harris and Brown, P.C., Pittsburgh, PA Counsel for Appellees A.E.V., Inc.; Beer & POP Warehouse, Inc.; Jet Distributors, Inc.; Q.F.A., Inc.; Red Sky, Inc.; Retail Services and Systems, Inc.; David J. Trone.

MICHAEL YABLONSKI, ESQUIRE, (ARGUED) Meyer, Unkovic & Scott, LLP, Pittsburgh, PA Counsel for Appellees Frank B. Fuhrer Wholesale Company and Frank B. Fuhrer, Jr.

Judges: Before: BECKER, Chief Judge, LEWIS and WELLFORD, * Circuit Judges. [\[**2\]](#)

Opinion by: BECKER

Opinion

[*240] OPINION OF THE COURT

BECKER, *Chief Judge*:

Prior to 1985, the retail sale of beer in the Pittsburgh area was conducted exclusively by "mom and pop"-type beer distributorships, such as those operated by plaintiff Michael W. Callahan and his fifteen co-plaintiffs. In that year, defendant David Trone opened the first "Beer World" store, a supermarket-style beer distributorship ten times the

* Honorable Harry Wellford, United States Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

size of the traditional stores. He opened four more such stores in the Pittsburgh area between 1986 and 1988, offering a larger selection and lower prices. This case involves antitrust and RICO claims arising out of the manner in which Trone operated these stores.

The Pennsylvania Liquor Code limits the ability of one entrepreneur to own or operate more than one beer distributorship. Trone apparently evaded these restrictions by placing the Beer World stores in the names of others, and, while acting as a "consultant," effectively running the stores himself. According to the plaintiffs, Trone deceived the Pennsylvania Liquor Control Board (LCB) as to the true state of affairs by filing of false statements and affidavits.

Trone negotiated purchases of beer from [**3] wholesalers for all of the Beer World stores collectively. By doing so, the stores were able to purchase at a wholesale price lower than they would have been able to obtain in individual purchases. Central to this case are Trone's negotiations with defendant Frank Fuhrer, the master distributor in the Pittsburgh area for Anheuser-Busch and Coors, in the course of which Trone allegedly forced Fuhrer to agree to give a quantity discount to the Beer World stores based on their purchases as a group, but not to give this discount to any other retailers.¹ Trone is said to have been able to do this because the Beer World stores held a substantial portion (at least 25%) of the Pittsburgh beer market, and because he threatened to place Fuhrer's products poorly within the stores. The Beer World stores allegedly received this discount even though their orders in the aggregate did not always reach the 4500-case level Fuhrer set for the discount. According to the plaintiffs, this discount was not disclosed to anyone else; it was not included on Fuhrer's ordinary price list and was excluded from loading sheets posted at Fuhrer's distribution center. Not surprisingly, the Beer World stores' advantage [**4] in pricing, as well as other areas, cut sharply into the business of the smaller stores.

This state of affairs has spawned this unusual antitrust and civil RICO case with state tort law claims appended, brought by the plaintiffs against Trone, the Beer World stores, and Fuhrer.² The plaintiffs' antitrust theory is that Trone, his employees, and the separately incorporated stores have contracted, combined and conspired to restrain trade in beer in Allegheny County, by confronting wholesalers as a group and using their buying power and the threats described above to force the wholesalers to sell them beer at a price lower than that available to other retailers. The plaintiffs' RICO theory is that Trone and others, by submitting false statements and affidavits to the [**5] LCB, as well as lying to a grand jury to cover up these false statements, were able to maintain illegal consolidated control of the Beer World stores. The plaintiffs submit that, as a [*241] result of this control, Trone and the Beer World stores obtained the advantages that enabled them to sell beer at prices below that of the plaintiffs. Although in a free market, these different approaches to operating a beer distributorship might not seem to offer grounds for a federal antitrust or civil RICO suit, in the context of Pennsylvania's detailed malt and brewed beverages regulatory scheme, the plaintiffs have found grounds for a lawsuit.

[**6] The District Court granted summary judgment for the defendants on all claims, including both the state tort law claims and the federal claims, and the plaintiffs have appealed. Strangely, antitrust *liability* issues are not presented in this appeal. The District Court, in deciding the defendants' motion for summary judgment, did not consider antitrust liability issues at all; rather, the District Court disposed of the antitrust and RICO claims on the ground that the plaintiffs had not produced sufficient evidence that they suffered actual losses that were in fact a result of the defendants' actions. Accordingly, and given the incomplete state of the record as presented to us by the parties, we do not intend to engage in an examination of the nature and scope of the plaintiffs' theory or proof of antitrust violations (and, consequently, we express no view as to their correctness). Instead, we will assume, for the purposes of this appeal, that the plaintiffs can offer sufficient proof that the defendants engaged in antitrust violations throughout the relevant time periods. We will accordingly concentrate on the issues -- actual loss and

¹ Several other master distributors were involved in similar arrangements with the defendants. Although they were apparently named in the original complaint, they have now settled with the plaintiffs and are no longer participating in this case.

² The Beer World stores are separately incorporated and named in the complaint as A.E.V., Inc., Beer and Pop Warehouse, Inc., Jet Distributor, Inc., Q.F.A., Inc., and Red Sky, Inc., all of which operate under the Beer World name. Trone is named personally in the complaint, along with the consulting business he runs, Retail Services and Systems, Inc. Fuhrer includes both Frank B. Fuhrer, Jr. himself and his business, Frank B. Fuhrer Wholesale Co.

causation in fact (termed "fact of damage") **[**7]** with respect to the antitrust claims, and proximate causation with respect to the RICO claim -- that are fairly presented by this appeal.

In order to prove that the plaintiffs suffered losses and that the defendants' antitrust violations caused the injuries as a matter of fact, the plaintiffs offered (1) testimony that various customers no longer came to their stores and that the customers explained that this was because the Beer World stores offered cheaper prices, along with (2) the report of an expert who opined that the defendants' actions had caused harm to the plaintiffs. The defendants contend that this evidence is insufficient to meet the plaintiffs' burden of production. They first submit that the plaintiffs' anecdotal evidence is inadmissible hearsay on which the plaintiffs cannot rely. We disagree. The plaintiffs themselves can testify that the customers are in fact no longer shopping at their stores. Furthermore, although the reports of the customers' statements are hearsay, they are admissible as evidence of the customers' states of mind, i.e., their reasons for no longer shopping at the plaintiffs' stores. This combined evidence is sufficient to meet the plaintiffs' **[**8]** burden of producing enough evidence of loss and causation with respect to the plaintiffs' antitrust claims to overcome a motion for summary judgment.

Also on the antitrust issues, the defendants argue that the plaintiffs' proffered expert testimony is inadequate to prove fact of injury and causation because, *inter alia*, the expert failed to discuss numerous other possible causes of the plaintiffs' losses. Furthermore, the defendants challenge the expert's methodology for estimating the amount of damages. In spite of these flaws, we conclude that the expert's testimony is sufficient to meet the plaintiffs' burden of proof. At all events -- taking into consideration *both* the customer evidence *and* the expert reports-- we believe that the District Court erred in dismissing the plaintiffs' antitrust claims on the ground that there was inadequate proof of fact of injury and causation in fact.

With respect to the RICO claim, the defendants contend that the alleged causal connection between the defendants' fraud and the plaintiffs' losses is not sufficiently close to meet the requirement of proximate causation. The plaintiffs' RICO claim runs as follows: If Trone and others **[**9]** associated with the Beer World stores had **[*242]** not defrauded the Pennsylvania Liquor Control Board by submitting sworn statements that Trone did not own and control all of the stores, the Liquor Control Board would have put Trone out of business. Since he stayed in business, Trone was able to use his control of several stores to obtain volume discounts by buying for the stores in the aggregate. The plaintiffs were then harmed by the defendants' ability to sell at lower prices.

We think this case is similar to *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), in which we recently held that the plaintiffs had failed to prove proximate causation. In *Steamfitters*, we recognized three factors the Supreme Court has identified for determining proximate causation in RICO cases: the directness of the injury, the difficulty of apportioning treble damages among potential plaintiffs, and the possibility of other plaintiffs vindicating the goals of RICO. Given that the plaintiffs are relatively remote third-party "victims" of the fraud and that the LCB itself, or the wholesalers, could take steps to counter the defendants' allegedly illegal **[**10]** actions, we think the plaintiffs' claim meets none of the factors. Accordingly, we believe that the District Court properly dismissed the plaintiffs' RICO claim, although not for the appropriate reason. For these reasons, we will affirm the judgment of the District Court to the extent it dismissed the plaintiffs' RICO claim, but reverse its judgment with respect to the antitrust claims.

I. Facts and Procedural History

A. The Pennsylvania Beer Sales Regulation Scheme

Pennsylvania is a state in which temperance with respect to alcoholic beverages has always been an important policy, and statutory regulation of alcoholic beverage sales is extensive. The best known example, of course, is the "state store" system, under which liquor can only be sold in state-owned stores. With respect to malt and brewed beverages there is likewise a panoply of regulations. See, e.g., *Pa. Stat. Ann. tit. 47, § 4-441(b)* (West 1997) (prohibiting sales in units smaller than one case); § 4-447 (limiting sellers' ability to change prices); § 4-492(2) (prohibiting sales by licensees for consumption on the premises); § 4-492(4) (prohibiting sales on Sunday); § 4-493(2) (prohibiting credit sales of **[**11]** alcoholic beverages other than by credit card); § 4-493(3) (prohibiting exchange of alcoholic beverages for goods or services); § 4-493(8) (prohibiting the use of labels or advertisements containing the alcoholic content of brewed or malt beverages).

For present purposes, we are concerned with the regulation of beer sales. Under Pennsylvania law, beer sellers are divided into four classes for licensing purposes: manufacturers, master distributors, importing distributors and distributors. See [Pa. Stat. Ann. tit. 47, § 4-431](#) (West 1997). The first category consists of breweries. An out-of-state brewer is required to designate a particular importing distributor as the master distributor for a particular geographic area within which only that master distributor is permitted to buy that brewer's beer directly from the brewer. See [§ 4-431\(b\)](#). Thus, any beer sold in a particular area must at some point pass through the master distributor designated for that brand in that area. A master distributor can sell beer to importing distributors, (ordinary) distributors or the public. An importing distributor can also sell beer either to other importing distributors, (ordinary) distributors [\[**12\]](#) or the public. A distributor can only sell beer to the public. The Beer World stores all have importing distributor licenses, and can therefore sell to each other and to the public. Only some of the plaintiffs have such licenses.

Highly relevant here is the extent to which Pennsylvania law limits the ability of a participant -- e.g., a partner, member or shareholder -- in one beer distributor to participate in another. [HN1](#)¹ See [§ 4-438](#) ("No [\[*243\]](#) person shall possess more than one class of license . . ."); [§ 4-443](#) (prohibiting interlocking ownership in various forms). In particular, the law restricts the ability of an individual to participate in companies that operate at the same level, although the parties debate the extent to which the law does so. See [§ 4-438\(b\)](#) ("No person shall possess or be issued more than one distributor's or importing distributor's license."); [§ 4-436\(e\)](#) (application for brewed or malt beverage license must state "that the applicant is not, or in case of a partnership or association, that the members are not, or in the case of a corporation, that the officers or directors are not, in any manner pecuniarily interested, either directly or indirectly, in [\[*13\]](#) the profits of any other class of business regulated under this article, except as hereinafter permitted"); [§ 4-436\(f\)](#) (applicant must state "that applicant is the only person in any manner pecuniarily interested in the business so asked to be licensed . . .").

B. Trone's Beer Business Arrangements

Trone's family had been in the beer business in Harrisburg and Pittsburgh for some time. While a business student at the University of Pennsylvania's Wharton School, Trone apparently came up with a plan for a new type of beer distributorship business. Prior to his plan, beer distributors were typically small, low-capitalization "mom-and-pop" stores of the kind operated by the plaintiffs. They usually had ordinary distributor licenses and operated relatively small stores, selling beer by having people come in and ask for a particular brand. Trone's idea was to create much larger stores, roughly ten times the square footage of the plaintiffs' stores, to be operated like a supermarket. The cases of beer would be set out on shelves so that shoppers could wander through the store picking out particular brands themselves. In addition, Trone planned to offer soda and snacks in addition [\[**14\]](#) to the beer. This business plan became the "Beer World" concept.³ We chronicle the history and management structure of the stores because it bears on the contention that Trone improperly controls all of the stores in violation of the Pennsylvania liquor control scheme, an important part of the plaintiffs' antitrust and RICO claims.

The first Beer World opened in the Pittsburgh area in 1985. Two more stores opened in Pittsburgh in 1986, followed by the last two in 1987 and 1988. The first store, incorporated as Jet Distributors, Inc., is apparently owned by Paul Piho, a childhood friend of Trone's. Piho initially worked full-time in Chicago after the store opened. For a short time, he moved to Pittsburgh [\[**15\]](#) and managed the store. Currently, he works at a Delaware branch of a chain of liquor stores apparently owned by Trone. The second store is apparently owned by Trone's wife, who for a time worked at the store, but presently spends less than five hours per week there. The third is apparently owned by Thomas Esper, a retired schoolteacher who apparently knows little about either the store or the liquor business. The fourth store is apparently owned by Trone's sister, who has been in school or working at other jobs for the relevant period. Before 1990 and since 1994, she has lived outside of Pennsylvania. The last store was apparently owned by Albert Vivio, the father of one of Trone's employees. He stated that he did not pay anything to own the

³ It might seem surprising that Trone was the first to come up with the beer supermarket concept. Indeed, one might think that it would have been around for decades. Perhaps he was simply the first to bring this idea to Pennsylvania. At all events, these ruminations have no bearing on the outcome of this case.

store, but that Trone asked him to put his name on a license. He testified that he had "no duties at the store," pursuant to an "agreement with Mr. Trone."

Since the Beer World stores opened, Trone has been employed as a "consultant" for all of them. The plaintiffs allege, however, that Trone's role in the stores is [*244] much greater. When the stores opened, he did much of the work in preparing the stores, choosing product line and layout, and selecting [**16] employees. He also set up purchasing and delivery systems. Since then, Trone has apparently controlled the day-to-day operations of the stores. He set the salaries for Beer World employees. Employees were routinely moved from store to store while remaining on the payroll of the store in which they began. Although each store maintains a separate bank account in the owner's name, Trone has a stamp of each owner's signature which he uses for checks. He also designed all the advertising for the stores, which included aggressive price advertising until July 1, 1987, when Pennsylvania banned it. And he determined purchasing and product placement within the stores. Finally, Trone purchased a single insurance policy and used one law firm for all of the stores.

Of particular relevance to the plaintiffs' claims are Trone's efforts in coordinating purchasing. Trone negotiated purchases of beer from wholesalers for all of the Beer World stores at once, obtaining an agreement that the Beer World stores could order together in order to obtain substantial volume discounts. The parties focus particularly on the negotiations between Trone and Fuhrer, who was the master distributor in the Pittsburgh [**17] area for Anheuser-Busch and Coors. All of Fuhrer's negotiations regarding the prices he would charge Beer World stores were conducted with Trone.

Even before the Beer World stores opened, beer wholesalers offered various quantity discounts, although they were relatively small. From September 1, 1987, until the end of 1989, pursuant to an agreement with Trone, Fuhrer implemented a \$.25 per case discount for purchases of 4500 or more cases, a purchase amount substantially larger than that required for other, smaller volume discounts wholesalers offered. The Beer World stores were the only ones ever able to achieve this level of purchasing, which they did by ordering as a unit. Although each store would place separate orders that were delivered separately, they were placed in the name of Jet Distributors, one of the stores, in order to aggregate the order size to reach the 4500 case level. Each store's order was substantially less than this, usually in the range of 1000 cases. Although the plaintiffs attempted to take advantage of this discount, they were never able or permitted to do so.

Although the parties focus primarily on these quantity discounts, the plaintiffs allege that [**18] Trone was also able to obtain other benefits for the Beer World stores from wholesalers. For example, Fuhrer allegedly gave the Beer World stores a full-time employee, paid by Fuhrer, who stocked shelves at all of the stores. The plaintiffs further contend that Trone forced Fuhrer to sell him out-of-code beer, i.e., beer past its expiration/freshness date, at a discount. Apparently state law prohibits this and requires wholesalers to give retailers new beer in exchange for out-of-code beer. Trone allegedly got such beer at a discount and sold it while concealing the fact that it had expired from customers and inspectors sent by the beer brewers.

The plaintiffs criticize several aspects of these arrangements. First of all, they contend that Trone forced Fuhrer to agree not to give the discount to any other retailers. He allegedly could do so because, since the Beer World stores held a substantial portion (at least 25%) of the Pittsburgh beer market, Trone's threat to place Fuhrer's products in unfavorable locations within the stores carried force. Second, the plaintiffs point out that the Beer Worlds consistently received this discount even though their orders in the aggregate did [**19] not always reach the 4500-case level. In addition, many of the individual orders were fairly small: 29% were below 500 cases and 14% were below 200 cases, roughly the level at which the plaintiffs ordered. Finally, this discount was not [*245] disclosed to anyone else; it was not even included on Fuhrer's ordinary price lists.

In response to the defendants' actions, the plaintiffs instituted a state lawsuit against the defendants and convinced the Commonwealth to commence criminal proceedings. Neither of these actions achieved their desired results.

C. The Present Lawsuit

The plaintiffs filed the present lawsuit in March of 1992. Their primary claims include price fixing, engaging in a group boycott, and attempting and conspiring to monopolize the beer market in Pittsburgh, all in violation of the

Sherman Act, [15 U.S.C. §§ 1 & 2](#), and civil RICO claims predicated on money laundering and mail fraud in connection with the license applications to the LCB, said to be a violation of [18 U.S.C. §§ 1341, 1956, 1962](#). They also brought various other claims that have been dismissed and not appealed or that we may dispose of summarily.⁴ Although the plaintiffs moved for class certification, this [\[**20\]](#) motion was denied, at which point some additional plaintiffs joined the suit.

The antitrust claims arise out of the joint operation of the Beer World stores. The plaintiffs contend that, by operating as a group, the Beer World stores were able to obtain an illegal competitive advantage. As evidence of such joint operation, they point to *inter alia* Trone's collective control of the stores, the aggregated orders through Jet Distributing, and coordinated advertising. The plaintiffs [\[**21\]](#) contend that this conduct violated the antitrust laws in several ways. First, the "quantity" discounts the Beer World stores were able to obtain are said to have constituted unfair price fixing, i.e., the price for other beer distributors was fixed at a level \$.25 higher than that for the Beer World stores. Second, the discounts are claimed to have resulted in a group boycott, i.e., Beer World convinced the wholesalers to sell to the other distributors only on unfairly disadvantageous terms. Finally, the plaintiffs allege that all of the actions of Trone and the Beer World stores constituted an effort to monopolize the beer retail market in Allegheny County, which includes Pittsburgh. These efforts were aggravated by the fact that, pursuant to the Pennsylvania Liquor Code, the plaintiffs could only purchase beer through the single, designated master distributor for each brand for Allegheny County.

The RICO claim arises out of the various statements made during and concerning the Beer Worlds' efforts to obtain licenses from the LCB. First, various of the defendants and others allegedly lied about the true ownership of the Beer World stores in affidavits and other documents filed [\[**22\]](#) with the LCB via mailings in order to obtain and retain their licenses. Second, Trone and others allegedly lied before a grand jury investigating their operation when asked about the ownership of the Beer World stores. The plaintiffs contend that, as a result of this fraud, the Beer World stores were able to remain in business illegally under the control of Trone. Furthermore, Trone is said to have engaged in transactions involving the proceeds of this fraud, i.e., the income of the stores, by reinvesting the money in the stores, allegedly in violation of the money laundering statute. The plaintiffs contend that these various activities violated RICO.

D. The District Court's Rulings

Following extensive discovery, the parties each moved for summary judgment on [\[*246\]](#) various of the claims. The plaintiffs moved for summary judgment on their RICO claim relating to the Trone and Beer World defendants' statements to the LCB. The District Court denied the plaintiffs' motion because they did not "provide [any] substantive analysis of the meaning or application of [§ 1962](#) or its various subsections." Dist. Ct. Op. I, at 3.⁵

[\[**23\]](#) The defendants moved for summary judgment on all of the plaintiffs' claims. The District Court, in a series of orders, granted the defendants' motions in part and denied them in part, and granted judgment in favor of the defendants on all of the plaintiffs' claims. First, the District Court dismissed part of the plaintiffs' RICO claim on statute of limitations grounds to the extent it was based on matters that occurred more than four years before the suit was filed.⁶ [\[**24\]](#) Second, the District Court dismissed all of the plaintiffs' remaining claims -- the antitrust and

⁴These claims include price discrimination in violation of the Robinson-Patman Act, [15 U.S.C. § 13](#); common-law fraud; common-law conspiracy to defraud; and RICO violations predicated on mail fraud in the mailing of price lists by Fuhrer, [18 U.S.C. §§ 1341, 1962](#). The Robinson-Patman Act claim was dismissed early on, and the plaintiffs have not appealed from that dismissal. See [Callahan v. A.E.V., Inc., 1994 U.S. Dist. LEXIS 19761](#), Civ. A. No. 92-556, 1994 WL 682756 (W.D. Pa. Sept. 26, 1994). The plaintiffs' others claims are discussed in *infra* note 7.

⁵Since we will affirm the District Court's judgment in favor of the defendants on the plaintiffs' RICO claim, we need not consider specifically whether it erred in denying the plaintiffs' motion for summary judgment.

⁶The District Court granted the defendants' motion for summary judgment on the RICO claim to the extent it was based on actions prior to March 1988, four years before the present suit was filed, because the plaintiffs should have been aware of the defendants' acts prior to that time. The plaintiffs contend that the District Court's conclusion erroneously rested on the fact that some of them filed a state lawsuit against Trone and the Beer World stores in 1986 alleging similar concerns, during which they

RICO claims -- because it concluded that the plaintiffs had not offered sufficient evidence of fact of damage, i.e., loss and causation in fact.⁷

[**25] [HN2](#)[↑]

[*247] 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\(c\)](#). [HN3](#)[↑] Although the plaintiffs must prove loss, causation and specific damages, at the summary judgment stage, the court's main concern should be with determining loss and causation in general, rather than proof of specific amounts of damages:

At this procedural juncture, reviewing the district court's grant of summary judgment, we are not, as we would be upon reviewing a jury verdict, determining whether a plaintiff has brought 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.

could have obtained sufficient discovery to bring their present claims. They argue that their attorney misled them into believing they could not pursue their claim in that context, and that the statute of limitations should be tolled equitably.

We recently explained that attorney misconduct can give rise to equitable tolling only in unusual circumstances. See [Seitzinger v. Reading Hosp. & Med. Ctr.](#), 165 F.3d 236, 240 (3d Cir. 1999). The plaintiffs contend that such unusual circumstances are present here, because their attorney allegedly was conflicted in that he also represented Fuhrer, and because, unlike *Seitzinger*, the lack of information on which to base a claim was at least arguably a result of the defendants' fraud. Furthermore, the plaintiffs note that, given the tremendous difficulties they faced in obtaining adequate discovery from the defendants in this case, the defendants cannot contend that the plaintiffs would have been able to obtain sufficient discovery in the previous state case. On the other hand, the defendants point out that, even if they fraudulently concealed certain facts, the plaintiffs were aware of those facts by the end of 1987. We need not decide this issue, because we will affirm the District Court's dismissal of the RICO claim in its entirety on other grounds.

⁷ As noted above, the plaintiffs brought additional RICO and common-law tort claims. In the same series of orders identified in the text, the District Court granted summary judgment on these claims in the defendants' favor. We will affirm those aspects of the judgment summarily.

The plaintiffs' common-law claims are that Fuhrer issued price lists that were fraudulent because they did not state the volume discount the Beer World stores received, and that Trone and Fuhrer conspired to misrepresent the prices through the same mechanism. Claims for common-law fraud and conspiracy are governed by a two-year statute of limitations. See [42 Pa. Cons. Stat. § 5524\(7\)](#). The discount was discontinued at the end of 1989, and the plaintiffs were aware of the discount before then. The complaint was filed in March of 1992. Accordingly, the District Court concluded that more than two years had elapsed between the defendants' fraudulent acts and the filing of the complaint, and that the claim was therefore time-barred. Since the plaintiffs have not addressed this issue in the briefs (or, apparently, before the District Court), and the District Court's decision appears to be correct, we will affirm the District Court's judgment as to the common-law claims summarily.

The other RICO claim was based on Fuhrer's allegedly fraudulent mailing of price lists that did not include the \$.25/case volume discount offered to the Beer Worlds. This discount was begun in September of 1987. Fuhrer did not mail a price list thereafter until March of 1988, and the plaintiffs were aware of the discount by October of that year. The District Court analyzed whether this constituted a "pattern of racketeering activity," [18 U.S.C. § 1962](#), in light of long-standing precedent. See, e.g., [H.J., Inc. v. Northwestern Bell Tel. Co.](#), 492 U.S. 229, 241, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989). First, the Court concluded that this was not an open-ended pattern because, as Fuhrer discontinued the discount in 1989, the alleged fraud was unlikely to recur. Second, the Court found that fraud of six months' duration could not constitute a closed-ended pattern. See, e.g., [Tabas v. Tabas](#), 47 F.3d 1280, 1293 (3d Cir. 1995) ("Since *H.J., Inc.*, this court has faced the question of continued racketeering activities in several cases, each time finding that conduct lasting no more than twelve months did not meet the standard for closed-ended continuity." (citing cases)). Because the plaintiffs could prove no pattern of racketeering activity, the District Court concluded that they could not bring a successful RICO claim based on the price lists. Since the plaintiffs have not discussed this issue in their briefs and the District Court's reasoning is persuasive, we will affirm the District Court's judgment in favor of the defendants on this other RICO claim, also summarily.

Rossi v. Standard Roofing, Inc., 156 F.3d 452, 484 (3d Cir. 1998) (citation and quotations omitted); see also Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267, 1276 n.19 (3d Cir. 1995) (declining to consider [**26] whether the plaintiff had offered sufficient proof of the amount of damages, since the plaintiffs' proof of loss in general was inadequate).

HN4 [+] On appeal, our review of a District Court's grant of summary judgment is plenary. See In re Baby Food Antitrust Litig., 166 F.3d 112, 123 (3d Cir. 1999). "We evaluate the evidence using the same standard the District Court applied in reaching its decision." 166 F.3d at 123-24.⁸

II. Antitrust Claims: Antitrust Liability

In the ordinary case, liability is the first question that must be decided. Accordingly, we would usually begin our analysis of this case with a discussion of whether the plaintiffs have produced sufficient evidence to prove that the defendants violated the Sherman Act. Although that would appear to be an obvious question in this case, for the reasons set forth below [**27] we are not presently in a position to evaluate the plaintiffs' theory of antitrust liability. We will, however, briefly summarize that theory and the defendants' arguments against it in order to provide a background for our discussion of fact of damage, and for the benefit of the District Court and the parties on remand.

The plaintiffs' antitrust claims begin with the premise that Trone coordinated the activities of all of the Beer World stores. In support of this contention, they note that Trone dictated most aspects of store policy, was in charge of hiring and managing employees, and had sole control of the stores' accounts. In addition, Trone coordinated the stores' interactions with other people, including wholesalers and customers. He negotiated a single set of wholesale prices for all of the Beer World stores. When one wholesaler would not [*248] agree to a discount, he organized a joint advertising campaign among the stores against the wholesaler. He also published joint advertising for the stores.

Furthermore, Trone and the stores allegedly conspired with wholesalers, Fuhrer in particular, so that the stores could obtain a competitive advantage over other retailers. Most prominently, [**28] the plaintiffs allege that Trone convinced Fuhrer to grant the stores a volume discount \$.25/case lower than that available to any other retailer. This discount was concealed from other customers and wholesalers in several ways, and denied to the customers when they requested it. The Beer World stores' orders pursuant to the discount were placed jointly. Furthermore, the discount was always given even though the minimum order required for the discount was not always met by the Beer World stores in the aggregate. In addition, the plaintiffs contend that the evidence shows that Fuhrer granted the stores other advantages, including special delivery terms and assistance in placing beer in the stores.

The plaintiffs contend that the advantages the Beer World stores obtained caused losses to the plaintiffs. As a result of the advantages, the Beer World stores were able to undersell the plaintiffs. Accordingly, the plaintiffs contend, they lost customers to the Beer World stores. The plaintiffs submit that these harms were particularly aggravated because of the geographical limitations the Liquor Code places on distributors. The Code requires that, for each brand of beer sold in a particular [**29] area, a specific wholesaler be designated as the master distributor. A beer retailer within that geographic area, must buy that brand either from the master distributor, or from someone who bought it from the master distributor. Since the plaintiffs allege that the defendants were conspiring with the master distributors, they were at a particular competitive disadvantage.

Although, as noted above, the plaintiffs identify several antitrust liability theories, they focus on one in particular in their briefs. They argue that the aforementioned actions constitute a group boycott on the part of Trone, the Beer World stores, and Fuhrer. They contend that Trone convinced Fuhrer to agree to sell beer to the Beer World stores at a lower price than would be available to any other retailer. They rest their legal theory on, *inter alia*, Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959), and Rossi v. Standard Roofing, Inc., 156 F.3d 452 (3d Cir. 1998).

⁸ 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.

The defendants contend that the plaintiffs' theory of antitrust liability is untenable for several reasons. First, they argue that the plaintiffs' theory is simply a Robinson-Patman Act [**30] price-discrimination claim recast as a Sherman Act claim. They note too that the plaintiffs did bring a Robinson-Patman Act claim that was dismissed on jurisdictional grounds. The defendants also submit that price discrimination without much more cannot be a violation of the Sherman Act.

We agree that [HN5](#)[↑] price discrimination *simpliciter* -- even when it violates the Robinson-Patman Act -- is usually not a Sherman Act violation. But we do not think this *necessarily* means that the plaintiffs are barred from bringing a price discrimination claim under the Sherman Act. The plaintiffs' claims are unlike an ordinary price discrimination case, in which a single supplier offers different prices to different purchasers in order to advance its own interests. They allege that Fuhrer was convinced to offer different prices in order to advance the defendants' -- the plaintiffs' competitors -- interests. We see no reason why price discrimination, under appropriate circumstances, could not be part of an agreement in restraint of trade or a monopolization attempt. See, e.g., [Black Gold, Ltd. v. Rockwool Indus., Inc.](#), 729 F.2d 676, 683-84 (10th Cir. 1984); [Peelers Co. v. Wendt](#), 260 [*31] F. Supp. 193, 198 [I*2491](#) (W.D. Wash. 1966); [McKeon Constr. v. McClatchy Newspapers](#), 1969 U.S. Dist. LEXIS 10593, Civ. No. 51627, 1969 WL 226 (N.D. Cal. Nov. 24, 1969). So long as the price discrimination involves a conspiracy to restrain trade or create a monopoly in some market--along with a substantial effect on competition in the market, see [J.F. Feeser, Inc. v. Serv-A-Portion, Inc.](#), 909 F.2d 1524, 1541 (3d Cir. 1990) (quoting [Zoslaw v. MCA Distributing Corp.](#), 693 F.2d 870, 887 (9th Cir. 1982)); see also [United States v. Arnold, Schwinn & Co.](#), 388 U.S. 365, 375, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967) -- it would violate the Sherman Act. The proper evidence in this case might support the conclusion that this constituted a conspiracy or agreement to restrain trade or create a monopoly, although we express no opinion as to whether the plaintiffs have produced such evidence.

The defendants also contend that the plaintiffs cannot prove that they engaged in a group boycott. Relying on *Klor's* and *Rossi*, they submit that a group boycott only exists where the defendants' actions result in the product's not being available to the plaintiffs at all, or only being available at highly unfavorable terms. [**32] Of course, when one thinks of a boycott, one ordinarily thinks of preventing access to something entirely. Moreover, the defendants contend that the putative quantity discount is modest. The plaintiffs respond, however, that the evidence here is sufficient to conclude that, as a result of the defendants' actions, beer was only available to them on highly unfavorable terms, i.e., \$.25/case more than their competitors were paying.

Finally, the defendants contend that the antitrust violations were limited to a narrow array of conduct, specifically the \$.25/case discount discussed above. Plaintiffs contest this point vigorously. They suggest that, solely with respect to Fuhrer, the evidence supports the conclusion that he engaged in other activities over a longer period of time, including delivery and product placement assistance, that gave the Beer World stores an advantage. Furthermore, the plaintiffs point to evidence that suggests that other wholesalers were giving the Beer World stores discounts and other benefits throughout a substantially broader time frame.

The District Court did not address these questions of antitrust liability because it thought it could dispose of the [**33] case on other grounds. In part, this may have been because the Court came to the case late, upon transfer of the case from the docket of another judge.⁹ In addition, it undoubtedly seemed to it to be a more straightforward way in which to dispose of the case. We imply no criticism of the District Court's approach. As discussed further below, however, liability is not an issue that ultimately can be avoided in this case. The defendants have suggested that it is an appropriate alternative grounds upon which we can rest our judgment, but we do not think so. Although the parties have set forth in their briefs their legal analyses of the liability questions, the record as presented to us is not sufficiently adequate for us to give the careful and thorough consideration these issues merit. Since the case must go back to the District Court, we think these issues would benefit from further elaboration there in the first instance.

⁹ We also note that the present plaintiffs' counsel came to the case late as well, after much of its present contours had been fixed.

[**34] On remand, in determining whether the plaintiffs can prove that the defendants violated the Sherman Act, the District Court can answer the questions discussed above. The Court will be able to determine under which of their variegated antitrust theories the plaintiffs may proceed. In addition, the Court can clarify the precise temporal scope and nature of the defendants' antitrust violations. Explication of this last issue in particular will provide a better framework for more precise analysis [*250] of the questions to which we turn next (and which will remain a matter in controversy on remand). At this juncture, because of the lack of clarity concerning the precise nature and scope of the plaintiffs' antitrust liability proofs, we will *assume* that the plaintiffs can prove that the defendants engaged in antitrust violations throughout the relevant period. Based on this assumption, we turn to the issue upon which the District Court rested its decision: whether the plaintiffs have offered sufficient proof of fact of damage.

III. Antitrust Claims: Fact of Damage

The primary issue actually before us on the antitrust claims is whether the plaintiffs have proffered sufficient evidence [**35] to raise a genuine issue of material fact as to whether the defendants' alleged antitrust violations caused harm to the plaintiffs. [HN6](#) "[A] plaintiff must prove a causal connection between [the antitrust violation] and actual damage suffered." *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1273 (3d Cir. 1995); see also [Rossi v. Standard Roofing, Inc.](#), 156 F.3d 452, 483 (3d Cir. 1998) ("To recover damages, an antitrust plaintiff must prove causation, described in our jurisprudence as 'fact of damage or injury.' " (citations omitted)); II *Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law* P 360c2, at 195 ("The plaintiff must show actual injury that was 'caused' by the violation."). Although we suspect our factual analysis of loss and causation would apply equally to both the plaintiffs' antitrust and RICO claims, we will focus in this section only on the former. We can put the RICO claim to the side because, although we are unsure that the District Court's reasons for dismissing it was correct, we think they should be dismissed for other reasons, i.e., lack of proximate causation.

In brief, the plaintiffs' theory of antitrust fact of damage is as follows: [**36] Trone, the Beer World stores, and Fuhrer engaged in various joint actions, including but not limited to granting the Beer World stores secret discounts on wholesale purchases, which resulted in the plaintiffs' losing business. In support of this theory of fact of damage, the plaintiffs offer two types of evidence: (1) testimony concerning customers who no longer shop at the plaintiffs' stores and their statements about their reasons for not doing so; and (2) expert opinion testimony concerning the cause of the plaintiffs' loss of income. We must decide whether the former type of evidence is admissible, and whether either is sufficient, individually or together, to establish actual injury and causation in fact.¹⁰

[**37] A. Customer Evidence

1. *Summary of the Evidence:* In opposition to the defendants' motion for summary judgment, the plaintiffs offered deposition testimony concerning their customers. It included testimony of various plaintiffs that certain customers ceased purchasing beer from them after the Beer World stores opened, and that the customers stated that they had done so because the Beer World stores had cheaper beer. The District Court concluded that this testimony was inadmissible hearsay and therefore could not meet the plaintiffs' burden of production to defeat the defendants' motion for summary judgment.

Five of the plaintiffs offered testimony concerning customers' behavior and statements. This testimony can be divided into two categories. First, several of the plaintiffs testified that, during the time at issue in this litigation, some people who had formerly been their customers stopped [*251] coming to their stores. Carl Altenhof testified that, "Retail customers that I had as steady customers, I don't have anymore when Beer World came in . . ." App. at 750. Likewise, Douglas J. Berthold stated in his deposition that, although he could not document his losses, he had

¹⁰ Given our conclusion that the customer and expert evidence of causation is sufficient, we need not consider the plaintiffs' other arguments for reversing the District Court's conclusion that they had not adduced sufficient evidence of causation: (1) that a price differential permits an automatic presumption of causation of loss to those who pay the higher price, see [Bogosian v. Gulf Oil Corp.](#), 561 F.2d 434, 455 (3d Cir. 1977), and (2) that the defendants' own statements and "admissions" constitute proof of causation.

"lost [**38] forty percent of [his] business, probably most of them are one case purchase customers, some of them two case purchase [sic]." App. at 754. Finally, Kathleen Kapres said that she lost customers, purportedly to Beer World. App. at 819.

Second, several of the plaintiffs testified that various customers, some identified and some not, told them that they no longer shopped at the plaintiffs' stores because of the Beer World stores' operations. Berthold testified that one customer, David Begg, told him that he was going to shop at Beer World because "I like selection" and "money talks." App. at 755. Kapres also stated that she "had quite a few customers come in and say they wanted the same deal [lower prices] from me or they were just going to buy their beer from [Beer World], and I said I just can't give you that deal." App. at 819. In addition, Paul Kelly identified by name three customers of his who began to buy from Beer World, and discussed at length conversations with one of them in which the customer revealed that he was going to Beer World because of the prices. App. at 822-27.

As noted previously, the defendants contend that the plaintiffs have presented evidence of [**39] antitrust violations at most during a fairly brief period of time, for which only some of the customer evidence is relevant. The District Court did not consider this issue and, as we have stated, neither will we. Instead, we assume that the plaintiffs can establish antitrust violations throughout the relevant period. On remand, the District Court will have to analyze the extent of the defendants' antitrust violations and then determine whether the plaintiffs' evidence of loss and causation remains sufficient in light of the more specific temporal scope. If it appears that the defendants did not engage in antitrust violations during some of the relevant period, the District Court is free to revisit the question whether the plaintiffs' proof of causation remains sufficient.

2. *Admissibility*: The District Court, relying on our decision in *Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), held this evidence inadmissible, finding that the plaintiffs' testimony concerning their customers' statements was inadmissible hearsay. It also noted that, although this litigation has been proceeding for some six years, the plaintiffs had not taken [**40] the simple step of obtaining affidavits from customers concerning their reasons for ceasing to purchase beer from the plaintiffs. We disagree with the District Court's reading of *Stelwagon*.

In *Stelwagon*, the plaintiff proffered the testimony of its employees concerning the statements of their customers. The employees proposed to testify, based on "out-of-court conversations with Stelwagon customers . . . that the customers could and did purchase Tarmac MAPs from 780 Standard at prices lower than Stelwagon's prices."

Stelwagon, 63 F.3d at 1274. The plaintiff argued that this testimony was admissible to prove fact of damage, i.e., both loss and causation, under [HNT](#) [↑] [Federal Rule of Evidence 803\(3\)](#), which provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . A statement of declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's [**41] will.

[Fed. R. Evid. 803\(3\)](#).

In *Stelwagon*, the plaintiff offered the customers' statements to prove, not only [*252] causation, i.e., the reason it lost business -- for which purpose it would be admissible evidence of motive under [Rule 803\(3\)](#) -- but also loss, i.e., the *fact* that it lost business to the defendants. We concluded that the customers' statements about why they purchased from Standard was inadmissible to prove that they actually did so. See 63 F.3d at 1274 ("Statements that are considered under the exception to the hearsay rule found at [Fed. R. Evid. 803\(3\)](#) . . . cannot be offered to prove the truth of the underlying facts asserted." (footnote omitted)). As we have explained, "'statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose,' i.e., the purpose of proving customer motive, but not as evidence of the facts recited as furnishing the motives." [J.F. Feeser, Inc. v. Serv-A-Portion, Inc.](#), 909 F.2d 1524, 1535 n.11 (3d Cir. 1990) (quoting [Herman Schwabe, Inc. v. United Shoe Mach. Corp.](#), 297 F.2d 906, 914 (2d Cir. 1962)).

We think that the District Court's dismissal of the plaintiffs' evidence [**42] on the basis of *Stelwagon* was inappropriate. The purpose for which the customers' statements are offered in this case differs in substance from the purpose for which the court in *Stelwagon* found them inadmissible. In that case, the only evidence of actual loss, i.e., that customers stopped purchasing from the plaintiff, was the employees' reports that customers had said that they were no longer buying from the plaintiff because the plaintiff's competitors had lower prices. We concluded that this evidence could not be used to prove such loss. While the plaintiffs here have also offered similar testimony that their customers told them that they were purchasing beer from the Beer World stores and not the plaintiffs, they offer it only for "the [limited] purpose of proving customer motive," for which purpose we found such evidence admissible under [Rule 803\(3\)](#). *Stelwagon*, 63 F.3d at 1274.¹¹

[**43] [*253] In addition, however, the record contains other non-hearsay evidence of a type not before the court in *Stelwagon*, that the plaintiffs offer to prove the fact of loss, the issue for which the court in *Stelwagon* found the customers' statements inadmissible. Here, the plaintiffs themselves testified that they knew of customers who used to purchase beer from them, but no longer did. This is direct evidence of an actual loss of customers. Although in *Stelwagon* we held that customers' hearsay statements were not admissible to prove lost business, the plaintiffs' own testimony about the actual behavior of their customers is not hearsay. Rather, it is admissible evidence of lost business, although not of the reason therefore. Thus, in the present case, the [HN9](#)[↑] plaintiffs' testimony that certain customers no longer purchased beer from them, coupled with their testimony concerning the customers' statements of their motive, which is admissible hearsay under [Rule 803\(3\)](#), are together evidence of the fact of damage.

¹¹ The defendants also complain that, even if the testimony is otherwise admissible under [Rule 803\(3\)](#), it is not admissible, particularly for use at the summary judgment stage, because the declarants are unidentified or inadequately identified. First, the defendants contend that this means the evidence cannot meet the plaintiffs' burden to defeat a motion for summary judgment because it is not in an admissible form. See [Fed. R. Civ. P. 56\(e\)](#) ("Supporting and opposing affidavits [introduced at the summary judgment stage] . . . shall set forth such facts as would be admissible in evidence . . ."); [Petrucci's IGA Supermarkets, Inc. v. Darling-Delaware Co.](#), 998 F.2d 1224, 1234 n.9 (3d Cir. 1993) (noting that evidence introduced to defeat a motion for summary judgment must be "capable of being admissible at trial"). In particular, the defendants argue that, since the declarants are unidentified, there is no way to ensure that they will be able or willing to testify at trial. We need not consider this issue, however, because the statements are admissible hearsay as discussed in the text.

Moreover, contrary to the defendants' apparent suggestion, we do not think that the fact that the declarants are not specifically identified is relevant for determining whether their statements fall within the [Rule 803\(3\)](#) hearsay exception. The defendants cite [Philbin v. Trans Union Corp.](#), 101 F.3d 957 (3d Cir. 1996), for the proposition that a hearsay statement by an unidentified or unknown person "is not 'capable of being admissible at trial.'" [Philbin](#), 101 F.3d at 961 n.1 (quoting [Petrucci's](#), 998 F.2d at 1234 n.9). *Philbin* is distinguishable, however. The plaintiff in that case relied on the statement of an unidentified official of the defendant as direct evidence of the defendant's allegedly unlawful motive in a Fair Credit Reporting Act suit. The declarant's identity was important to ensure that he or she was in fact an official of the defendant company whose statement would be admissible nonhearsay under [Fed. R. Evid. 801\(d\)](#). Identity was a critical element of admissibility.

The customers' statements in this case, however, are different. In a practical sense, their identities are not important. The relevance of their statements depends only on the fact that they were the plaintiffs' customers, not their particular identities. Furthermore, we do not think that [HN8](#)[↑] the admissibility of their statements under the [Rule 803\(3\)](#) hearsay exception depends on their being identified. Knowing the specific identity of the declarant will not make the statements more trustworthy evidence of the declarants' descriptions of their states of mind, the primary concern in interpreting hearsay exceptions.

In [United States v. Mitchell](#), 145 F.3d 572, 576-77 (3d Cir. 1998), we held that the identity of the declarant is a substantial, although not determinative, factor in determining whether a hearsay statement is admissible under the present sense impression or the excited utterance exceptions to the hearsay rule. The proposed evidence in that case was an anonymous note purportedly identifying a getaway car. We held that the note was not admissible as a present sense impression or excited utterance because there was no evidence that the unidentified declarant personally perceived the event or condition about which the statement is made. With respect to a state-of-mind statement, however, it is only important that the declarant be the person whose state of mind the statement concerns, which is true by definition.

3. *Sufficiency of the Evidence to Prove Causation:* The next question is whether this evidence is sufficient to defeat a motion for summary judgment. "Our jurisprudence [**44] 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." *Rossi, 156 F.3d at 466* (citations and some quotations omitted). We recently confronted the question of the sufficiency of this sort of evidence of causation in antitrust cases. In *Rossi*, the plaintiff offered, in opposition to the defendants' motion for summary judgment, the testimony of several potential customers that they would have purchased a certain product from him if he had not been deprived of it in violation of the antitrust laws. We concluded that this evidence was sufficient evidence of fact of damage to defeat a motion for summary judgment:

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 Drosch, Rossi's partner in the failed Rossi Florence venture, backed out of that venture [**45] 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 [sic] allegedly unlawful actions.

156 F.3d at 485. We think that *Rossi* supports the conclusion that the plaintiffs' testimony concerning their customers' actions and statements is sufficient to meet their burden to produce evidence of loss and causation.

Initially, we reject the defendants' attempt to distinguish *Rossi* on the ground that the customers there stated that they would have purchased product from Rossi but for circumstances that were the direct and intended result of the conspiracy. As noted previously, we have had to assume for the purposes of this appeal that the plaintiffs will be able to prove that the defendants violated the antitrust laws. The direct result of these violations would [*254] be the Beer World stores' ability to sell beer at a lower price than the plaintiffs, the precise circumstance the customers cited as a [**46] reason for their actions.

The defendants also submit that *Rossi* is distinguishable because in this case there was no admissible evidence that the customers purchased beer from the Beer World stores. Of course, the defendants are correct that the testimony at issue is not admissible to prove that the customers purchased beer from the defendants. See *Stelwagon*, 63 F.3d at 1274. But the plaintiffs do not need to prove that point; *HN10*[[↑]] in order to establish antitrust liability and damages, all the plaintiffs must show is that they suffered an economic loss as a result of the defendants' antitrust violations; not that the defendants benefitted from that loss directly. See *Rossi, 156 F.3d at 464-65* (plaintiff, in order to recover on an antitrust claim, must prove an antitrust violation and "that the plaintiffs were injured as a proximate result of that" violation (citation omitted)). As long as the plaintiffs can prove that they lost business, and that this loss was a result of the defendants' antitrust violations, they can bring a successful antitrust claim.

At all events, *Rossi* makes no mention of any evidence, or even any requirement, that the customers in that case purchased [**47] product from the defendants instead of the plaintiff. See *Rossi, 156 F.3d at 485*. For all we know, the customers who offered testimony in *Rossi* simply decided not to purchase GAF product at all, instead of buying it from the defendants. What the customers did instead of purchasing product from the plaintiff is irrelevant, so long as there is evidence that they did not purchase from the plaintiff because of the defendants' antitrust violations.

In addition to these points, we also find it significant that neither here nor in *Rossi* did the customer evidence purport to prove any specific amount of damages. Although the plaintiff in *Rossi* proffered the testimony of five customers, these customers gave no indication of exactly how much product they would have bought from him if they could. Yet we concluded that the evidence of causation was sufficient. This conclusion was driven by the principle that, *HN11*[[↑]] on review of a grant of summary judgment, we should focus on whether there is sufficient evidence of fact of damage in general, not on the sufficiency of the evidence of a specific amount of damages. See *Rossi, 156 F.3d at 484*. Accordingly, just as in *Rossi*, the lack [**48] of specific evidence of the total amount of lost

beer sales does not preclude our ultimate conclusion that the customer evidence, especially in conjunction with the expert evidence discussed next, is sufficient to meet the plaintiffs' burden of producing evidence of fact of damage.

B. Expert Evidence

The plaintiffs also offered expert opinion evidence in support of their contention that the defendants' alleged antitrust violations caused actual injuries to them. In particular, they offered the report and testimony of their primary expert, Garth Seidel, along with the report and testimony of their rebuttal expert, Brian Sullivan, to that effect. Neither the defendant nor the District Court raised a question about the admissibility of Seidel's or Sullivan's opinion. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999); *Daubert v. Merrell Dow Pharmas., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). The District Court concluded, however, that this evidence was insufficient as a matter of law to permit a finding of causation. In particular, the Court noted that Seidel's opinion appeared to be based primarily on timing, and that he did not [**49] consider a number of possible alternative causes of the plaintiffs' losses. It therefore concluded that Seidel's report was deficient under the standards we have set forth in previous cases. We disagree.

1. *Seidel's Report*: Seidel concluded, based on the facts provided to him, that "the plaintiffs experienced significant [*255] drops in gross profits in the period subsequent to the start of Beer World operations and which were caused by the Beer World Stores' unique advantage." App. at 830. He began by collecting data on gross profits of the sixteen plaintiffs from 1980 to 1995, although such information was not available from every plaintiff for every year, or even for many of the years. He then made two calculations. First, using the admittedly incomplete data he had, he calculated the plaintiffs' average annual gross profits for the periods from 1980-84 and 1985-95. He then estimated that the plaintiffs' damages were the difference between these two numbers, multiplied by eleven years and sixteen plaintiffs, or approximately \$ 6.6 million. Second, he made a similar calculation, but using only data from the six plaintiffs for whom data was available for most of the years. This method [**50] gave a damages estimate of \$ 2 million.

Next, he concluded that these lost profits "were caused by the Beer World Stores' unique advantage." App. at 830. He based this opinion initially on his conclusion that the Beer Worlds' ability to purchase beer at a lower wholesale cost "must have had a significant impact on the market." App. at 831. He also stated that the Beer World stores' aggressive price advertising would have magnified the effect of the special discount. In addition, he examined Fuhrer's profits between 1989 and 1994, and observed that they increased substantially during this period. Based on this, Seidel concluded that the malt-beverage market experienced no downturn during this time. Third, he noted that, beginning in 1991 -- after the grand jury investigation of Trone began -- the Beer World stores' volume of business declined each year until 1995, while at the same time the plaintiffs' gross profits increased. Finally, he noted that two other stores had opened using a "supermarket" approach similar to the Beer Worlds'. One of them opened shortly after the Beer World stores, but failed within a matter of months in spite of aggressive promotions. The other was open [**51] from the mid-1970's to the mid-1990's, but did not appear to have had any effect on the plaintiffs. App. at 829-32.

The District Court found Seidel's report inadequate to meet the plaintiffs' burden of production because it failed to consider other market forces that could have explained the plaintiffs' losses. The Court began with the proposition that "any analysis of antitrust, RICO or similar damage that fails to exclude or take account of any adverse effects caused by other factors, including lawful competition on the part of the defendants, is fatally flawed." Dist. Ct. Op. IV, at 6. It observed that Seidel's report did not include a comparison of costs and business practices, price advertising, the availability of pool-buying and other discounts, store size, purchasing capacity, or proximity to a Beer World store, any one of which might have provided an alternative explanation for the plaintiffs' losses. Furthermore, it noted that Seidel had specifically failed to consider whether any other differences between the plaintiffs and the Beer World stores accounted for the plaintiffs' loss of business to the latter. Given these omissions, the District Court concluded that Seidel's [**52] report provided insufficient evidence of causation.

The plaintiffs contend that we must reverse the judgment because the District Court relied, in its legal analysis, on the district court's opinion in *Rossi* rejecting Rossi's proffered expert evidence, which opinion we later reversed on these exact grounds, although not until well after the District Court in the present case had issued its opinions. See

Rossi v. Standard Roofing, Inc., 958 F. Supp. 976 (D.N.J. 1997), *revd.*, 156 F.3d 452 (3d Cir. 1998). As this question is before us on an appeal from a grant of summary judgment and our review is plenary, we will start from the premise that it is the defendants's burden to show that Seidel's report is inadequate to create a genuine issue of material fact as to causation. We begin with [*256] a review of our case law in this area, and then apply that law to the evidence before us.

2. Precedent: Stelwagon and Rossi: We have twice recently considered the sufficiency of expert evidence offered as proof of causation in antitrust cases. See Rossi, 156 F.3d at 485-87; *Stelwagon*, 63 F.3d at 1275-76. In addition to the customer evidence discussed above, the plaintiff [**53] in *Stelwagon* offered expert opinion evidence to prove causation. In brief, "based on the assumption that but for Tarmac's price discrimination, Stelwagon's sales of MAPs would have tracked its sales of [other] products [not subject to anticompetitive practices], Dr. Perry concluded that Stelwagon lost \$ 257,000 in profits as a result of Tarmac's illegal pricing policy." *Stelwagon*, 63 F.3d at 1275.¹²

[**54] We concluded that the expert's testimony, although admissible evidence, was insufficient by itself to prove that the antitrust violations had in fact caused Stelwagon's losses:

Significantly, Dr. Perry's analysis failed to sufficiently link any decline in Stelwagon's MAPs sales to price discrimination. The sales may have been lost for reasons apart from the price discrimination -- reasons that Dr. Perry's analysis apparently did not take into account. For example, the evidence showed that Stelwagon had higher overhead costs than his competitors. In addition, there was undisputed evidence that Stelwagon experienced other business complications during the relevant time period. In 1988, for example, Stelwagon terminated a vice-president, two territorial managers and three key employees for their part in an embezzlement scheme.

Stelwagon, 63 F.3d at 1275. Given that Stelwagon had not offered any other evidence of loss -- as discussed previously, its employees' anecdotal testimony concerning lost customers was not admissible to prove that it actually lost customers, see *Stelwagon*, 63 F.3d at 1274-75 -- we concluded that he could not meet his burden of proof, [**55] *Stelwagon*, 63 F.3d at 1275-76.

In *Rossi*, by contrast, we considered an expert opinion and found it sufficient to prove loss and causation. The expert in *Rossi* rested his calculation of damages on two assumptions:

First, he estimated that Rossi'[s businesses] 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 1990-93, operating out of the same location, with Rossi as branch manager. . . . The second major assumption in the Rockhill Report is that Rossi would have been able to manage [his proposed businesses] in the manner that he had run Standard's Morristown branch from 1984-87. Rockhill used Standard's Morristown branch financial statements to develop 14-year averages for [costs] and applied them to the sales estimate.

Rossi, 156 F.3d at 486 (footnote omitted). Based on these assumptions, the expert estimated Rossi's losses as a result of the defendants' antitrust violations.

We determined that this expert evidence was sufficient proof of causation to defeat a motion for summary judgment. We began our analysis with [*56] the recognition that the expert's opinion was a "but for" damage model -- one that "aggregates the defendant's alleged violations and creates a hypothetical calculation projecting the [*257]

¹² More specifically, the expert's report based its analysis on two premises. First, it assumed that Stelwagon's sales of the product at issue during the year in which it did not allegedly suffer antitrust harm were representative of what the sales would have been in the absence of such harm. Second, the expert assumed that its sales of this product would follow a pattern similar to that of other products Stelwagon sold. Finally, the expert posited that Stelwagon would have been able to charge the same retail markup on the product at issue as it did on other products. Based on these assumptions, the expert calculated Stelwagon's lost sales and profits. See *Stelwagon*, 63 F.3d at 1275.

plaintiff's profits and losses 'but for' the defendant's antitrust violations" -- which several courts have rejected. [Rossi, 156 F.3d at 485](#) (citing *Southern Pac. Com. Co. v. American Tel. & Tel. Co.*, 556 F. Supp. 825 (D.D.C. 1982), affd., [238 U.S. App. D.C. 309, 740 F.2d 980 \(D.C. Cir. 1984\)](#); [Van Dyk Research Corp. v. Xerox Corp.](#), 478 F. Supp. 1268 (D.N.J. 1979), affd., [631 F.2d 251 \(3d Cir. 1980\)](#)). We identified two key problems with the use of "but for" damage models:

First, they do not attempt to measure the particularized effects of any specific alleged illegal activities, but rather rely on an aggregation of injury from all factors. 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 damages claim. Thus, using a "but for" damage model arguably makes it impossible [**57](#) 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 the amount of injury.

[Rossi, 156 F.3d at 486](#) (citations omitted).

We concluded that, although the Rockhill Report rested on a "but for" damage model, this did not mean it was inadequate proof of causation, because it did not have the usual problems of "but for" damage models. We noted that, since the Report was based on the actual performance of other businesses -- the business Rossi managed instead of running his own and the business he formerly managed-- it did not involve any "unrealistic *ex ante* assumptions about the business environment." We concluded that, "This kind of estimate, while perhaps not one upon which we would base our own personal investment decisions, nevertheless is sufficient to establish causation . . ." [Rossi, 156 F.3d at 485](#).

We also rejected the defendants' argument, upon which the district court had rested its decision, see [Rossi, 958 F. Supp. at 991](#), that the Rockhill Report was inadequate because it failed to consider [**58](#) possible alternative causes of Rossi's losses. In particular, the defendants contended that Rossi's businesses 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." [Rossi, 156 F.3d at 486](#). Although we recognized that these explanations might ultimately prove to be correct, we found that they were issues of fact best left to the jury, not reasons for concluding that the Rockhill Report was insufficient evidence of causation as a matter of law.

3. Application to Seidel's Report. We believe that our jurisprudence supports the conclusion that the plaintiffs, by offering Seidel's report, have produced [HN12](#) sufficient evidence of causation to defeat a motion for summary judgment. Here, as in *Rossi*, Seidel's report rests on assumptions that are based on past performance, not guesses as to the future. His opinion was based on the assumption that the plaintiffs' performance in the years before Beer World entered the Pittsburgh market [**59](#) provided an appropriate benchmark for their performance thereafter. This assumption does not rest on any "assumptions of perfect knowledge of future demand, future prices, and future costs" of the sort we condemned in *Rossi*. At most, it requires some consideration of whether general economic conditions were substantially similar before and after the Beer World stores opened. Seidel's observation that Fuhrer's sales increased substantially during the period after the Beer World stores opened strongly suggests that economic conditions were at least as good during this period. See App. at 831.

[\[*258\]](#) The defendants, in response, identify several problems that they believe render Seidel's report inadequate. In general, the defendants criticize Seidel's report for failing to take into account potential alternative causes for the plaintiffs' losses not attributable to the defendants' actions.¹³ Seidel stated that, "In my opinion, it does not appear

¹³ The defendants also contend that, even if Seidel has shown that the defendants' acts caused the damages, he has not shown that the defendants' *illegal* acts caused damages. The defendants are correct that Seidel failed to account for many variations in what the defendants did during the periods that Seidel aggregated for analysis. We cannot evaluate this contention without a clearer picture of the scope of the defendants' antitrust violations, however. In the absence of such a clarification, we will leave it

that the losses in plaintiffs' profits . . . were caused by market factors other than plaintiffs' competition with the Beer World stores in the face of the availability to the Beer Worlds of unique discounts and special services, such as [**60] free delivery." App. at 831. The defendants contend that, just as we found in *Stelwagon* that the expert's report was inadequate because it failed to consider alternative causes, so must we find Seidel's report inadequate because he failed to consider certain specific factors that might have affected the plaintiffs' business success, such as general economic conditions, changes in their operations during the relevant time period, or changes in costs.

[**61] Initially, we note that, as discussed above, Seidel does discuss some of these factors the defendants suggest he should have -- including general economic conditions -- albeit not to the degree the defendants might prefer. In addition, he specifically noted a correlation between declining profits for the Beer World stores and increasing profits for the plaintiffs after the criminal indictment came down in 1991. Furthermore, we think that the factors Seidel failed to explain are more like those at issue in *Rossi*, in which we found the expert's report acceptable in spite of certain gaps, than the factors in *Stelwagon*. In the latter case, the expert failed to discuss certain factors-- higher overhead costs and embezzlement by the plaintiff 's employees -- about which the defendants introduced specific evidence. In *Rossi*, by contrast, the defendants argued that the Rockhill Report was inadequate because of factors the effects of which were pure speculation on the defendants' part. Similarly, the defendants here propose numerous factors extrinsic to the defendants that might explain the plaintiffs' losses. But they have not directed us to any point in the record that suggest [**62] that these concerns were actually relevant in this case. Accordingly, we will leave these questions to be resolved during further proceedings in the District Court. See *Rossi*, 156 F.3d at 487 ("[Although o]ne or more of these reasons. . . might explain Rossi's failure and could conceivably result in a verdict for the defendants at trial . . . 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.").

Finally, the defendants make a number of arguments to the effect that Seidel's method of calculating the plaintiffs' losses is unsupported and inappropriate. Seidel's calculations were based on the average or aggregate gross profits of the plaintiffs. The defendants contend that this use of averages was inappropriate, as it ignored potential differences among the plaintiffs. For instance, it ignores the problem that data was not available for all of the plaintiffs for all of the relevant time period. Furthermore, there is no way to determine based on this calculation how the damages are to be allocated among the plaintiffs. Finally, it masks the fact that some of the plaintiffs in fact had *higher* gross [**63] profits [*259] during the relevant period as compared with earlier. The defendants' observations are, of course, correct. They ignore a vital distinction, however: proof of fact of damage and proof of the actual amount of damages are two distinct steps. Cf. *Stelwagon*, 63 F.3d at 1276 n.19 ("Because of our conclusion on the issue of Stelwagon's entitlement to damages under the Clayton Act [i.e., he failed to present sufficient evidence to prove causation], we do not reach Tarmac's argument that the amount of damages is unsupported by the evidence.").

As we stated in *Rossi*, at the summary judgment stage "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." *Rossi*, 156 F.3d at 484. Rather, before us is only the question whether the defendants' unlawful actions caused the plaintiffs' losses. See 156 F.3d at 484. Although in *Rossi* we did specifically note that the Rockhill Report would support a damages judgment in the amount the expert estimated, we did so only for the future guidance of the district court, and not for any purposes related to deciding motions [**64] for summary judgment. See *Rossi*, 156 F.3d at 486 n.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 . . ." (emphasis added)).

In sum, we believe that, although the question is close, Seidel's report, like the Rockhill Report in *Rossi*, is sufficient to create a genuine issue of material fact concerning fact of damage. This is in contrast to the expert evidence offered in *Stelwagon*, in which the expert's opinion involved more speculation and failed to explain certain factors concerning which the defendants had presented specific evidence at trial.

4. *Sullivan's Report*: We find additional evidence of loss and causation, contributing to our ultimate conclusion that the plaintiffs have adduced sufficient evidence of fact of damage, in the report of the plaintiffs' rebuttal expert, Brian Sullivan. Sullivan examined the defendants' expert's report and rebutted it in part. Although his report focused primarily on antitrust liability issues, Sullivan observed that, between 1985 and 1993, beer distributors in Allegheny County failed at a rate **[**65]** nearly twice that in Pennsylvania as a whole. The plaintiffs argue that, since the record suggests no other distinction between Allegheny County and the remainder of the Commonwealth than the presence of Beer World stores, the logical conclusion is that these failures were caused by the Beer World stores.

The defendants contend that we cannot consider Sullivan's report for several reasons. First, they submit that we cannot do so because he functioned only as the plaintiffs' rebuttal expert to respond to the defendants' expert, and that his report and testimony therefore cannot be introduced to support the plaintiffs' substantive case. The District Court refused to consider Sullivan's report on precisely these grounds. We think that that refusal was inappropriate. See *Bowers v. Northern Telecom, Inc.*, 905 F. Supp. 1004, 1008 (N.D. Fla. 1995) (holding that **HN13** labeling of a witness as a rebuttal expert did not preclude consideration of his testimony to defeat a motion for summary judgment). The Federal Rules of Civil Procedure, and Rule 26(a)(2) governing the disclosure and discovery of expert witnesses in particular, make no distinction between the permissible uses of "regular" experts **[**66]** and "rebuttal" experts. Furthermore, we see no reason to prevent the plaintiffs from using Sullivan in their case-in-chief at trial. Accordingly, it is appropriate to consider Sullivan's report as evidence in opposition to the defendants' motion for summary judgment.

Second, the defendants submit that the distinction upon which the plaintiffs base their reasoning is flawed, in that Sullivan's own report reveals that there were Beer **[*260]** World stores in other parts of Pennsylvania. Although there may have been other beer supermarkets in Pennsylvania, as far as we can determine from the record the only other Beer World store was one in Harrisburg. We do not think the existence of this one store can be sufficient to render Sullivan's opinion a nullity as a matter of law.

Third and last, the defendants argue that Sullivan's report is irrelevant, since it focuses on predatory pricing and the Beer World operations in general, rather than the specific discriminatory discount. Once again, we note that the record before us is not sufficiently developed for us to address this contention. We will assume for present purposes that the Beer World stores committed antitrust violations. Accordingly, **[**67]** we leave the defendants' contention to the District Court to consider in the first instance. We conclude that Sullivan's report provides some additional evidence of causation that, together with Seidel's report, meets the plaintiffs' burden of production on the issue of actual loss and causation in fact.

C. Is the Evidence in the Aggregate Sufficient to Prove Causation in Fact?

At all events, we are satisfied that Seidel's report, as well as Sullivan's, *in conjunction with the customer evidence discussed above*, constitutes sufficient evidence of causation. In *Stelwagon*, we noted that there was no admissible evidence that the plaintiffs had suffered injuries attributable to the defendants' price discrimination. See *Stelwagon*, 63 F.3d at 1275. We therefore held that the expert's report was not sufficient evidence of causation and loss. Here, by contrast, there is direct evidence--i.e., the plaintiffs' testimony about their customers' behavior -- that identifies customers whom the plaintiffs lost as a result of the defendants' actions. See *supra* section III.A. Furthermore, there is evidence -- the customers' hearsay statements, which are admissible under *Rule 803(3)*, **[**68]** in addition to the expert reports -- of the reasons for such loss. Thus, the plaintiffs have "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." *Rossi*, 156 F.3d at 487. We conclude that all of this evidence taken together defeats the defendants' motion for summary judgment on the ground that the plaintiffs have not adduced sufficient evidence of fact of damage on their antitrust claims.¹⁴ Accordingly, we will reverse the District Court's grant of summary judgment on the antitrust claims, and remand for further proceedings.

¹⁴ The defendants offer as an alternative ground for affirming the dismissal of the plaintiffs' antitrust claim that the plaintiffs have failed to show that they suffered an "antitrust injury." Since we have declined to consider whether the plaintiffs have offered

[**69] IV. RICO: Proximate Causation

A. Basic Principles

HN14[] In addition to establishing that the defendants' unlawful actions in fact caused the plaintiffs' losses, the plaintiffs must also establish proximate causation, i.e., that this causal connection is not too remote. Although this requirement applies to both antitrust and RICO claims, in this section we focus on the latter, because the plaintiffs' RICO claim founders on these grounds. A causal connection *simpliciter* between the defendants' actions and the plaintiffs' injuries is insufficient to give rise to a RICO claim; the plaintiff must show that that connection is proximate, i.e., not too remote. See [*Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 \(1992\)](#); [*Steamfitters Local Union No. 420* \[*261\] *Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 932 \(3d Cir. 1999\)](#).

The defendants contend that, with respect to the plaintiffs' RICO claim, the causal connection between the defendants' racketeering activities -- defrauding the LCB -- is too remote as a matter of law from the plaintiffs' losses -- lost business. We agree. The LCB and the Commonwealth more generally were [**70] the direct victims of the defendants' actions; the plaintiffs' losses are at most derivative of any injuries to the LCB's regulatory mission. The plaintiffs are simply too remote to be able to bring a claim based on the defendants' actions.

In *Holmes*, the Court identified **HN15**[] three key factors in determining whether a RICO claim is based on an injury too remote from the alleged racketeering activity:

First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff 's damages attributable to the violation, as distinct from other, independent, factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by [**71] plaintiffs injured more remotely.

[*Holmes*, 503 U.S. at 269-70](#) (citing, *inter alia*, [*Associated General Contractors, Inc. v. California St. Council of Carpenters*, 459 U.S. 519, 540-42, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#));¹⁵ see also [*Steamfitters*, 171 F.3d at 932](#) (citing *Holmes*).

sufficient evidence of antitrust violations at the present time, we will also refrain from considering the defendants' contention that the plaintiffs cannot prove an antitrust injury. See *supra* Part II.

¹⁵ Although the Court in *Holmes* adopted these three factors for RICO cases from *Associated General Contractors*, we recognized in *Steamfitters* that the Court in the latter case had outlined six factors relevant to antitrust proximate causation analysis. See [*Steamfitters*, 171 F.3d at 924](#). These factors included:

(1) the causal connection between defendant's wrongdoing and plaintiff 's harm; (2) the specific intent of defendant to harm plaintiff; (3) the nature of plaintiff 's alleged injury (and whether it relates to the purpose of antitrust laws, i.e., ensuring competition within economic markets); (4) "the directness or indirectness of the asserted injury"; (5) whether the "damages claim is . . . highly speculative"; and (6) "keeping the scope of complex antitrust trials within judicially manageable limits," i.e., "avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other."

[*Steamfitters*, 171 F.3d at 924](#) (quoting [*Associated General Contractors*, 459 U.S. at 537-38, 540, 542-44](#)). In our discussion of proximate causation for the RICO claims in *Steamfitters*, in addition to analyzing the *Holmes* factors, we incorporated by reference our discussion of the *Associated General Contractors* factors from the antitrust analysis. We did not express an

[**72] Both *Holmes* and *Steamfitters* clarified how the three factors set forth above would apply in particular cases.¹⁶

[**73] The factual [***262**] circumstances of these two cases, which inform our decision, are briefly summarized in the margin.¹⁷

opinion as to whether the *Holmes* factors replace the *Associated General Contractors* factors for RICO claims or merely supplement them.

At all events, to the extent the *Associated General Contractors* factors are relevant only to antitrust analysis, they are irrelevant in the present case. In addition, to the extent that any of the issues raised in these factors are not included in *Holmes*, they only weigh against a finding of proximate causation. For example, the second factor, specific intent to injure, is arguably not included in *Holmes*. To the extent it is not, however, we think it would be difficult on the present facts to conclude that the defendants specifically intended to harm the plaintiffs. Although harm to the plaintiffs may have been a probable ultimate consequence of the defendants' actions, we do not think they specifically intended to cause such harm. Accordingly, considering this factor in addition to the *Holmes* analysis would only provide an additional reason to conclude that proximate causation is lacking.

¹⁶ In a recent case, we concluded that RICO proximate causation existed without specifically analyzing the *Holmes* factors. See *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998). That case is distinguishable, however. The plaintiff BCI had formerly been the administrator of a pharmacy's self-funded employee health-insurance plan. When the pharmacy opened a new branch that it wanted to be a part of U.S. Healthcare's network, U.S. Healthcare essentially forced the pharmacy to use a U.S. Healthcare affiliate as its health-plan administrator, rather than the plaintiff. We concluded that, in such circumstances, proximate causation could exist:

The injury proved by BCI, the loss of its TPA contract with Gary's [the pharmacy], is not 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 administrator relationship with Gary's was the direct target of the alleged scheme -- indeed, interference with that relationship may well be deemed the linchpin of the scheme's success.

Brokerage Concepts, 140 F.3d at 521. The plaintiffs contend, similarly, that interference with their relationship with their customers, i.e., attracting the plaintiffs' customers to shop at Beer World stores, the precise harm the plaintiffs suffered, is the "linchpin of [Trone's] scheme's success." Although it may be true that interference in the relationship between the plaintiffs and their customers was the linchpin of the success of Trone's scheme, we think *Brokerage Concepts* is distinguishable.

The relationship between the alleged racketeering activities and the injuries to the plaintiffs are more distant than they were in *Brokerage Concepts*. In the latter case, the pharmacy, the party with whom BCI had a relationship with which U.S. Healthcare interfered, was the direct target of U.S. Healthcare's alleged racketeering activities, which included extortion and commercial bribery. See *Brokerage Concepts*, 140 F.3d at 521. Here, although the ultimate goal of Trone and the Beer World stores was presumably to woo customers away from the plaintiffs, the direct target of its alleged fraudulent scheme was the LCB, not customers. Unlike *Brokerage Concepts*, this case involves two third parties, one that was the target of the defendants' racketeering and another that had a relationship with the plaintiffs with which the defendants interfered.

¹⁷ In *Holmes*, the plaintiffs (actually the plaintiffs' subrogors, although that was not relevant to the result) were customers of broker-dealers that had failed as a result of the defendants' conspiracy to manipulate certain stocks. As a result of the broker-dealers' failure, their customers suffered losses. The particular plaintiffs in *Holmes* were customers of the broker-dealers who never purchased the particular stocks that the defendants had manipulated. Thus, the plaintiffs' losses were not an immediate result of the defendants' manipulations, but rather were a derivative effect of the collapse of the broker-dealers. The Court found this connection insufficient to establish proximate causation for RICO claims. See *Holmes*, 503 U.S. at 271.

Steamfitters involved claims of union health and welfare funds against tobacco companies. The funds alleged that the tobacco companies had defrauded the funds by misleading them into believing that tobacco products were safe and could not be made safer. As a result of this fraud, the funds did not take steps to reduce their costs by, for example, attempting to reduce smoking among their participants or undertaking legal efforts to shift the costs of smoking back to the companies. The funds were harmed because their participants continued to smoke and accumulate medical bills that the funds were obligated to pay. We concluded that this causal chain was too attenuated to satisfy the requirements of proximate causation. See *171 F.3d at 932-34*.

[**74] B. Anatomy of the Plaintiffs' RICO Claim

The plaintiffs' RICO claim alleges that the defendants engaged in racketeering activities by fraudulently obtaining and retaining licenses to operate beer distributorships. Specifically, they contend that Trone and others made false and fraudulent statements to the Pennsylvania LCB in order to obtain or retain various liquor licenses. The plaintiffs themselves best summarize their contention that the defendants' actions proximately caused their injuries:

Causation in plaintiffs' RICO case . . . is a simple claim: we say that absent the fraud, the Trone defendants would not have been able to assemble or operate the chain of stores, and that only by [**263] assembling the chain -- by "aggregating" their purchases, as Mr. Fuhrer put it -- were the Beer Worlds able to secure the discriminatory discount. The Trone defendants' brief (at 40) asks rhetorically how David Trone's fraudulent statements to the LCB caused the discount, but the above two sentences show exactly how: *absent the fraud, no chain; absent the chain, no discrimination.* It's that simple.

Appellant's Reply Brf. at 13 (emphasis added; alterations in original). Although [**75] this is a clever and well-phrased summary, we disagree with its conclusion because the claim does not satisfy the specific factors the Court in *Holmes* identified as indicative of proximate causation.¹⁸

[**76] Reflection on these three factors reveals that the direct impact of the fraud is primarily on the LCB, not the plaintiffs.

C. Analysis

1. *Directness of the Injury.* The first factor, and the one on which we focused primarily in *Steamfitters*, is the directness of the relationship between the defendants' actions and the plaintiffs' injuries. See [Holmes, 503 U.S. at 269](#). This is significant because [HN16](#)↑ "the less direct an injury is, the more difficult it becomes 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](#). The more difficult it is to distinguish between the effects of the defendants' legitimate activities and their alleged racketeering actions on the plaintiffs, the more likely we are to conclude that proximate causation is lacking.

In *Holmes*, the Court found this factor indicated a lack of proximate causation. "If the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, [**77] the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets." [Holmes, 503 U.S. at 272-73](#). In *Steamfitters*, we reasoned that

¹⁸ The plaintiffs argue that, since the defendants' antitrust violations were a proximate cause of the plaintiffs' losses, a point the defendants do not -- unlike the issue of causation in fact--presently contest, the RICO violations must also be a proximate cause of their losses. They base this contention on our recognition in *Steamfitters* that proximate causation principles for antitrust and RICO claims are closely related. See [Steamfitters, 171 F.3d at 921](#) ("The standing requirements for RICO and antitrust claims are similar, and . . . the standing analysis under these federal laws is drawn from common-law principles of proximate cause and remoteness of injury . . .").

The plaintiffs misread *Steamfitters*. Admittedly, we said in that case that "much (if not all) of what we have said above in our discussion of antitrust standing applies to the Funds' RICO claims." See [171 F.3d at 932](#). But that was simply a recognition that the factual underpinnings of the causation chains in the funds' antitrust and RICO claims was so similar. The plaintiffs' theory of antitrust proximate causation in this case, however, is factually distinct from their RICO theory. Causation in their antitrust claim rests on the simple notion that the defendants contracted, combined and conspired to force the wholesalers to offer them beer at a lower price, which gave them a competitive advantage over the plaintiffs. Their RICO claim, however, rests on the more complicated theory of causation discussed in the text. It includes the additional step that Trone was able to operate the Beer World stores as a group because of his fraud on the LCB, which enabled him to obtain discounts which hurt the plaintiffs. This additional step distinguishes the plaintiffs' RICO and antitrust claims, and bars the inference of proximate causation they suggest, for reasons amplified in the text, *infra*.

if the Funds are allowed to sue, the court would need to determine the extent to which their increased costs for smoking-related illnesses resulted from the tobacco companies' conspiracy to suppress health and safety information, as opposed to smokers' other health problems, smokers' independent (i.e., separate from the fraud and the conspiracy) [*264] decisions to smoke, smokers' ignoring health and safety warnings, etc.

[Steamfitters, 171 F.3d at 933](#) (footnote omitted).

We believe that this case presents similar difficulties in ascertaining the proportion of the plaintiffs' losses that can be attributed to the defendants' alleged racketeering activity. We think it would be difficult to trace the chain from the fraud on the LCB to particular actions of the defendants, and then to particular portions of the plaintiffs' losses, because the fraud only directly affects the LCB. In order to determine how the fraud affected the plaintiffs, we would need to analyze the extent to which the [**78] defendants were permitted to act as they did as a result of the fraud as opposed to normal operating procedures. More specifically, focusing solely on the issue of volume discounts, even if we could say that the plaintiffs' losses were entirely attributable to the defendants' ability to obtain such discounts, we would be hard-pressed to say that those discounts were *entirely* attributable to Trone's fraud on a third party, the LCB. Rather, it is likely that the defendants' ability to obtain these discounts was attributable, in at least as substantial a part, to the size of the individual Beer World stores, Trone's negotiating ability, the operating methodology of the stores, or other legitimate actions. Accordingly, we conclude that, "As in *Holmes* [and *Steamfitters*], this causation chain is much too speculative and attenuated to support a RICO claim." [Steamfitters, 171 F.3d at 933](#).

2. *Apportionment of Damages*: *Holmes* also directs that we inquire into the difficulty of apportioning damages among potential plaintiffs in determining whether proximate causation is present. [HN17](#) [↑] "Recognizing claims of the indirectly injured would force courts to adopt complicated [**79] rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." [Holmes, 503 U.S. at 269](#). As a result, where granting plaintiffs relief would require us to apportion that relief among numerous plaintiffs of different standing, we are inclined to find an absence of proximate causation for those less directly involved.

Again, this factor as applied to the facts in *Holmes* suggested that proximate causation was missing. The Court noted that the broker-dealers had suffered at least as much at the hands of the defendants as their customers did, and thus any determination of liability to the customers would necessitate an inquiry into the defendants' liability to the broker-dealers. The Court concluded that the possibility of treble damages in favor of both groups of plaintiffs militated in favor of finding no proximate causation for the former. See [Holmes, 503 U.S. at 273](#) ("The district court would . . . have to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages."). [**80] Likewise, in *Steamfitters*, we noted the potential difficulty in allocating recovery between the funds and their participants:

As we noted in our discussion of the Funds' antitrust claims, more directly injured parties, i.e., smokers, would be unlikely to bring federal claims against tobacco companies for the same damages claimed by the Funds. Yet, as we also noted above, Fund participants who have not been fully reimbursed for their out-of-pocket costs that are traceable to defendants' alleged fraud and conspiracy might bring RICO or antitrust claims. Therefore, as in *Holmes*, a court adjudicating the Funds' RICO claims would need to consider the appropriate apportionment of damages between smokers and others such as the Funds who suffered economic losses as a result of the tobacco companies' alleged fraudulent acts.

[Steamfitters, 171 F.3d at 933](#).

We believe that these cases support the conclusion that the defendants' fraud on [*265] the LCB did not proximately cause the plaintiffs' injuries. In particular, we note that the master distributors from whom the defendants purchased their beer at an artificially lowered price -- at least according to the plaintiffs' [**81] theory of

the case--suffered an injury identical to the plaintiffs'. The wholesalers presumably were paying the same price to brewers for beer, regardless of the price at which they sold it to distributors. Any discounts they gave to the Beer World stores as a result of racketeering violations came out of their own pockets. Determining how to apportion damages between the wholesalers and the plaintiffs in this case would require exactly the same sort of apportionment determination condemned in *Holmes* and *Steamfitters*.¹⁹ This difficulty in apportioning damages among the potential plaintiffs suggests that proximate causation is not present in this case.

[82] 3. Vindication of Claims by Others:** Thefinal factor that the Court in *Holmes* recognized as significant for proximate causation analysis was whether the plaintiff 's claim could be vindicated by another, more directly injured plaintiff. More specifically, the Court recognized that [HN18](#) the searching inquiry into causation and apportionment of damages among plaintiffs discussed above is unjustified where the central focus of RICO in deterring unlawful conduct can be vindicated by other means. See [*Holmes*, 503 U.S. at 269-70](#) ("The need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."). Where a more directly affected party is available to vindicate the public interest in enforcing the law, we have less need to stretch the limits of proximate causation in RICO cases.

In *Holmes*, the Court concluded that, since the broker-dealers were available to vindicate the public interest in deterring racketeering, it was unnecessary to [\[**83\]](#) extend proximate causation analysis to include the customers. "The law would be shouldering these difficulties [of making fine distinctions among causes of the plaintiff 's injuries and apportioning recovery among potential plaintiffs] despite the fact that those directly injured, the broker-dealers, could be counted on to bring suit for the law's vindication." [*Holmes*, 503 U.S. at 273](#). In *Steamfitters*, however, we found this factor to be less helpful. We noted initially that, although the funds' participants might be able to pursue RICO claims against the tobacco companies, granting due deference to the funds' allegations we could not conclude that their suits would provide the same deterrence as the funds. We were, however, ultimately "unconvinced that this distinction [from *Holmes* was] sufficient to overcome the concerns about apportioning damages and, most fundamentally, the remoteness of the Funds' alleged RICO injuries from any wrongdoing on the part of [\[*266\]](#) the tobacco companies." [*Steamfitters*, 171 F.3d at 933-34](#) (citation omitted).

The plaintiffs contend that this factor dictates a finding that proximate causation is present in this case because there is no other [\[**84\]](#) party that was more directly injured or that will otherwise be able to vindicate the public interest in deterring racketeering activity of the sort in which the defendants have engaged. Preliminarily, as noted above, the master distributors were injured by the defendants' activities, and accordingly they could presumably serve at least as well to vindicate the public interest in deterring violations of the law. More significantly, the LCB--the direct victim of the defendants' alleged fraud -- is an additional possible alternative agent for vindicating the public interest.

As the plaintiffs point out, the LCB would not be able to bring a private civil RICO action, since it is not a "person injured in his business or property by reason of " the defendants' alleged racketeering violations. [18 U.S.C. § 1964\(c\)](#). In spite of the fact that the LCB cannot bring a private civil RICO action, we think that the LCB and the Commonwealth of Pennsylvania more generally are in a position to vindicate the public interest in the sense set

¹⁹ The plaintiffs in their supplemental memorandum discussing *Steamfitters* contend that we cannot consider the wholesalers in our *Holmes* calculus because "they have decided to make their separate peace with Beer World, no doubt for the same reasons they decided to acquiesce in this scheme in the first place." Appellant's Post-Arg. Memo. at 13. While it may be true that the wholesalers in this case have not attempted to recover from the defendants, we do not think this is relevant to our *Holmes* analysis. We do not think the question whether the defendants' fraud proximately caused the plaintiffs' injuries can turn on whether some other potential claimants have filed suit. Although the broker-dealers identified in *Holmes* as having a potential claim did in fact sue the defendants in that case, see [*Holmes*, 503 U.S. at 273](#) & n.21, we recognized in *Steamfitters* that the fact that smokers themselves could bring claims against the tobacco companies was relevant to determining proximate causation with respect to the funds, even though the smokers were in fact unlikely to bring claims on their own, see [*Steamfitters*, 171 F.3d at 933](#).

forth in *Holmes*. If the facts justified it, the Commonwealth could bring a criminal charge against Trone and the other defendants under the state "little RICO" [**85] corrupt organizations statute, which is virtually identical to the federal racketeering statute. [HN19](#)¹⁹ See [18 Pa. Cons. Stat. § 911\(b\)](#). [Section 911](#) includes in particular perjury, false swearing in official matters, and tampering with official records as predicate activities which can lead to racketeering liability. See [§ 911\(h\)\(1\)\(i\)](#) ("'Racketeering activity' means any act which is indictable under any of the following provisions of this title: . . . Chapter 49 (relating to falsification and intimidation)."); see also [18 Pa. Cons. Stat. § 4902\(a\)](#) (defining perjury); § 4903 (defining false swearing in official matters); § 4911 (defining tampering with public records or information).

In fact, the Commonwealth indicted Trone on state racketeering charges predicated on tampering with public records and perjury before the LCB. See App. at 99. These charges arose out of the same activities that the plaintiffs identify as the racketeering acts upon which their RICO claim is predicated. Although the indictment was dismissed,²⁰ this does not affect our ultimate conclusion that the Commonwealth could vindicate the public interest. The racketeering indictment charged Trone [**86] only with racketeering predicates in which he participated as a principal, and was dismissed because all but one of these was found wanting. But the indictment included perjury charges against others involved in the Beer World operations, which, like the remaining charge against Trone, were eventually nolle prossed. See App. at 98, 100. The indictment could have charged these other acts of perjury as predicates to the racketeering charge against Trone, which would have created the pattern of racketeering activity necessary to support a "little RICO" charge.

[**87] Although the Commonwealth cannot now bring *civil RICO* claims against the defendants here, given the possibilities set forth above, we do not think this brings it outside the scope of the third *Holmes* factor. The Court's primary concern in *Holmes* was to ensure that some plaintiff [*267] be available to vindicate the law's "general interest in deterring injurious conduct." [Holmes, 503 U.S. at 269](#). [HN20](#)²⁰ A civil RICO action is not specifically required to vindicate this general deterrence interest. See [Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 172 F.3d 223, 235 \(2d Cir. 1999\)](#) (concluding that the possibility of independent tort claims by smokers, or subrogated claims based thereon by union health funds, would be sufficient to satisfy the requirements of the third *Holmes* factor). Although not providing for treble damages, we believe that the prospect of state criminal racketeering charges would provide an adequate deterrent to lawless conduct of the type alleged here to satisfy the concerns embodied in *Holmes*.²¹

[**88] 4. *Summary:* At all events, even to the extent that we have questions about whether the possibility of the Commonwealth bringing criminal racketeering charges against Trone and the other defendants falls within the scope of the third *Holmes* factor, such questions cannot alter our ultimate conclusion, based on the *Holmes* factors as a whole, that proximate causation is lacking here. To paraphrase *Steamfitters*, "we are unconvinced that [the potential lack of alternative plaintiffs] is sufficient to overcome the concerns about apportioning damages and, most fundamentally, the remoteness of [the plaintiffs'] alleged RICO injuries from any wrongdoing on the part of [Trone]."

²⁰ See App. at 43. The court dismissed the tampering charges on the ground that they should have been brought under a more specific statute, the Liquor Code, see [Pa. Stat. Ann. tit. 47, § 4-436\(j\)](#) (West 1997), which makes false statements on liquor license applications a misdemeanor. See App. at 25-31. The alleged tampering therefore also could not serve as part of the pattern of racketeering activity necessary to support the racketeering charge, since Liquor Code violations are not specified as racketeering activities in [section 911](#). See App. at 39 n.6; [18 Pa. Cons. Stat. § 911\(h\)](#). Since the only remaining racketeering activity was one alleged instance of perjury on the part of Trone, the court concluded that there was no "pattern of racketeering activity" as required to support a racketeering charge. See App. at 40.

²¹ Judge Wellford in his dissent contends that we cannot consider the wholesalers or the Commonwealth as potential alternative agents for the vindication of the public interest, because in this case none of them brought suit against Trone and the Beer World stores. We think this circumstance is irrelevant to determining whether the plaintiffs' injuries are too remote from the defendants' actions to be a proximate cause for the RICO claim. The post-injury actions of intervening parties cannot make the plaintiffs' losses more or less of a direct result of the defendants' actions. The only question is whether these intervening parties are ones that possibly could take steps to deter illegal activity as contemplated in *Holmes*. See [Holmes, 503 U.S. at 269-70](#) ("Directly injured victims can generally be counted on to vindicate the law as private attorneys general" (emphasis added)); [503 U.S. at 273](#) ("Those directly injured . . . could be counted on to bring suit for the law's vindication")

Steamfitters, 171 F.3d at 933-34. Considered as a whole, the *Holmes* factors dictate the conclusion that the plaintiffs cannot demonstrate a proximate causal connection between their injuries and the defendants' alleged racketeering activities.

D. Policy Issues: Were the Plaintiffs the Intended Beneficiaries of the Liquor Code?

The plaintiffs also contend that proximate causation is present in a civil RICO case where the alleged racketeering conduct effects violations of a regulatory [**89] regime designed to protect the plaintiffs. See, e.g., Rodriguez v. McKinney, 878 F. Supp. 744, 747-49 (E.D. Pa. 1995); Trautz v. Weisman, 819 F. Supp. 282, 287 (S.D.N.Y. 1993); see also In re Orthopedic Bone Screw Prods. Liab. Litig., 159 F.3d 817, 826-27 (3d Cir. 1998) (recognizing a similar principle in the context of state common-law fraud claims). Although this may be a valid principle, we find it inapposite in the present case, as the condition of its application is not present here.

The purpose of the Pennsylvania Liquor Code is to promote temperance, not to protect small-business owners or ensure competition among beer retailers:

The provisions of [the Liquor Code] are intended to create a system for distribution that shall include the fixing of prices for liquor and alcohol and controls placed on prices for malt and brewed beverages, and each of which shall be construed as integral to the preservation of the system, without which system the Commonwealth's control of the sale of liquor and alcohol and malt and brewed beverages *and the Commonwealth's promotion of its policy of temperance and responsible conduct with respect to* [**268] *alcoholic beverages* [**90] *would not be possible.*

HN21 [↑]

Pa. Stat. Ann. tit. 47, § 1-104(d) (West 1997) (emphasis added); see also § 1-104(a) ("This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth and to prohibit forever the open saloon"); Altshuler v. Pennsylvania Liquor Control Bd., 729 A.2d 1272, 1999 WL 298228, at *3 (Pa. Commw. Ct. 1999) ("The purpose of the Liquor Code is not to promote the sale of liquor, rather it is to regulate and restrain the sale of liquor."). At least one court has recognized that the Liquor Code was, in fact, not at all intended to protect the economic interests of liquor retailers. See Lancaster County Tavern Assn. v. Pennsylvania Liquor Control Bd., 14 Pa. D. & C. 3d 381 (Lancaster Cty. C.P. Ct. 1980).

The plaintiffs submit that even if the purpose of the Liquor Code is not to protect retailers like themselves, the effect of the Code, and one of the goals of the LCB in enforcing it, is to protect retailers and competition. But although the LCB's efforts to enforce the Code may have resulted largely [**91] in a predominance of beer retailers similar to the plaintiffs, that does not render large-scale stores like the Beer World stores automatically illegal. Accordingly, we do not think that the principle of *Rodriguez*, were we to adopt it, would compel a finding of proximate causation. We will therefore affirm the District Court's grant of summary judgment on the plaintiffs' RICO claim.

For the foregoing reasons, the judgment of the District Court will be reversed to the extent that it granted summary judgment to the defendants on the plaintiffs' antitrust claims, but affirmed in all other respects, and the case will be remanded to the District Court for further proceedings in accordance with this opinion.

Concur by: WELLFORD (In Part)

Dissent by: WELLFORD (In Part)

Dissent

WELLFORD, Senior Circuit Judge, **concurring in part and dissenting in part**: I concur in Chief Judge Becker's excellent analysis of the antitrust claims of plaintiffs against the defendants. I therefore share in the conclusion that the district court was in error in granting summary judgment to defendants on the antitrust claims before the court.

My disagreement is in respect to the treatment of the RICO claims. [**92] I dissent in that respect with some trepidation, realizing that Chief Judge Becker has recently authored several RICO decisions of this court flowing from the Supreme Court decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992). I begin, then, with an analysis of *Holmes* in respect to the RICO issues in this case.

First, however, I construe plaintiffs' RICO claim to be as follows: as an intended consequence of defendants' alleged predicate fraudulent actions and activities in attaining a special status as a Pennsylvania beer retailer/distributor and obtaining through that fraud from the state a special license and status (contrary to any legal entitlement), plaintiffs were economically damaged. The relevant cases discuss in the RICO context whether plaintiffs have standing to bring the claim against a defendant, and whether plaintiffs can establish commercial damages as a proximate cause of defendant's illegal predicate acts.

Holmes involved the issue of standing and of proximate cause under RICO by a party asserting securities fraud. Plaintiff, Securities Investor Protection Corp. ("SIPC"), was neither a buyer [**93] nor a seller of alleged manipulated stocks orchestrated by defendants. SIPC sued seventy-five defendant broker/dealers whose alleged illegal predicate acts brought about the collapse of several brokerage concerns which were members of SIPC, causing it to pay millions in damages to the failed member brokerage houses. *Holmes* acknowledged that § 1964(c) of RICO was "modeled on [*269] the civil-action provision of the federal antitrust laws." *Id. at 267*. We agree that plaintiffs in this case have set out an antitrust claim that survives summary judgment treatment. *Holmes* interpreted proximate cause in its RICO analysis:

At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984). . . . [One requirement is] some direct relation between the injury asserted and the injurious conduct alleged.

Id. at 268.

Was the plaintiff in *Holmes* simply complaining about "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts . . ."? *Id.* [**94] *Holmes* held that SIPC was complaining about an indirect injury, but it is important to consider why it reached that result. First, *Holmes* noted in footnote 19 that SIPC was not claiming to sue under a claimed right of any customer who actually purchased the manipulated securities. *Id. at 272 n.19*. Second, it is important to note that in *Holmes*, the broker/dealers, directly defrauded, who went into bankruptcy "have in fact sued" the same defendants. *Id. at 273*. Those third parties might then vindicate the public interest in recouping the economic damages caused by the fraudulent defendants, and in punishing them by treble damages.

Because of the potential of multiple claims against defendants seeking damages as a direct result of the same illegal predicate acts and the necessity of difficult and complex apportionment, *Holmes* decided in favor of defendants that SIPC's damages claims did not meet the proximate cause test. Our case is a very different one factually from *Holmes*. Plaintiffs here assert actions arising from defendants' illegally attained status based on asserted fraud perpetrated on the state of Pennsylvania. This does not, in my view, vindicate [**95] the rights of private parties, such as plaintiffs, arising out of that fraud.¹ Unlike defrauded third party customers who had also sued defendants for the RICO actions in *Holmes*, neither Fuhrer, nor any other master distributor, sought any such damages against the Trone defendants for the alleged illegal predicate activity.

¹ As Chief Judge Becker indicates, Pennsylvania may only seek criminal penalties and withdrawal of defendants' special license, not damages.

Indeed, Fuhrer denied that any such illegal activity took place, and is an alleged co-conspirator in the antitrust activity.

In sum, I cannot construe *Holmes* as helpful to defendants in this case. [*Steamfitters Local Union Fund No. 420 v. Philip Morris, Inc., 171 F.3d 912 \(3d Cir. 1999\)*](#), I think, is distinguishable. In *Steamfitters*, customers or purchasers of the tobacco products had brought suit, or might be expected to bring suit, to vindicate plaintiff's clearly indirect claim. These customers or purchasers had varying degrees [**96] of proximate contributory or comparative negligence or knowledge about the danger of the tobacco product used or sold to them. Respectfully, I do not believe plaintiffs' claims in the instant case to be as attenuated as in *Steamfitters*. It is closer to the standing and proximate causal relationship of plaintiff in [*Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494 \(3d Cir. 1998\)*](#), in my view.

I do, therefore, respectfully dissent on the RICO element of this difficult case. I would hold that we should reverse and remand on both the antitrust and RICO claims.

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Dyno Nobel, Inc. v. Amotech Corp.

United States District Court for the District of Puerto Rico

July 1, 1999, Decided ; July 7, 1999, Opinion Filed

Civil No. 95-2475(SEC), Collection of Monies/Antitrust

Reporter

63 F. Supp. 2d 140 *; 1999 U.S. Dist. LEXIS 10505 **; 1999-2 Trade Cas. (CCH) P72,605

DYNO NOBEL, INC., Plaintiff v. AMOTECH CORPORATION, et al., Defendants/Third-Party Plaintiffs v. DRILLEX, S.E., et al., Third-Party Defendants

Disposition: [**1] Amotech's claim of contractual interference against Dyno and Drillex DISMISSED. Motions for summary judgment filed by Dyno and Drillex GRANTED and Amotech's amended counterclaim and third-party complaint DISMISSED.

Core Terms

conspiracy, summary judgment, explosives, dealer, Sherman Act, summary judgment motion, terminated, monopolize, blasting cap, contractual, market share, Deposition, antitrust, alleges, fail to comply, material fact, just cause, Undisputed, commerce, distribution agreement, Robinson-Patman Act, counterclaim, distributors, non-movant's, monopoly, parties, manufacturer, products, genuine, prices

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > 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 > 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, Entitlement as Matter of Law

Summary judgment is appropriately granted when the record shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Thus, in order to defeat a properly crafted summary judgment motion, the party opposing it must demonstrate that a trialworthy issue looms as to a fact which could potentially affect the outcome of the suit.

63 F. Supp. 2d 140, *140LÁ999 U.S. Dist. LEXIS 10505, **1

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > Judgments > Summary Judgment > General Overview

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

HN2 **Summary Judgment, Evidentiary Considerations**

In determining whether to grant a summary judgment, the court may not weigh the evidence. Summary judgment admits of no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails. Accordingly, if the facts permit more than one reasonable inference, the court on summary judgment may not adopt the inference least favorable to the non-moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

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

HN3 **Entitlement as Matter of Law, Appropriateness**

The mere existence of a factual dispute is not, however, enough to defeat summary judgment. In those cases where there are factual disputes, summary judgment will be deemed proper if the unresolved facts are not genuine and material to the resolution of the case. For a dispute to be "genuine", the factual controversy must be sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.

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

HN4 **Summary Judgment, Entitlement as Matter of Law**

Summary judgment may be appropriate even in cases where elusive concepts such as motive or intent are at issue if the non-moving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

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

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

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

HN5 **Summary Judgment, Evidentiary Considerations**

63 F. Supp. 2d 140, *140LÁ999 U.S. Dist. LEXIS 10505, **1

As long as it is the nonmovant that bears the ultimate burden of proof at trial, he will not be able to defeat a motion for summary judgment by relying upon evidence that is "merely colorable" or "not significantly probative." To the contrary, the nonmovant will have to present definite, competent evidence to rebut the motion.

[Civil Procedure > Judicial Officers > Judges > Discretionary Powers](#)

[Civil Procedure > Judicial Officers > Judges > General Overview](#)

[Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery](#)

HN6 Judges, Discretionary Powers

The court has a duty to sanction those parties that repeatedly fail to comply with a trial judge's pre-trial orders.

[Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview](#)

HN7 Summary Judgment, Supporting Materials

See Loc. R. 311.12.

[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](#)

HN8 Summary Judgment, Supporting Materials

When a party opposing a motion for summary judgment fails to comply with the foregoing "anti-ferret rule," the statement of material facts filed by the party seeking summary judgment shall be deemed admitted.

[Civil Procedure > ... > Summary Judgment > Supporting 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](#)

HN9 Summary Judgment, Supporting Materials

Although the non-movant's failure to provide a statement of uncontested material facts does not automatically warrant the granting of summary judgment, it launches the non-movant's case down the road towards an easy dismissal.

[Antitrust & Trade Law > Robinson-Patman Act > Claims](#)

[Antitrust & Trade Law > Robinson-Patman Act > General Overview](#)

63 F. Supp. 2d 140, *140LÁ999 U.S. Dist. LEXIS 10505, **1

HN10 [blue download icon] **Robinson-Patman Act, Claims**

See [§ 2\(a\)](#) of the Clayton Act, as amended in 1936 by the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN11 [blue download icon] **Robinson-Patman Act, Claims**

In order to prevail under a claim for violation of [§ 2\(a\)](#) of the Clayton Act, [15 U.S.C.S. § 13\(a\)](#), a party must show: 1) a cognizable difference in price; 2) between two buyers purchasing contemporaneously from the same seller; 3) involving commodities; 4) of like grade and quality; 5) that may injure competition. [15 U.S.C.S. 13\(a\)](#).

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > Sherman Act > General Overview

HN12 [blue download icon] **Sherman Act, Penalties**

See [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 15\(a\)](#).

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN13 [blue download icon] **International Aspects, Commerce With Foreign Nations**

A plaintiff must prove three elements to recover under [Section 1](#) of the Sherman Act, [15 U.S.C.S. § 15\(a\)](#) to wit: (1) a contract, combination or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate or foreign commerce.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

HN14 [blue download icon] **Sherman Act, Claims**

To establish a conspiracy claim under [Section 1](#) of the Sherman Act, [15 U.S.C.S. § 15](#), a plaintiff must prove the existence of a "meeting of the minds" or "an agreement" to carry out an unlawful scheme. Absent direct evidence of

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an agreement, the plaintiff bears the burden of showing that circumstantial evidence raises a legal inference of conspiracy.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN15 **Summary Judgment, Evidentiary Considerations**

To survive a motion for summary judgment for a claim of conspiracy under the Sherman Act, [15 U.S.C.S. § 15\(a\)](#), a plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

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

HN16 **Summary Judgment, Burdens of Proof**

There are two separate inquiries critical to an antitrust plaintiff's burden of demonstrating an inference of conspiracy: first, whether the conspiracy is economically plausible, and second, whether the defendant's conduct was consistent with the defendant's independent interest. Where the inferences of conspiracy are no stronger than the competing inferences of independent action, the plaintiff has not sustained its burden of proof, and the claim must be dismissed.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN17 **Monopolies & Monopolization, Conspiracy to Monopolize**

A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN18 **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Poor credit may constitute a defendant's proof that the refusal to deal was a unilateral rather than conspiratorial decision.

Antitrust & Trade Law > Sherman Act > General Overview

HN19 **Antitrust & Trade Law, Sherman Act**

See [§ 2](#) of the Sherman Act, [15 U.S.C.S. 15\(a\)](#).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

HN20 [blue icon] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Share of the relevant market is the most significant element to determine monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN21 [blue icon] Monopolies & Monopolization, Conspiracy to Monopolize

The key elements of a "conspiracy to monopolize" offense are: 1) the existence of a conspiracy; 2) an overt act in furtherance of the conspiracy; and 3) specific intent to monopolize.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN22 [blue icon] Sherman Act, Claims

Under § 2 of the Sherman Act, 15 U.S.C.S. 15(a), plaintiff's burden of proof for claims of conspiracy to monopolize is higher than that required for § 1 of the Sherman Act, 15 U.S.C.S. 15(a) conspiracy claims.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN23 [blue icon] Price Fixing & Restraints of Trade, Vertical Restraints

See Puerto Rico Dealers Act, Law 75 of June 24, 1964, as amended, *10 L.P.R.A. 278 et seq.*

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Limited Partnerships > Dissolution & Winding Up

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

HN24 [blue icon] Price Fixing & Restraints of Trade, Vertical Restraints

The Puerto Rico Dealers Act clearly authorizes termination of a relationship between a distributor and its dealer when there is "just cause" for its termination. Law 75, *10 L.P.R.A. 278*, defines "just cause" as nonperformance of

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any of the essential obligations of the dealer's contract on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interest of the principal or grantor in promoting the marketing or distribution of the merchandise or service. *10 L.P.R.A. 278(d)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN25 Price Fixing & Restraints of Trade, Vertical Restraints

Under *10 L.P.R.A. 278(d)*, the law limits the definition of "just cause" to acts attributable to the dealer. In essence, when the dealer fails to comply with an essential obligation of the agreement or adversely affects in a substantial manner the interest of the principal, the principal can terminate the contract without payment of damages.

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

Torts > Business Torts > Commercial Interference > General Overview

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

HN26 Intentional Interference, Elements

Puerto Rico law provides a cause of action for tortious interference by third parties with contractual obligations. *31 L.P.R.A. § 5141* (1990). To state a claim for interference with contracts under Puerto Rico law, there must be: (1) a contract with which a third person interferes; (2) fault or knowledge of the contract's existence; (3) damage to the plaintiff; and (4) causation.

Counsel: Edilberto Berrios-Davila, San Juan, PR, for third-party plaintiffs.

Edilberto Berrios-Perez, Hato Rey, PR, for third-party plaintiffs.

Edilberto Berrios-Davila, San Juan, PR, for counter-claimant.

Edilberto Berrios-Perez, Hato Rey, PR, for counter-claimant.

Francisco A. Besosa, Axtmayer, Adsuar, Muniz & Goyco, San Juan, PR, for counter-defendant.

Francisco A. Besosa, Axtmayer, Adsuar, Muniz & Goyco, San Juan, PR, for plaintiff.

Francisco J. Criado, SAN JUAN, PR, for third-party defendants.

Judges: SALVADOR E. CASELLAS, United States District Judge.

Opinion by: SALVADOR E. CASELLAS

Opinion

[*142] OPINION AND ORDER

Pending before the Court are several motions for summary judgment filed by Dyno Nobel, Inc. ("Dyno") (**Docket # 94, 93**) and third-party defendants Drillex, S.E., Jose F. Criado Vazquez, his wife Pilar Valladares de Criado and their conjugal partnership. (hereinafter "Drillex")(**Docket # 94**). Dyno and Drillex seek dismissal of the antitrust, **[**2] Law** 75 and tortious contractual interference claims filed by Amotech Corporation, Rey Francisco Rivera, Jr, his wife Ada Luz Collazo, and their conjugal partnership (hereinafter "Amotech"). Amotech filed its opposition on

June 4 and June 7, 1999, more than a month after the April 25 deadline prescribed by the Court. For the reasons stated below in this Opinion and Order, the motions for summary judgment filed by Dyno and Drillex are **GRANTED**.

Summary Judgment Standard

The First Circuit Court of Appeals has explained that summary judgment "is a means of determining whether a trial is actually required. [HN1](#)[¹] It is appropriately granted when the record shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Thus, in order to defeat a properly crafted summary judgment motion, the party opposing it must demonstrate that a trialworthy issue looms as to a fact which could potentially affect the outcome of the suit." [Serapion v. Martinez, 119 F.3d 982 \(1st Cir. 1997\)](#). See also [McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 \(1st Cir. 1995\)](#).

[HN2](#)[¹] In determining whether to grant a summary [**3] judgment, the Court may not weigh the evidence. [Casas Office Machines, Inc. v. Mita Copystar America, Inc., 42 F.3d 668 \(1st Cir. 1994\)](#). Summary judgment "admits of no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails." Id. citing [Greenburg v. Puerto Rico Maritime Shipping Authority, 835 F.2d 932, 936 \(1st Cir. 1987\)](#). Accordingly, if the facts permit more than one reasonable inference, the court on summary judgment may not adopt the inference least favorable to the non-moving party. [Casas Office Machines, 42 F.3d at 684](#).

[HN3](#)[¹] The mere existence of a factual dispute is not, however, enough to defeat summary judgment. [United Structures, Inc. v. G.R.G. Engineering, S.E., 927 F. Supp. 556, 560 \(D.P.R. 1996\)](#). In those cases where there are factual disputes, summary judgment will be deemed proper if the unresolved facts are not genuine and material to the resolution of the case. [Corporacion Insular de Seguros v. Reyes Munoz, 849 F. Supp. 126, 132 \(D.P.R. 1994\)](#). For a dispute to be "genuine", "the factual controversy 'must be sufficiently [**4] open-ended to permit a rational factfinder to resolve [*143] the issue in favor of either side'." [Lynne Woods-Leber v. Hyatt Hotels of Puerto Rico, Inc., 124 F.3d 47 \(1st Cir. 1997\)](#). See also [U.S. v. One Parcel of Real Property, 960 F.2d 200, 204 \(1st Cir. 1992\)](#); [Boston Athletic Assn. v. Sullivan, 867 F.2d 22, 24 \(1st Cir. 1989\)](#), of the suit under the governing law. [Morris v. Government Development Bank of Puerto Rico, 27 F.3d 746, 748 \(1st Cir. 1994\)](#).

Recent case law has established that "[HN4](#)[¹] summary judgment may be appropriate 'even in cases where elusive concepts such as motive or intent are at issue ... if the non-moving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation'." [Woods v. Friction Materials, Inc., 30 F.3d 255, 259 \(1st Cir. 1994\)](#) (quoting [Medina-Munoz v. R.J. Reynolds Tobacco, Co., 896 F.2d 5, 8 \(1st Cir. 1990\)](#)).

It thus seems that, at least [HN5](#)[¹] as long as it is "the nonmovant [that] bears the ultimate burden of proof at trial, he [will] not [be able to] defeat a motion for summary judgment by relying upon evidence that is "merely [**5] colorable" or "not significantly probative." [Pagano v. Frank, 983 F.2d 343, 347 \(1st Cir. 1993\)](#), referring to [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 \(1986\)](#). "To the contrary, the nonmovant [will have to] 'present definite, competent evidence to rebut the motion'." [Pagano, 983 F.2d at 347](#), referring to [Mesnick v. General Elec. Co., 950 F.2d 816, 822 \(1st Cir. 1991\)](#), cert. denied, 504 U.S. 985, 112 S. Ct. 2965, 119 L. Ed. 2d 586 (1992).

Factual Background

Dyno, a corporation organized under the laws of Delaware, formerly known as IRECO Incorporated, specializes in the manufacture and sale of explosives and explosives-related products. Amotech is a corporation organized under the laws of the Commonwealth of Puerto Rico, with its principal place of business in Toa Baja, Puerto Rico, that specializes in the distribution and sale of explosives and is also a drilling and blasting contractor. On or about December 3, 1991, Dyno and Amotech Corporation ("Amotech") entered into a distribution agreement (the "Agreement") whereby Amotech would [**6] promote and sell Dyno products in Puerto Rico, Virgin Islands and other Caribbean Islands. Complaint, P18; Amotech, Agreement, P1.A.

The Agreement, according to Dyno, was not exclusive and would only become so for the Puerto Rico area if Amotech obtained 25% of the Puerto Rico market within the first year of the agreement. Agreement, Exhibit 3 of the Complaint, P1.A. Dyno alleges that the Agreement was never meant to be or become exclusive for the Virgin Islands and other Caribbean Islands. (Docket # 38 Unsworn Declaration of Richard Shea Under Penalty of Perjury, P10, DYNO's Corporate Counsel, Exhibit 1 (hereinafter "Shea Declaration").)

On or about April 1, 1992, at DYNO's request, Mr. Rey Rivera, Amotech's President ¹ and owner of 30% interest in the company (Complaint, P15, Deposition of Rey Francisco Rivera Jr., Exhibit 2, p. 16, "Rivera Deposition") executed a guaranty agreement (the "Guaranty") pursuant to which Rivera, individually and in his personal capacity, jointly and severally with Amotech, guaranteed the full and complete payment of "all sums owing, and to become owing, and to become owing upon any and all sales of goods" sold to Amotech by DYNO; and "all attorneys' [**7] fees, court costs and other costs and expenses incurred by [Amotech] in connection with collection of such Debt. . ." (Complaint, P21; Rivera's Guaranty, Exhibit 5 of the Complaint.) Upon the execution of the Guaranty and upon Amotech's compliance of several additional terms and conditions, DYNO and Amotech continued doing business in the regular course of their Agreement. Complaint, P20, Amotech's Answer, P20.

[*144] From September 30, 1994 to September 30, 1995, DYNO sold Amotech goods on credit. Upon Amotech's failure to pay for these goods, Dyno filed the present complaint on December 1, 1995. On March 11, 1996, Amotech and Rivera filed an answer and a counterclaim alleging several violations by Dyno under the Puerto Rico's Dealers Act (Law 75). On February 20, 1997, Amotech filed an amended counterclaim and a third-party complaint against [**8] Drillex, S.E., Jose Fernando Criado Vazquez, his wife Pilar Valladares de Criado and the conjugal partnership formed by them.

The third-party complaint alleged, in essence, that Drillex conspired with Dyno to control the market of explosives in Puerto Rico. Amotech claims that Dyno sold explosive materials to Drillex at a lower price than it had charged Amotech for the same materials. This alleged price discrimination, claims Amotech, substantially lessened competition and undermined Amotech's market share in the Puerto Rico "explosives material" market. Thus, Amotech claims damages under Sections 1 and 2 of the Sherman Act, 15 U.S.C. 15(a) and the Robinson-Patman Act, 15 U.S.C. 13(a).

On March 27, 1998, this Court granted Dyno's unopposed motion for partial summary judgment against Amotech and ordered Amotech to pay Dyno the amount of \$ 176,455.34, plus accrued interest, costs, and attorneys' fees incurred in the collection of the debt. (**Docket # 84**) Amotech's claims pursuant to Law 75 and antitrust laws and its contractual interference claim are the focus of the pending summary judgment motions. However, before we decide the parties' [**9] contentions on the merits, we must discuss Dyno and Drillex's allegations regarding Amotech's delayed filing of its opposition to the pending summary judgment motions. (**Dockets # 99, 100, 101, 103,104**)

Dyno and Drillex filed their respective summary judgment motions on March 15, 1999. (**Dockets # 93, 94**) On April 8, 1999, Amotech requested and this Court granted an extension of time to file its opposition until **April 24, 1999**. This Court noted on its margin order of April 12, 1999 that "**no further extensions of time shall be granted.**" (**Docket # 96**). On April 26, 1999, notwithstanding this Court's order against further extensions, Amotech requested another extension of time to file a reply until May 20, 1999, which the Court did not grant. (**Docket # 98**) Dyno and Drillex both objected to Amotech's petition and requested sanctions and the entry of summary judgment against Amotech. (**Dockets # 99-101**). On June 1, 1999, Amotech requested another extension of time to reply until June 4, 1999, which the Court did not grant, claiming 1) that many of the depositions were in Spanish and Amotech's United States counsel could not understand them, 2) that Drillex [**10] withheld relevant documents from Amotech, and 3) that Amotech received the summary judgment motions "well after March 15th, the date that the papers were certified as being mailed." This was the first time that Amotech recited this litany of reasons to request an extension. (**Docket # 102**) Amotech filed its opposition on the Law 75 claims on June 7, 1999, 3 days after its self-imposed deadline. (**Docket # 106**)

¹ In his taking of deposition Mr. Rivera noted that at the time he subscribed the Guaranty he was serving as Amotech's Vice-president. (Rivera Deposition, Exhibit 2, p. 13)

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In view of the procedural history described above, the Court would be shirking its duty to "secure the just, speedy, and inexpensive determination of every action" if it allowed Amotech to flaunt this Court's orders with impunity. See [Fed.R.Civ.P. 1](#). This Court would be hard-pressed to find another case where it would feel more justly entitled to "close the gates to the Courthouse." ² The First [*145] Circuit has repeatedly stressed the need for district court judges to keep a tight rein over its proceedings in discovery and pretrial matters. In [Legault v. Zambarano, 105 F.3d 24 \(1st Cir. 1997\)](#), the Court described [HN6](#)[↑] the Court's duty to sanction those parties that repeatedly fail to comply with a trial judge's pre-trial orders:

A challenge to a trial [*11] judge's exercise of discretion in these circumstances carries an especially heavy burden. Over twenty years ago the Supreme Court sharply underlined the importance of supporting a trial court's decisions concerning sanctions, even where the judge imposed the most stringent sanction, outright dismissal, for misconduct in the pretrial phase of a case. [National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643-43, 49 L. Ed. 2d 747, 96 S. Ct. 2778 \(1976\)](#). . .This circuit's decisions have been entirely consistent with the Supreme Court's directive. See, e.g. [Spiller v. U.S.V. Laboratories, Inc., 842 F.2d 535, 537 \(1st Cir. 1988\)](#) [Damiani v. Rhode Island Hosp., 704 F.2d 12, 17 \(1st Cir. 1983\)](#).

[105 F.3d at 26.](#)

[**12] The First Circuit continued:

The extent to which a party's failure to file pretrial papers in a timely manner puts an opponent into an unfair position, by causing unnecessary preparation, confusion or distraction, and the translation of this unfairness into a sum of money, are tasks that must be left except in the most extraordinary circumstances to the good sense of the judge on the scene. Beyond this the trial judge has an independent responsibility to enforce the directives he has laid down for the case. This court has made this point before in the clearest terms. "Rules are rules --and the parties must play by them. In the final analysis, the judicial process depends heavily on the judge's credibility. To ensure such credibility, a district judge must often be firm in managing crowded dockets and demanding adherence to announced deadlines. If he or she sets a reasonable due date, parties should not be allowed casually to flout it or painlessly to escape the foreseeable consequences of noncompliance."

[105 F.3d at 28-29.](#) (Citing [Mendez v. Banco Popular de Puerto Rico, 900 F.2d 4, 7 \(1st Cir. 1990\)](#)).

Just as Amotech ignored the Court's admonition [*13] of April 12, 1999 that "no further extensions of time shall be granted," this Court shall ignore Amotech's belated opposition for summary judgment. Accordingly, the Court orders the Clerk of the Court to **strike from the record** Amotech's motion in opposition to summary judgment. (**Docket # 106**) Amotech, in failing to timely oppose the motion for summary judgment, has also failed to comply in a timely manner with the so-called "anti-ferret rule"; that is, they have not presented a concise statement of material facts as to which there is a genuine issue to be tried, as required by Local Rule 311.12.³

² We note that every party has a right to timely oppose a motion for summary judgment. In [Delgado Biaggi v. Air Transport Local 501, 112 F.3d 565 \(1st Cir. 1997\)](#), the Court of Appeals reversed the district court's grant of summary judgment, since the judge failed to give the opposing party the opportunity to file within the 10-day period prescribed by [Fed.R.Civ.P. 56\(c\)](#). The Court noted: "Summary judgment targets should be secure in the knowledge that they will have at least ten days in which to formulate and prepare their best opposition." [Id. at 567](#). In the present case, Amotech had over a month to prepare its opposition and yet was unable to comply with the Court's generous extension of time.

³ [HN7](#)[↑] Local Rule 311.12 provides that:

upon any motion for summary judgment, there shall be served and filed annexed to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried and the basis of such contention as to each material fact, properly supported by specific reference to the record. All material facts set forth in the statement required to be served by the moving party shall be deemed to be admitted unless controverted by the statement required to be served by the opposing party. The papers opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, properly supported by specific reference to the record.

[**14] [*146] This Court has previously expressed that "[HN8](#)" when a party opposing a motion for summary judgment fails to comply with [the foregoing] 'anti-ferret rule,' the statement of material facts filed by the party seeking summary judgment [shall be] deemed... admitted." [Mendez-Marrero v. Toledo, 968 F. Supp. 2d \(D.P.R. 1997\)](#), referring to [Dominquez v. Eli Lilly & Co., 958 F. Supp. 721, 727 \(D.P.R. 1997\)](#). See also [Tavarez v. Champion Products, Inc., 903 F. Supp. 268, 270 \(D. P.R. 1995\)](#).

Otherwise, the Court would be forced to search "through the entire record for evidence of genuine issues of material fact which might preclude the entry of summary judgment." [Mendez-Marrero, 968 F. Supp. at 34](#), referring to [Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 930-31 \(1st Cir. 1983\)](#). [HN9](#) Although the non-movant's failure to provide a statement of uncontested material facts does not automatically warrant the granting of summary judgment, "it launches the non-movant's case down the road towards an easy dismissal." [Id.](#)

Such is the scenario in the present case. Because defendants have failed to timely [**15] oppose the present motion, they have violated the anti-ferret rule. Accordingly, all material facts set forth in defendant's statement of undisputed material facts shall be deemed admitted. [Rivas v. Federacion de Asociaciones Pecuarias, 929 F.2d 814, 816 n.2 \(1st Cir. 1991\)](#); [Laracuente v. Chase Manhattan Bank, 891 F.2d 17, 19 \(1st Cir. 1989\)](#). Thus, we need only examine whether given the facts, Dyno and Drillex are entitled to judgment as a matter of law.

Applicable Law/Analysis

Amotech's Price Discrimination Claim Fails to Comply with the Required Elements of a Claim under the Robinson-Patman Act

Amotech claims that from the period of October 1994 through February 1996, Dyno began to sell explosives material to Drillex, specifically "blasting caps," at a substantially lower price than it sold "blasting caps" to Amotech. Amotech alleges that Dyno never offered it the same below-market prices that Dyno offered to Drillex. As a result of Dyno's refusal to make a similar offer, Amotech contends that it was forced to buy its supplies from Dyno at a price six times higher than the price offered to Drillex. This price discrimination between Drillex [**16] and Amotech, argues Amotech, substantially affected its ability to compete in the "explosives material market" with Drillex, and caused irreparable economic injury to Amotech, all in violation of the Robinson-Patman Act.

[HN10](#) [Section 2\(a\)](#) of the Clayton Act, as amended in 1936 by the Robinson-Patman Act, [15 U.S.C. Section 13\(a\)](#), reads, in pertinent part:

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 either or any of the purchases involved in such discrimination are in commerce, ... 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.... (Emphasis added)

Upon review of the allegations and the pertinent evidence before us, we find that Amotech fails to comply with the required criteria to establish a Robinson-Patman claim. [HN11](#) In order to prevail under this claim, [**17] Amotech must show: 1) a cognizable difference in price; 2) between two buyers purchasing contemporaneously from the same seller; 3) involving commodities; 4) of like grade and quality; 5) that may injure competition. [15 U.S.C. 13\(a\)](#). [Federal Trade Commission v. Borden Co., 383 U.S. 637, 643, 16 L. Ed. 2d 153, 86 S. Ct. 1092 \(1966\)](#).

[*147] Although Amotech claims that there was a cognizable difference in the price of the blasting caps sold to Drillex and Amotech and that Drillex and Amotech purchased commodities from Dyno during the same period, Amotech has failed to present evidence to suggest that the "blasting caps" sold to Dyno and Amotech were "of like

grade and quality" and that the price distinction from the sales directly caused the erosion of Amotech's market share in the "explosives material" market.

In the present case, the blasting caps put on the "blue light" list by Dyno are vastly different in quality, physical characteristics and value, compared to the new caps. It is undisputed that the blasting caps sold to Amotech were new, while the blue light caps sold to Drillex were old, obsolete or approaching the end of their shelf lives. (Docket [**18] # 94, Dyno's Statement of Undisputed Facts # 3 (hereinafter "Dyno's Undisputed Facts")) An essential feature of a blasting cap is its ability to set off explosives with exact timing. As noted by Dyno's expert, as blasting caps age, their timing ability deteriorates. (Dyno's Undisputed Facts # 6, Deposition of Robert Taylor, p. 31) In view of the record presented before us, we agree with Dyno's contention that the "blue light" caps sold to Drillex were substantially different in grade and quality from the caps sold to Amotech and thus cannot be used to show price discrimination pursuant to the Robinson-Patman Act. Accordingly, Amotech's claim under the Robinson-Patman Act is **DISMISSED**.

Amotech has Failed to Establish the Required Elements of a Claim under Sections 1 and 2 of the Sherman Act.

a. § 1 of the Sherman Act for Conspiracy

HN12[] Section 1 of the Sherman Act reads as follows:

1. Trusts, etc., in restraint of trade illegal; penalty

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 [**19] any contract or engage in any combination or conspiracy hereby declared to be illegal 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.

HN13[] A plaintiff must prove three elements to recover under Section 1 of the Sherman Act, to wit: (1) a contract, combination or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate or foreign commerce. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)

Amotech claims that Dyno and Drillex conspired to undermine Amotech's market share in the "explosives material" market through a price-discrimination scheme. Amotech alleges that Dyno agreed to sell, and Drillex agreed to buy, explosives material, which included the "blasting caps", at a substantially lower price than the price Dyno would offer to Amotech. Such scheme, notes Amotech, constituted a conspiracy which curtailed [**20] Amotech's ability to compete with Drillex and led to a precipitous decline in Amotech's market share in the "explosives material" market. Amotech thus notes that the above described scheme violated Sections 1 and 2 of the Sherman Act. (Amended Counterclaim, par. 10-12)

HN14[] To establish a conspiracy claim under Section 1 of the Sherman Act, a plaintiff must prove the existence of a "meeting of the minds" or "an agreement" to carry out an unlawful scheme. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984). Absent direct evidence of an agreement, the plaintiff bears the burden of showing that circumstantial evidence raises a legal inference of conspiracy. In Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), the Supreme Court explained that "antitrust law" limits the range of permissible inferences from ambiguous evidence in a Section 1 case. Thus, . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy . . . HN15[] To survive a motion for summary [**21] judgment . . . , a plaintiff . . . must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently."

The Matsushita Court identified [HN16](#)¹⁵ two separate inquiries critical to an antitrust plaintiff's burden of demonstrating an inference of conspiracy: first, whether the conspiracy is economically plausible, and second, whether the defendant's conduct "was consistent with the defendant's independent interest." [*Id. at 587*](#). Where the inferences of conspiracy are no stronger than the competing inferences of independent action, the plaintiff has not sustained its burden of proof, and the claim must be dismissed [*Id. at 596-97*](#); see also [*Computer Identics Corp. v. Southern Pacific Co.*, 756 F.2d 200, 203 \(1st Cir. 1985\)](#)(dismissing antitrust claim where plaintiff failed to produce evidence that would tend to "exclude the possibility that [the defendants] were acting independently." (quoting [*Monsanto*, 465 U.S. at 764](#))

It is clear from the record that there is no direct evidence that Dyno and Drillex had a "meeting of the minds" to intentionally undermine Amotech's competitiveness in [**22](#) the market. Although representatives of Dyno and Drillex met in January 1994 to conduct business, such meeting, without more, does not create an inference of conspiracy as defined by the Sherman Act. See [*Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. at 762](#). ("[HN17](#)¹⁵ A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market.) Furthermore, the persons involved in the meeting of January 1994 testified that they did not discuss, and much less agreed, to any scheme or plan designed to undermine Amotech's position in the market. (Docket # 94, Dyno's Undisputed Facts, Exhibit 8, Deposition of Raymond Delon Hunsaker, p. 157, ln 17-19; Exhibit 9, Deposition of Hardin Dean Mitchell, p. 81, ln. 9-25., Exhibit 6, Deposition of Jose Criado Vazquez)

Lacking such direct evidence of conspiracy, Amotech also fails to show that the inference of conspiracy is reasonable in light of the competing inferences of independent action. [*Matsushita*, 475 U.S. at 588](#). The meeting between Dyno and Drillex, as noted above, does not create a reasonable inference of conspiracy in the present [**23](#) case; the fact that Dyno stopped selling to Amotech due to its poor payment record also fails to establish an inference of conspiracy. See [*Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 860 \(5th Cir. 1981\)](#)("Poor [HN18](#)¹⁵ credit may constitute a defendant's proof that the refusal to deal was a unilateral rather than conspiratorial decision").

Amotech's claim that Dyno would not sell it bagged ammonium nitrate ("AN") also fails to raise an inference of conspiracy. Dyno stopped selling bagged AN not only to Amotech but to all its other customers, since it could no longer obtain the product from Arcadian, who later discontinued sales of the product. (Docket # 94, Dyno's Undisputed Facts, Exhibit # 12, Deposition of Robert Taylor, p. 69-70, ln. 3-25). Practices that affect all distributors cannot satisfy conspiracy requirements. See [*Schaben v. Samuel Moore & Co.*, 606 F.2d 831, 834 \(8th Cir. 1979\)](#) Furthermore, Amotech's allegation [\[*149\]](#) that Dyno's lawsuit for collection of a debt is a "sham" designed to cover up anticompetitive practices is without merit. This Court has already granted summary judgment in favor of Dyno's collection claim. (**Docket # 85**) Since [**24](#) Amotech has failed to establish that the lawsuit is objectively baseless, its argument must fail. See [*Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 \(1993\)](#).

Finally, Amotech cannot properly contend that Dyno's alleged conspiracy with Drillex was consistent with Dyno's independent interests. [*Matsushita*, 475 U.S. at 587](#). As noted by Dyno, it would not have been in its best economic interest to substantially undermine Amotech's market share and eliminate it as Drillex's competitor. Although the elimination of Amotech may benefit Drillex, Dyno's financial interest in Puerto Rico would be harmed if Drillex became the sole distributor of explosives. Dyno argues, and this Court agrees, that Dyno's business interests are best served by selling to competing distributors, not to a powerful monopoly. The First Circuit Court of Appeals has explained that "other things being equal, a profit-maximizing dealer monopolist would set retail prices that, from the supplier's perspective, are too high and unduly restrict the product's sales." [*Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 528 \(1st Cir. 1989\)](#). [**25](#)

Simply put, if Drillex eliminated Amotech as a dealer, it would harm Dyno. In the absence of competition, Drillex could raise prices and reduce output leading to diminished demand for Dyno's products. See Areeda and Turner, [*Antitrust Law*](#) sec. 402 (ordinarily manufacturers will maximize their profits by encouraging maximum competition among dealers and low retail profit margins). Furthermore, if Drillex became a monopoly, it would substantially strengthen its bargaining position with Dyno. Thus, Drillex could demand concessions from Dyno that would be

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unachievable if it faced competitors. See Robert Bork, *The Antitrust Paradox*, at 290 ("The manufacturer shares with the consumer the desire to have distribution done at the lowest possible cost. . ."); Viscusi, Vernon and Harrington, *Economics of Regulation and Antitrust* at 243 (dealer monopoly "would not be in supplier's best interest.")

Having failed to establish the "conspiracy" element required under [Section 1](#) of the Sherman Act, this Court will not delve into the other elements of the claim. Pursuant to the previous analysis, Amotech's claim under [Section 1](#) of the Sherman Act against Dyno and Drillex is **DISMISSED**.

[**26] b. [Section 2](#) of the Sherman Act for Monopoly or Attempt to Monopolize

[HN19](#) [↑] [Section 2](#) of the Sherman Act reads as follows:

2. Monopolizing trade a felony; penalty

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.

Amotech's monopoly claim against Dyno is improper, since Dyno does not have any market share in the relevant market, that is, "the market for the commercial explosive industry and explosives-related products in Puerto Rico." (Complaint, par. 9). See [Gilbuilt Homes, Inc. v. Continental Homes](#), 667 F.2d 209, 211 (1st Cir. 1981); [Pastore v. Bell Telegraph Co.](#), 24 F.3d 508, 513 (3rd Cir. 1994) (share [HN20](#) [↑] of the relevant market most [*150] significant element to determine monopolization)

As cogently [**27] noted by Dyno's counsel, Amotech's [Section 2](#) claim suffers the same infirmities as its [Section 1](#) claim under the Sherman Act. [HN21](#) [↑] The key elements of a "conspiracy to monopolize" offense are: 1) the existence of a conspiracy; 2) an overt act in furtherance of the conspiracy; and 3) specific intent to monopolize. [United States v. Yellow Cab Co.](#), 332 U.S. 218, 225, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947). [HN22](#) [↑] Under [Section 2](#) of the Sherman Act, plaintiff's burden of proof for claims of conspiracy to monopolize is higher than that required for [Section 1](#) conspiracy claims. [Seagood Trading Corp v. Jerrico, Inc.](#), 924 F.2d 1555, 1573-75 (11th Cir. 1991). Amotech must show not only evidence of concerted action but also a shared intent to monopolize the market. As previously discussed by the Court with Amotech's [Section 1](#) claim, there is no evidence of concerted action. In view of Dyno's non-participation in the relevant market and the absence of concerted action to monopolize, Amotech's [Section 2](#) claim against Dyno and Drillex is **DISMISSED**.

Amotech's Claim under the Puerto Rico Dealers Act

Amotech also alleges in its amended counterclaim that Dyno terminated [**28] its distribution agreement with Amotech without just cause, in violation of the Puerto Rico Dealers Act, Law 75 of 1964. Dyno contends in its motion for summary judgment that it terminated its relationship with Amotech due to Amotech's repeated failures to pay on time, as stipulated in the Agreement, and that such reason constitutes "good cause", for purposes of Law 75. This Court agrees.

[HN23](#) [↑] The Puerto Rico Dealers Act, Law 75 of June 24, 1964, as amended, 10 L.P.R.A. 278 et seq. reads, in pertinent part:

Termination of relationship

Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, **except for just cause**. (Emphasis added)

10 L.P.R.A. 278a

HN24 [↑] The Puerto Rico Dealers Act clearly authorizes termination of a relationship between a distributor and its dealer when there is "just cause" for its termination. Law 75 defines "just cause" as "nonperformance of any of the essential obligations of the dealer's [**29] contract on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interest of the principal or grantor in promoting the marketing or distribution of the merchandise or service." 10 L.P.R.A. 278(d). **HN25** [↑] The law limits the definition of "just cause" to acts attributable to the dealer. *Warner Lambert v. Superior Court*, 1973 PR Sup. LEXIS 203, 101 D.P.R. 378 (1973). In essence, when the dealer fails to comply with an essential obligation of the agreement or adversely affects in a substantial manner the interest of the principal, the principal can terminate the contract without payment of damages.

Dyno argues, and this Court agrees, that Amotech's refusal to pay its bills constituted just cause to terminate the agreement. From the beginning of the distributorship relationship, Amotech has repeatedly failed to make timely payments to Dyno. Despite repeated efforts by Dyno to set reasonable payment schedules, Amotech continued its untimely payments. Such delay eventually led to Dyno's filing of the present complaint. The First Circuit Court of Appeals has held that paying for goods on time is one of the bedrock essential obligations [**30] of the dealer's contract. *PPM Chemical Corp. of P.R. v. Saskatoon Chemical Ltd.*, 931 F.2d 138, 139 (1st Cir. 1991).

[*151] In *PPM*, a Canadian manufacturer, Saskatoon Chemical Ltd. ("Saskatoon") entered into an exclusive distribution agreement with PPM, under which it made PPM its Caribbean Distributor of calcium hypochlorite. Two years later, Saskatoon stopped selling to PPM on an exclusive basis due to PPM's poor performance. The First Circuit Court of Appeals found that PPM's failure to pay was "just cause" for termination of the exclusive agreement. Id.

We apply the same reasoning to the present case. Amotech's compliance with the payment terms of the Agreement was essential to Dyno. The Distribution Agreement includes several sections which underscore the importance of timely payments by Amotech, to wit: section 4C details the terms of payment (Docket # 93, Exhibit 2, par. 4C); section 6A notes that Dyno may require collateral at any time to secure full and complete payment (Id., Exhibit 2, par. 6A), and section 9b(1) stipulated that failure to make payments when due was an event which terminated the relationship immediately (Id., Exhibit2, par. 9b(1)). The record [**31] shows that Dyno repeatedly required the payment of overdue amounts and that Amotech often responded by either not making any payments at all or failing to comply with its own proposed payment schedules. (Docket # 93, Dyno's Uncontested Facts Under Law 75, Exhibits 3-7).⁴ Accordingly, the Court holds that Dyno did not incur in a violation of Law 75, since it terminated its relationship with Amotech for just cause. Since we have found that Dyno properly terminated its distribution relationship with Amotech due to the latter's untimely payments, we need not go any further into the nature of the distribution agreement between the parties. Pursuant to the case law and the analysis above, Amotech's Law 75 claim is **DISMISSED**.

[32] Amotech's Claim of Contractual Interference Against Drillex**

Amotech claims that Drillex knew about the exclusive distribution agreement between Dyno and Amotech. Amotech contends that despite this knowledge, Drillex agreed to buy explosives material from Dyno at substantially reduced prices, thus interfering with the existing contractual relationship between Dyno and Amotech. This interference, argues Amotech severely undermined the contractual relationship between Dyno and Amotech, which led to a substantial loss of market share for Amotech. Thus, Amotech seeks to hold Dyno and Drillex jointly liable for the damages caused by such contractual interference.

⁴ According to the civil code which regulates contractual relationships in Puerto Rico, Dyno properly invoked the doctrine of *exceptio non adimplenti contractus*, that is, once a party fails to fulfill its obligations under the contract, the other party is no longer bound to comply with its own obligations. See *Mora Development v. Sandin*, 1987 PR Sup. LEXIS 121, 118 D.P.R. 733; *Martinez v. Colon*, 89 JTS 109.

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This district court recently explained the requisites under which a plaintiff may recover for contractual interference. The Court explained in *Mr. (Vega Alta) v. Caribe General Elec. Products, 31 F. Supp. 2d 226* (D.Puerto Rico 1998) as follows: "HN26" Puerto Rico law provides a cause of action for tortious interference by third parties with contractual obligations. See 31 L.P.R.A. § 5141 (1990). To state a claim for interference with contracts under Puerto Rico law, there must be: (1) a contract with **[**33]** which a third person interferes; (2) fault or knowledge of the contract's existence; (3) damage to the plaintiff; and (4) causation. *General Office Products Corp. v. A.M. Capen's Sons, Inc., 780 F.2d 1077, 1081-82 (1st Cir. 1986)* (citing *General Office Products Corp. v. A.M. Capen's Sons, Inc., 1984 PR Sup. LEXIS 138, 115 D.P.R. 553 (1984)*)." *Id.* at 238.

Although Amotech properly alleges the first three elements of the contractual interference claim, it has been unable to present persuasive evidence that Dyno's sale of blasting caps to Drillex during the term of Amotech's relationship with Dyno **[*152]** directly caused Amotech's financial losses and subsequent drop in its market share of the "explosives material" market. Accordingly, Amotech's claim of contractual interference against Dyno and Drillex is **DISMISSED**. Pursuant to the above discussion, the motions for summary judgment filed by Dyno and Drillex are **GRANTED** and Amotech's amended counterclaim and third-party complaint is **DISMISSED**. Judgment shall follow accordingly.

SO ORDERED.

In San Juan, Puerto Rico, this 1st day of July, 1999.

SALVADOR E. CASELLAS

United States **[**34]** District Judge

JUDGMENT

Pursuant to our opinion and order of even date, Amotech's counterclaim against Dyno Nobel, Inc. and third party complaint against Drillex, S.E., Jose Fernando Criado Vazquez, his wife Pilar Valladares de Criado and their conjugal partnership are hereby **DISMISSED**. Judgment is entered accordingly.

SO ORDERED.

In San Juan, Puerto Rico, this 1st day of July, 1999.

SALVADOR E. CASELLAS

United States District Judge

FTC v. Mylan Labs., Inc.

United States District Court for the District of Columbia

July 7, 1999, Decided ; July 7, 1999, Filed

Cv. 98-3114 (TFH), Cv. 98-3115 (TFH)

Reporter

62 F. Supp. 2d 25 *; 1999 U.S. Dist. LEXIS 10532 **; 1999-2 Trade Cas. (CCH) P72,573

FEDERAL TRADE COMMISSION, Plaintiff, v. MYLAN LABORATORIES, INC., CAMBREX CORP., PROFARMACO S.R.L., and GYMA LABORATORIES OF AMERICA, INC., Defendants. THE STATE OF CONNECTICUT, et al., Plaintiffs, v. MYLAN LABORATORIES, INC., CAMBREX CORP., PROFARMACO S.R.L., GYMA LABORATORIES OF AMERICA, INC., and SST CORP., Defendants.

Disposition: [**1] Defendants' motions to dismiss granted in part and denied in part.

Core Terms

purchasers, indirect, restitution, disgorgement, defendants', motion to dismiss, damages, claim for damages, authorizes, injunctive relief, antitrust, lorazepam, civil penalty, manufacturer, anti trust law, attorney's fees, monetary relief, equitable, costs, state law claim, allegations, umbrella, amended complaint, generic, drugs, state law, permanent injunction, equitable relief, state statute, Clayton Act

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Sherman Act > General Overview

HN1 **Public Enforcement, US Federal Trade Commission Actions**

Section 5 of the Federal Trade Commission Act prohibits violations of the Clayton and Sherman Antitrust Acts.

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

HN2 **Motions to Dismiss, Failure to State Claim**

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Under [Fed. R. Civ. P. 12](#), a claim should not be dismissed 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. In evaluating a plaintiff's complaint, a court must accept the factual allegations as true and draw reasonable inferences therefrom in favor of plaintiff.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

[HN3](#) Antitrust & Trade Law, Federal Trade Commission Act

See [15 U.S.C.S. § 53 \(b\)](#).

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Real Property Law > Environmental Regulations > Indoor Air & Water Quality

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

Civil Procedure > Preliminary Considerations > Equity > Relief

[HN4](#) Jurisdiction, Jurisdictional Sources

Power is thereby resident in the district court, in exercising jurisdiction, to do equity and to mold each decree to the necessities of the particular case. The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words or by a necessary and inescapable inference restricts a court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful conclusions.

Civil Procedure > Preliminary Considerations > Equity > Relief

Civil Procedure > Preliminary Considerations > Equity > General Overview

[HN5](#) Equity, Relief

When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. There is inherent in the courts of equity a jurisdiction to give effect to the policy of the legislature.

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

[HN6](#) Private Actions, Purchasers

Antitrust plaintiffs do not have standing to seek relief for purchases from non-conspirators. The umbrella theory is rejected for three reasons. First, ascertaining damages under such a theory would be "highly conjectural", as the court would need to estimate what portion of the non-conspirators' price increases was attributable to market forces and what portion was fueled by the defendants' anti-competitive conduct. Second, determining the effect of

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defendants' overcharges upon their competitors' prices would transform the litigation into the sort of complex economic proceeding that Illinois Brick counseled courts to avoid. Finally, permitting a purchaser from a competitor of the defendants to sue the defendants for treble damages is incompatible with the antitrust goal of maintaining a competitive economy. Purchasers from competitors of price-fixing defendants may not seek damages under an umbrella theory of liability.

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

HN7 [down] **Private Actions, Purchasers**

Claims based on umbrella liability are unacceptably speculative and complex. Any attempt to ascertain with reasonable probability whether non-conspirators' prices resulted from defendants' purported price-fixing conspiracy or from numerous other considerations would be necessarily speculative.

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

HN8 [down] **Private Actions, Purchasers**

A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured until after the fact; indeed a businessman may be unable to state whether, had one fact been different he would have chosen a different price. A judicial inquiry into these factors would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN9 [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

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 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.S. § 26](#).

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN10 [down] **Remedies, Damages**

While restitution is indeed an equitable remedy, § 16 of the Clayton Act limits the equitable remedies available under its terms to those against "threatened loss or damage". Recovery for past losses is properly covered under § 4; it comes under the head of "damages". Section 16 does not allow the claimed relief for past loss.

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Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > Judgments > Relief From Judgments > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN11[Remedies, Injunctions

Divestiture is a form of injunctive relief within the meaning of § 16 of the Clayton Act. The literal text of § 16 is plainly sufficient to authorize injunctive relief, including an order of divestiture, that will prohibit a defendant's conduct from causing that harm. Divestiture decrees are consistent with § 16's "statutory context" because of § 7's relatively expansive definition of antitrust liability. The remedy is an appropriate means of preventing the harm that a merger might inflict.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN12[Purchasers, Indirect Purchasers

The addition of indirect purchasers to the litany of possible antitrust plaintiffs threatens to mire courts in unduly complicated and speculative damages proceedings, and permitting indirect purchasers to sue creates a serious risk of multiple liability for a defendant.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN13[Purchasers, Direct Purchasers

Under the Clayton Act, private parties, including the states can pursue direct purchaser actions for treble damages under § 4. [15 U.S.C.S. § 15](#). In addition, the states have a cause of action for treble damages under § 4c of the Clayton Act as parens patriae on behalf of natural persons. [15 U.S.C.S. § 15c](#).

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Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN14 [blue icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

The Monopolies Act, [Alaska Stat. § 45.50.580](#), states that a court may make additional orders or judgments as may be necessary to restore to a person in interest any money or property that may have been acquired by an act prohibited by Alaska Stat. [§ 45.50.562 through Alaska Stat.](#) § 45.50.596. Alaska is required to interpret its antitrust statutes consistently with analogous federal law.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN15 [blue icon] **Monopolies & Monopolization, Conspiracy to Monopolize**

[Ark. Code Ann. § 4-75-310](#) states that if any person engaged in the manufacture or sale of any article of commerce shall, with the intent and purpose of driving out competition or for the purpose of financially injuring competitors, sell within this state at less than cost of manufacture or production or sell in such a way, or give away, in this state their productions then the person shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN16 [blue icon] **Public Enforcement, State Civil Actions**

The Colorado Antitrust Act states that the election by the attorney general to seek a civil penalty shall preclude the attorney general from pursuing an action against such person for damages. [Colo. Rev. Stat. § 6-4-112](#).

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN17 [blue icon] **Purchasers, Indirect Purchasers**

Connecticut courts are guided by federal court interpretations of federal antitrust statutes. [Conn. Gen. Stat. § 35-44b](#).

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

HN18 [blue icon] **Private Actions, Standing**

The Florida courts have held that an indirect purchaser has standing to bring a suit for damages under the Florida Deceptive and Unfair Trade Practices Act. Because an intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

[**HN19**](#) [blue icon] **Public Enforcement, State Civil Actions**

The Iowa Competition law should be interpreted to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter. [Iowa Code 553.2](#).

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[**HN20**](#) [blue icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

The Monopolies Act applies to restraints of trade or commerce in this state. [La. Rev. Stat. Ann. § 51:122](#). Louisiana courts have held that federal **antitrust law** should be used as guidance in interpreting the Monopolies Act.

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

[**HN21**](#) [blue icon] **Private Actions, Standing**

The Louisiana Consumer Protection Act (CPA) provides that an injured person may bring an action individually but not in a representative capacity to recover actual damages. [La. Rev. Stat. Ann. § 51:1409 \(A\)](#). Only consumers and competitors have standing to sue for damages under the CPA. The term "consumer" only applies to natural persons.

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

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

[**HN22**](#) [blue icon] **Private Actions, Remedies**

Minnesota's **Antitrust Law**, Minn. Stat. §§ 325D.49-325D.66 does not expressly authorize restitution and disgorgement and [Minn. Stat. § 8.31 \(3\)](#) allows other equitable relief but limits such relief to injunctions and penalties under \$ 25,000.

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

[**HN23**](#) [blue icon] **Private Actions, Remedies**

The administrative rules necessary to the enforcement of Missouri's Merchandising Practices Act (MPA) state that an unfair practice includes any practice which presents a risk of, or causes, substantial injury to consumers. Mo. Code Regs. Ann. tit. 15, § 60-8.020. The MPA also authorizes civil penalties up to \$ 1000 per violation. See Mo. Rev. Stat. § 4.07.100.6.

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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN24 [] **Private Actions, Remedies**

N.C. Gen. Stat. § 75-15.1 allows a presiding judge to restore any moneys or property obtained by any defendant as a result of any violation of the antitrust laws.

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

HN25 [] **Private Actions, Standing**

Oklahoma's Antitrust Reform Act does not authorize a suit on behalf of indirect purchasers. See Okl. Stat. tit. 79, § 212.

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

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

HN26 [] **Private Actions, Standing**

The legislative purpose of the Oregon Antitrust Act is that it apply only to intrastate trade or commerce, and to interstate trade or commerce which is primarily of an intrastate nature and over which federal jurisdiction, for whatever reason, has not been exercised by the Federal Trade Commission or the United States Department of Justice. Or. Rev. Stat. § 646.715.

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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN27 [] **Private Actions, Standing**

Although the South Carolina Antitrust statute applies only to intrastate conduct, the Unfair Trade Practices Act is not limited to in-state conduct by its own terms.

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

Transportation Law > Intrastate Commerce

HN28 [] **Private Actions, Standing**

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The Trade Practices Act (TPA) and the Tennessee Consumer Protection Act (TCPA) apply only to violations occurring in intrastate commerce. When the challenged conduct occurs before the products arrive in Tennessee, the conduct is considered interstate in nature and the TPA and TCPA should not apply.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN29 [+] **Purchasers, Indirect Purchasers**

Texas is required to follow federal antitrust law, and both state and federal law prohibit damage relief on behalf of indirect purchasers.

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

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

HN30 [+] **Private Actions, Purchasers**

The Illinois Brick decision requires a plaintiff to allege purchases directly from the alleged price-fixing conspiracy between supplier and its Vermont dealers. The Vermont Consumer Fraud Act states that the attorney general may request and the court is authorized to render an order for restituiton of cash or goods on behalf of a consumer. Vt. Stat. Ann. tit. 9, § 2458 (b)(2).

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN31 [+] **Private Actions, Purchasers**

If direct purchasers decide not to sue, the indirect purchaser is not entirely without a remedy. While a private plaintiff must be injured in his or her business or property in order to bring any suit under Wash. Rev. Code § 19.86.080, this requirement does not exist in the section that enables action by the Washington attorney general.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN32 [+] **Public Enforcement, State Civil Actions**

Article 6 of West Virginia's Consumer Credit and Protection Act states that the legislative purpose of the article is to complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices. W.Va. Code §§ 46A-1-102.

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

[**HN33**](#) [blue icon] **Monopolies & Monopolization, Actual Monopolization**

To state a [§ 2](#) monopolization claim, a plaintiff must allege facts sufficient to establish both (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.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[**HN34**](#) [blue icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

Monopoly power is the power to raise prices well above competitive levels before customers will turn elsewhere.

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

[**HN35**](#) [blue icon] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Allegations of massive price increases, when combined with anti-competitive conduct such as exclusive licensing agreements, are sufficient to support a claim for unreasonable restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN36**](#) [blue icon] **Antitrust & Trade Law, Sherman Act**

Proof of a tacit, as opposed to explicit, understanding is sufficient to show agreement.

Counsel: For Plaintiff(s): Richard A. Feinstein, Esq., Bureau of Competition, Federal Trade Commission, Washington, D.C.

For Mylan, Defendant(s): Steven A. Newborn, Esq., Rogers & Wells, Washington, D.C.

For Cambrex, Profarmaco S.R.L., Defendant(s): Ann M. Ashton, Esq., Jonathan M. Tuttle, Esq., Debevoise & Plimpton, Washington, D.C.

For Gyma Labs, Defendant(s): Peter Dean Isakoff, Esq., Weil, Gotshal & Manges, Washington, D.C.

For U.S. Chamber of Commerce, Defendant(s): Bertram W. Rein, Esq., Wiley, Rein & Fielding, Washington, D.C.

Judges: Thomas F. Hogan, United States District Judge.

Opinion by: Thomas F. Hogan

Opinion

[*32] MEMORANDUM OPINION

The above-captioned cases are actions by the Federal Trade Commission (FTC) and thirty-two States against Mylan Laboratories and other drug companies for various federal and state law antitrust violations. Pending before

the Court are defendants' motions to dismiss the complaints in both cases. There are three motions to dismiss pending in FTC v. Mylan and three pending in State of Connecticut v. Mylan. Defendants argue both that plaintiffs have not stated a **[**2]** claim upon which relief can be granted, and that this Court lacks subject matter jurisdiction over certain aspects of the complaints. For the reasons set forth below, defendants' motions will be granted in part and denied in part.

I. BACKGROUND

A. Legal Framework

The first action is brought by the Federal Trade Commission ("FTC") under § 13(a) of the Federal Trade Commission Act, 15 U.S.C. § 53(a) ("FTC Act"), to secure a permanent injunction and other relief against the defendants. Defendants are Mylan Laboratories, Inc., Cambrex Corporation, Profarmaco S.R.L. and Gyna Laboratories of America, Inc. The FTC alleges that the defendants engaged and are engaging in unfair methods of competition in or affecting commerce in violation of § 5(a) of the FTC Act, 15 U.S.C. § 45(a). The Complaint contains eight counts of unfair competition.¹ The relief sought by the FTC is for the Court to (1) find that the defendants have violated § 5(a) of the FTC Act; (2) permanently enjoin the defendants from engaging in such conduct; (3) rescind the defendants' unlawful licensing arrangements; and (4) order other equitable relief, including **[**3]** the disgorgement of \$ 120 million plus interest.

The second case, State of Connecticut v. Mylan Labs, is an action brought by thirty-two states against defendants for violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, as well as various state antitrust laws. Plaintiffs bring the action as *parens patriae* on behalf of natural persons; on behalf of their state's general economies in their sovereign capacities; and as injured purchasers or as reimbursers under state Medicaid and other programs. The defendants are the same as in FTC v. Mylan Labs, except that the State complaint names **[**4]** an additional defendant, SST Corporation. The substantive allegations contained in the State complaint are identical to those in the FTC complaint, except that the State complaint contains an additional ninth count alleging that Mylan and SST entered into an illegal price-fixing agreement. As relief, the States are requesting that the Court (1) find that the defendants have violated §§ 1 and 2 of the Sherman Act; (2) permanently enjoin the defendants from engaging in such conduct; (3) rescind the defendants' unlawful licensing **[*33]** arrangements; and (4) award treble damages; (5) award appropriate relief under the state statutes; and (6) order other equitable relief under federal law, including disgorgement and restitution.

The defendants have filed motions to dismiss in both cases.² The six motions are:

1. Defendants' motion to dismiss the FTC's amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6);
2. Defendants' motion to dismiss the FTC's amended complaint in part pursuant to Fed. R. Civ. P. 12(b)(6);
3. Gyna Corporation's motion to dismiss the FTC's amended complaint pursuant to Fed. R. Civ. P. 12(b)(6);
4. Defendants' motion to **[**5]** dismiss the States' amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6);

¹ The eight counts are for monopolization, attempted monopolization, conspiracy to monopolize, and unlawful restraint of trade. If proven, these counts constitute violations of HN1 **[**5]** § 5 of the FTC Act, which prohibits "violations of the Clayton and Sherman Antitrust Acts." Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 609, 97 L. Ed. 1277, 73 S. Ct. 872 (1953).

² In addition, the United States Chamber of Commerce has filed a brief *Amicus Curiae* supporting defendants' motion to dismiss the FTC's amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

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5. Defendants' motion to dismiss the States' amended complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#);
6. Gyna Corporation's motion to dismiss the FTC's amended complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#).

After briefly reviewing the factual background of these cases, the Court will address each of defendants' motions.

B. Facts

For purposes of the instant motions to dismiss, the allegations of the complaints are taken as true. The facts below are presented accordingly, and do not constitute factual findings.

These cases concern the generic drug industry. Generic drugs, which are chemically identical versions of branded drugs, cannot be marketed until after the patent on the branded drugs **[**6]** has expired. Firms that manufacture and market generic drugs often specialize in such drugs, although Mylan manufactures both generic and branded drugs. Generic drugs are sold at substantial discounts from the price of branded drugs.

Mylan and other generic drug manufacturers require the approval of the Food and Drug Administration (FDA) to market a generic product in the United States. For each generic drug, the manufacturer must file an Abbreviated New Drug Application (ANDA) with the FDA to establish that its version of the drug is therapeutically equivalent to the branded drug. FDA approval of an ANDA takes an average of about 18 months..

Typically, the generic manufacturer purchases the Active Pharmaceutical Ingredient (API) from a specialty chemical manufacturer (API Supplier). The generic manufacturer combines the API with inactive filters, binders, colorings and other chemicals to produce a finished product. To sell an API in the United States, the API supplier must file a Drug Master File (DMF) with the FDA. The DMF explains the processes that the API supplier uses to make the API and to test chemical equivalence and bioequivalence to the brand product. To use an API, the **[**7]** generic manufacturer's ANDA must refer to the API supplier's DMF filed with the FDA. More than one drug manufacturer can reference the DMF of the same API supplier. A generic manufacturer that wants or needs to change its API supplier must obtain FDA approval of an ANDA supplement which includes a reference to the new supplier's DMF and test results regarding the generic manufacturer's product using the new API. This process averages about 18 months, though it can take as long as three years.

Lorazepam and clorazepate are two of the approximately 91 generic drugs that Mylan currently manufactures and sells in tablet form. Lorazepam is used to treat anxiety, tension, agitation, insomnia, and **[*34]** as a preoperative sedative. Doctors issue over 18 million prescriptions a year for lorazepam tablets. Because lorazepam is used to treat chronic conditions and is heavily prescribed for nursing home and hospice patients, lorazepam users tend to stay on the drug for long periods of time. Clorazepate is used to treat anxiety and in adjunct therapy for nicotine and opiate withdrawal. Doctors issue over three million prescriptions a year for clorazepate tablets.

Profarmaco (which is a wholly owned **[**8]** subsidiary of Cambrex) manufactures APIs in Italy. Profarmaco holds DMFs for lorazepam API and clorazepate API, and has supplied such APIs to drug manufacturers in the United States. Foreign firms, like Profarmaco, that supply APIs to the United States typically have distributors in the United States who purchase APIs and resell them to generic drug manufacturers in the United States. Mylan purchases its lorazepam and clorazepate API from Gyna, Profarmaco's U.S. distributor of these products. Several other drug manufacturers have purchased API from SST Corporation, another U.S. distributor of this product.

The plaintiffs in these two cases allege the following anti-competitive conduct on the part of the defendants. Mylan sought from its API suppliers long-term exclusive licenses for the DMFs of certain APIs selected because of limited competition. If Mylan obtained such an exclusive license, no other generic drug manufacturer could use that supplier's API to make the drug in the U.S. Mylan sought exclusive licenses for the DMFs for lorazepam API and clorazapate API as well as one other drug not the subject of these lawsuits.

Mylan entered into contracts with Profarmaco and Gyna such **[**9]** that these companies would license exclusively to Mylan for 10 years. The exclusive licenses would provide Mylan with complete control over Profarmaco's entire

supply of lorazepam API and clorazapate API entering the U.S. With complete control of Profarmaco's supply of these products and by refusing to sell to any of its competitors, Mylan would deny its competition access to the most important ingredient for producing lorazepam and clorazapate tablets.

In return for the 10-year exclusive licenses, Mylan offered to pay Cambrex, Profarmaco and Gyma a percentage of gross profits on sales of lorazepam and clorazapate tablets, regardless of who Mylan purchased the API from. Mylan also tried to execute an exclusive licensing arrangement with SST for control of its lorazepam supply. This is significant because Mylan was not authorized by the FDA to sell lorazepam manufactured with SST API (i.e. Mylan's ANDA did not reference SST's DMF). Thus, the States allege that Mylan was entering into a deal for exclusive rights even though it would not have been able to use SST API until after an ANDA Supplement had been completed, which usually takes around 18 months. The plaintiffs' argue that Mylan's **[**10]** attempt to obtain control over SST's supply, when Mylan could not even use SST API, demonstrates the anti-competitive nature of Mylan's actions.

On or around January 12, 1998, Mylan raised its price of clorazepate tablets to State Medicaid programs, wholesalers, retail pharmacy chains and other customers by amounts ranging approximately from 1,900 percent to over 3,200 percent, depending on the size of the bottle and the strength. On March 3, 1998, Mylan raised its price of lorazepam tablets by amounts ranging from approximately 1,900 to 2,600 percent. Shortly thereafter, SST raised the price of lorazepam API by approximately 19,000 percent. SST sold the lorazepam API to Geneva, one of Mylan's competitors, which raised its prices to approximately the price of Mylan's tablets.

The FTC brought its action on December 21, 1998, and filed an amended complaint ("FTC Compl.") on February 9, 1999. Fifteen states, by their respective attorney generals, filed an action under **[*35] §§ 1 and 2** of the Sherman Act, **15 U.S.C. §§ 1 and 2**, and their respective state statutes against the defendants and SST Corporation on December 22, 1998. These states, together with 17 other states, **[**11]** filed an amended complaint ("State Compl.") on February 8, 1999. As noted above, the substantive allegations are substantially identical to those of the FTC complaint, except that the State complaint alleges that defendants and SST, another distributor of APIs, conspired to raise and stabilize the price of lorazepam API. See State Compl. PP 35, 38, 44, 55-70, 85-88.

II. DISCUSSION

A. Standard of Judgment

HN2 Under Fed. R. Civ. P. 12, a claim should not be dismissed "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, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). In evaluating plaintiffs' complaints, the Court must accept the factual allegations as true and draw reasonable inferences therefrom in favor of plaintiffs. Square D. Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 411, 90 L. Ed. 2d 413, 106 S. Ct. 1922 (1986).

B. FTC v. Mylan Labs

1. Defendants' Motion to Dismiss Under Rules 12(b)(1) and 12(b)(6)

Defendants have moved to dismiss the complaint in the FTC Action because of a lack of subject **[**12]** matter jurisdiction. See Fed. R. Civ. P. 12(b)(1). According to defendants, this Court lacks subject matter jurisdiction under § 13(b) of the FTC Act for two reasons: (1) § 13(b) does not authorize the FTC to seek a permanent injunction in an antitrust case such as this one; and (2) § 13(b) does not permit monetary relief such as the disgorgement of profits sought in this case. These claims are addressed in turn.

a. Permanent Injunction

The first issue is whether § 13(b) of the FTC Act permits the FTC to seek a permanent injunction in an antitrust case. Section 13(b) states:

HN3[] Temporary restraining orders; preliminary injunctions

(b) Whenever the Commission has reason to believe-

(1) that any person, partnership or corporation is violating, or is about to violate any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public-

the Commission by any of its attorneys designated [**13] by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice.

Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business....

15 U.S.C. § 53(b). The FTC argues that the final proviso (the "permanent injunction proviso") provides it with the authority [*36] to seek a permanent injunction in antitrust cases. Defendants, on the other [**14] hand, contend that this is not a "proper case" within the meaning of the proviso, and that this Court lacks jurisdiction to issue a permanent injunction in an action brought by the FTC.

The FTC's authority to pursue an injunction in antitrust cases was considered by this Court in *FTC v. Abbott Laboratories, 1992 U.S. Dist. LEXIS 18030*, [1992-2 Trade Cas.] P 69,996 (D.D.C. 1992) (Gesell, J.) dismissed on other grounds, 853 F. Supp. 526 (D.D.C. 1994). In that case, the Court permitted the FTC to pursue a permanent injunction in an antitrust case and rejected the argument that preliminary relief only was available under § 13(b). *Id.*t 68,833. The Court held that the permanent injunction proviso applies to "any provision of law" enforced by the Commission and then concluded that the antitrust case at issue, involving a price fixing conspiracy, "fell squarely within the jurisdiction of the Commission's law enforcement responsibilities" under § 5 of the FTC Act. *Id.*

This Court can find no reason to depart from the Abbott Labs holding. Defendants attempt to distinguish Abbott Labs on the ground that it involved a *per se* antitrust violation (i.e. a price fixing agreement), [**15] instead of a "rule of reason" antitrust violation, but this argument is unconvincing. Although the permanent injunction proviso speaks of "proper cases," there is nothing in the statute, regulations or case law restricting the statutory term "proper cases" to *per se* violations of the antitrust laws. Indeed, several courts have explicitly rejected such narrowing constructions. See, e.g., FTC v. Evans Products Company, 775 F.2d 1084, 1087 (9 Cir. 1985) (holding that the FTC may proceed under § 13(b) for any violation of a statute administered by the FTC); *FTC v. H.N. Singer, 668 F.2d 1107, 1111* (9 Cir. 1982) (stating that "the district court has the power to issue a permanent injunction to enjoin acts or practices that violate the law enforced by the Commission."); *FTC v. Virginia Homes Mfg. Corp., 509 F. Supp. 51, 54* (D. Md.) aff'd, *661 F.2d 920* (4 Cir. 1981). Accordingly, this Court finds that the permanent injunction proviso may be used to enjoin violations of "any provision of law" enforced by the FTC. 15 U.S.C. § 53(b)(1). Because § 5 of the FTC Act is a "provision of law" [*16] enforced by the Federal Trade Commission," § 13(b) allows this Court to issue a permanent injunction. Defendants' motion is therefore denied on this issue. | | |

b. Monetary Relief

The second issue is whether the FTC may pursue monetary relief in this action. In addition to an injunction prohibiting defendants' conduct and rescission of defendants' unlawful licensing arrangements, the FTC asks this Court to "order other equitable relief, including the disgorgement of \$ 120 million plus interest." FTC Compl. at 22, P 4. Defendants object to the FTC's request on the ground that § 13(b) does not authorize disgorgement or any other form of monetary relief.

It is true that the plain language of § 13(b) does not authorize the FTC to seek monetary remedies. See [15 U.S.C. § 53\(b\)](#). The FTC argues, however, that monetary relief is a natural extension of the remedial powers authorized under § 13(b). Although courts are generally disinclined to find remedies beyond those that Congress has expressly granted, the equitable jurisdiction of a federal agency such as the FTC must be read in light of the principles articulated in [Porter v. Warner Holding Co., 328 U.S. 395, 90 L. Ed. 1332, 66 S. Ct. 1086 \(1946\)](#). [**17] In that case, the Supreme Court upheld the district court's authority to refund the illegal rent overcharges pursuant to § 205(a) of the Emergency Price Control Act of 1942, which expressly granted only the power to enjoin illegal practices. The Court wrote:

unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, [*37] those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. [HN4](#)[↑] Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case."

Id. at 398 (quoting [Hecht Company v. Bowles, 321 U.S. 321, 329, 88 L. Ed. 754, 64 S. Ct. 587 \(1944\)](#))(citation omitted). The Porter Court went on to state:

The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words or by a necessary [**18] and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful conclusions."

Id. (quoting [Brown v. Swann, 35 U.S. 497, 10 Peters 497, 9 L. Ed. 508](#)). The Supreme Court affirmed the Porter principle in [Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 291-92, 4 L. Ed. 2d 323, 80 S. Ct. 332 \(1960\)](#). The Court wrote:

[HN5](#)[↑] When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to...give effect to the policy of the legislature.' [Clark v. Smith, 38 U.S. 195, 13 Peters 195, 203, 10 L. Ed. 123](#).

Id.

Based on the principle of statutory construction set forth in Porter and reaffirmed in DeMario, five courts of appeals and numerous district courts have permitted the FTC to [**19] pursue monetary relief under § 13(b). See [FTC v. Febre, 128 F.3d 530, 534](#) (7 Cir. | 1997); [FTC v. Gem Merchandising, 87 F.3d 466, 470](#) (11 Cir. | 1996); [FTC v. Pantron, 33 F.3d 1088, 1102](#) (9 Cir. | 1994); [FTC v. Security Rare Coin, 931 F.2d 1312](#) (8 Cir. | 1991); [FTC v. Southwest Sunsites, Inc., 665 F.2d 711](#) (5 Cir. | 1982); see also [R.A. Walker & Assocs., No. 83-2138, 1991 U.S. Dist. LEXIS 14114](#) (D.D.C. July 26, 1991). Although the precise form of monetary relief differs among the cases, compare [Security Rare Coin, 931 F.2d at 1316](#) (restitution) with [Southwest Sunsites, 665 F.2d at 718](#) (asset freeze pending further proceedings), at least one court has upheld the FTC's ability to seek disgorgement in the courts. See [Gem Merchandising, 87 F.3d at 470](#) ("We conclude that section 13(b) permits a district court to order a

defendant to disgorge illegally obtained funds"). As defendant cites no relevant case law that prohibits the FTC from seeking disgorgement or any other form of equitable ancillary relief, the Court denies defendants' [**20] motion on this issue.

C. State of Connecticut v. Mylan Labs

1. Defendants' Motion to Dismiss Under [Rules 12\(b\)\(1\)](#) and [12\(b\)\(6\)](#)

This motion seeks to dismiss the State complaint insofar as the complaint asserts improper legal theories and requests for relief. Defendants' claims are that: (1) the States' request for monetary relief based on purchases from suppliers other than Mylan is not authorized under federal antitrust law; (2) the States' request for restitution and/or disgorgement should be dismissed because it is not authorized by Section 16 of the Clayton Act and it conflicts with the detailed scheme of antitrust remedies enacted by Congress, as well as the principles enunciated in *Illinois Brick v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977); and (3) many of the supplemental state law claims must be dismissed because the state statutes do not permit injunctive and/or monetary relief [*38] under the facts of this case. These claims are considered in turn.

a. "Umbrella Liability"

The State complaint seeks to recover damages not only for direct purchases from Mylan, but also for purchases from Mylan's competitors. See State [**21] Compl. P 50. The premise of the States' request is that Mylan's competitors in the generic drug industry, though not parties to the exclusive licenses nor members of the alleged conspiracy, raised their prices as a consequence of Mylan's actions. The States argue that defendants should be liable for the difference between the prices charged by Mylan's competitors and what those prices would have been had Mylan not raised its prices pursuant to an illegal agreement.

The "price umbrella" theory of antitrust liability presented by the States has not been considered by this Circuit or the Supreme Court. Three circuits have addressed this theory. In *Mid-West Paper Products Co. v. Continental Group Inc.*, 596 F.2d 573 (3d Cir. 1979), the Third Circuit held that the HN6[¹] antitrust plaintiffs in that case did not have standing to seek relief for purchases from non-conspirators. The court rejected the umbrella theory for three reasons. First, the court found that ascertaining damages under such a theory would be "highly conjectural," as the court would need to estimate what portion of the non-conspirators' price increases was attributable to market forces and what portion was fueled [**22] by the defendants' anti-competitive conduct. *Id. at 584-85* ("it cannot readily be said with any degree of economic certitude to what extent, if indeed at all, purchasers from a competitor of the price-fixers have been injured by the illegal overcharge."). Second, the court found that determining the effect of defendants' overcharges upon their competitors' prices would transform the litigation into the sort of complex economic proceeding that the Supreme Court in *Illinois Brick v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977), counseled courts to avoid.³ *596 F.2d at 585*. Finally, the court wrote that permitting a purchaser from a competitor of the defendants to sue the defendants for treble damages was incompatible with the antitrust goal of maintaining a competitive economy. *Id. at 586*. For these reasons, the court held that purchasers from competitors of price-fixing defendants may not seek damages under an umbrella theory of liability.

[**23] The Fifth Circuit reached the opposite conclusion regarding umbrella liability in *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), cert denied, 449 U.S. 905 (1980). The Beef Industry court addressed the umbrella theory in a footnote, which states that an umbrella-type injury (i.e. paying higher prices due to "price following" by non-conspirators) "satisfies the test for proximate causation." *Id. at 1166 n.24*. Accordingly, the Beef Industry court held that the antitrust plaintiffs in that case had standing to sue the defendants for purchases from non-conspirators.

³ For a complete discussion of Illinois Brick, see *infra* at 20.

Three years after Mid-West Paper and the beef industry litigation, the Ninth Circuit addressed the umbrella theory in In re Petroleum Products Antitrust Litigation, 691 F.2d 1335 (1982).⁴ [**25] The Petroleum Products court rejected the umbrella liability theory for two reasons. First, in the context of the multi-tiered scheme of distribution present in that case, the court was concerned that the umbrella theory would permit double recovery against the defendants for the effects of the same overcharge. Id. at 1340. [**24] For example, borrowing from the facts of that case, if a plaintiff purchased gasoline both from Standard Oil and from an independent refiner further along the chain of distribution, the umbrella theory would dictate that Standard Oil is liable to the plaintiff both for its price increase (if the result of an illegal agreement) as well as the price hike instituted by the independent refiner. In addition, however, the independent refiner could sue Standard Oil for its price increase, without reduction for the damages already awarded to the plaintiff.⁵ See id. at 1340. The result would be to make defendants liable twice for the effects of the same overcharge.

The second basis of the Petroleum Products decision was that HN7⁶ claims based on umbrella liability are "unacceptably speculative and complex." 691 F.2d at 1341. Echoing the Midwest Paper decision, the court found that "any attempt to ascertain with reasonable probability whether the non-conspirators' prices resulted from the defendants' purported price-fixing conspiracy or from numerous other considerations" would be necessarily speculative.⁶ Id.

[**26] In light of Midwest Paper and Petroleum Products, the Court will grant defendants' motion to dismiss the States' complaint insofar as it seeks umbrella damages. The main difficulty with the umbrella theory is that, even in the context of a single level of distribution, ascertaining the appropriate measure of damages is a highly speculative endeavor. There are numerous pricing variables which this Court would be bound to consider to approximate the correct measure of damages, including the cost of production, marketing strategy, elasticity of demand, and the price of comparable items (i.e. the brand versions of lorazepam and clorazepate). See Gross v. New Balance Athletic Shoe, 955 F. Supp. 242, 246 (S.D.N.Y. 1997). (dismissing umbrella liability claims as "the causal connection between the alleged injury and the conspiracy is attenuated by significant causative factors (i.e. independent pricing decisions of non-conspiring retailers)"). The interaction of these variables is uncertain. As noted in Hanover Shoe, 392 U.S. at 492-93, "[HN8]⁷ a wide range of factors influence a company's pricing policies. Normally the impact of a single change in the [**27] relevant conditions cannot be measured until after the fact; indeed a businessman may be unable to state whether, had one fact been different...he would have chosen a different price." A judicial inquiry into these factors "would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings[.]" Illinois Brick, 431 U.S. at 732. Accordingly, this Court will decline the States' invitation to consider umbrella damages and dismiss the States' complaint insofar as it requests such relief.

⁴ Of the district courts to consider the issue, at least five courts found it appropriate to hold a defendant liable under an umbrella theory while two other courts have denied such relief. Compare In Re Arizona Dairy Antitrust Litig., 627 F. Supp. 233, 236 (D. Ariz. 1985); In Re Uranium Antitrust Litig., 552 F. Supp. 518, 525 (N.D. Ill. 1982); Pollock v. Citrus Associates of New York, 512 F. Supp. 711 (S.D.N.Y. 1981); In Re Bristol Bay Salmon Fishery Antitrust Litig., 530 F. Supp. 36 (W.D. Wash. 1981); Washington v. American Pipe & Constr. Co., 280 F. Supp. 802 (W.D. Wash. 1968) with In Re Folding Carton Antitrust Litig., 88 F.R.D. 211 (N.D. Ill. 1980); Gross v. New Balance Shoe, 955 F. Supp. 242 (S.D.N.Y. 1997) (denying plaintiffs standing to seek relief from purchases from non-conspirators).

⁵ Although Standard Oil might argue that the independent refiner was not injured by the antitrust violation because the independent refiner passed the price increase along to its customers (such as the plaintiff), this defense was rejected as a matter of law by the Supreme Court in Hanover Shoe v. United Machinery Corp., 392 U.S. 481, 494, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968).

⁶ The Petroleum Products court expressly reserved judgment on the application of the umbrella theory to the kind of facts present here. The court wrote: "we need not decide...whether, in a situation involving a single level of distribution, a single class of direct purchasers from non-conspiring competitors of the defendants can assert claims for damages against price-fixing defendants under an umbrella theory." Id. at 1340. Nevertheless, a principle concern of the Petroleum Products court - the speculative nature of umbrella damages - is also applicable to cases involving a single level of distribution.

[*40] b. Restitution/Disgorgement

Defendant's next argument is that the States cannot sue for restitution and disgorgement under § 16 of the Clayton Act. Section 16 states that "[HN9](#)" 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...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](#). Defendants argue that restitution and disgorgement are retrospective remedies for past conduct, not relief [\[*28\]](#) against "threatened" conduct.

The sole opinion addressing restitution and/or disgorgement under § 16 is from a 1976 case in the Ninth Circuit, [In re Multidistrict Vehicle Air Pollution Litigation](#), 538 F.2d 231, 233-34 (9th Cir. 1976). In that case, twenty-two states, as well as other plaintiffs, sued four automobile manufacturers for allegedly suppressing the development of automobile antipollution technology and thereby eliminating competition in the research and development of automobile pollution control devices. In addition to an order requiring the automobile manufacturers to "retrofit" all automobiles produced by the defendants that did not have pollution control devices, the plaintiffs sought restitution for those persons who had already paid to have pollution devices installed on their own cars.

The Ninth Circuit upheld the district court's dismissal of the action on the basis that restitution was not an available remedy under § 16 of the Clayton Act. In a somewhat confusing opinion, the court first upheld the district court's dismissal based on the plain language of § 16. The court stated:

[HN10](#) While restitution is indeed an equitable remedy, § [\[*29\]](#) 16 limits the equitable remedies available under its terms to those against "threatened loss or damage." Here, the "reimbursement" would be awarded for the loss which has already occurred, at the time the car owner paid to have his vehicle retrofitted; it would not be relief "against threatened loss or damage." Recovery for past losses is properly covered under § 4; it comes under the head of "damages."

Id. at 234. Following that holding, however, the court questioned the need for its legal conclusion by distinguishing the relief sought by the states from restitution in the "usual" sense. The court went on:

What plaintiffs seek is not "restitution" in the sense in which that term is usually used. Defendants have not received from the car owners any money to which they are not entitled; plaintiffs do not claim that they have. Thus, whether payments which appellants seek for some of their citizens is "equitable" or not is of no consequence because § 16 does not allow the claimed relief for past loss.

Id. This language suggests that a typical restitution or disgorgement scenario might fit within the contours of § 16, such as where plaintiffs [\[*30\]](#) seek to deprive antitrust violators of the benefits of their illegal conduct. Unlike the automobile manufacturers in [Multidistrict Vehicle](#), such defendants have "received...money to which they are not entitled..." *Id.*

The Supreme Court addressed the remedies available under § 16 in [California v. American Stores Co.](#), 495 U.S. 271, 109 L. Ed. 2d 240, 110 S. Ct. 1853 (1990). In that case, the Court considered whether divestiture is a form of injunctive relief authorized by § 16. The case involved a merger between the first and fourth largest supermarkets in California. California sued under § 7 of the Clayton Act, alleging that the merger constituted an anticompetitive acquisition that would harm consumers throughout the State. The district court granted the state a preliminary injunction requiring the defendants to operate the acquired stores separately pending the outcome of the suit. The defendants appealed, contending that the [\[*41\]](#) "indirect divestiture" effected by the preliminary injunction was outside the district court's jurisdiction under § 16 of the Clayton Act. The Court of Appeals for the Ninth Circuit agreed with the defendants and reversed the district [\[*31\]](#) court.

On appeal from the Ninth Circuit, the Supreme Court held that [HN11](#) divestiture is a form of injunctive relief within the meaning of § 16. The [American Stores](#) Court found that § 16's requirement of "threatened loss or damage" was "unquestionably satisfied" because of the economic harm threatened by the allegedly illegal merger.

Id. at 282. The Court based its holding on the plain language of § 16, finding that "the literal text of § 16 is plainly sufficient to authorize injunctive relief, including an order of divestiture, that will prohibit [defendants'] conduct from causing that harm." Id. at 283. Additionally, the Court reasoned that divestiture decrees are consistent with § 16's "statutory context" because of § 7's "relatively expansive definition of antitrust liability." Id. at 284.

Although American Stores is capable of broad application,⁷ the opinion must be read in light of the nature of the relief ordered by the district court in that case. The divestiture order in American Stores was quintessentially forward-looking: it was designed to prevent the anticompetitive harms of the merger from materializing [**32] by dissembling the merged corporation. The Court emphasized the prospective effect of divestiture in concluding that the remedy was an "appropriate means of preventing the harm" that the merger might inflict. Id. at 282.

A second key distinction between the divestiture remedy authorized in American Stores and the disgorgement sought in this action is that divestiture does not implicate the concern for duplicative recoveries articulated [**33] by the Supreme Court in Illinois Brick. The Illinois Brick holding that indirect purchasers do not have standing under the Clayton Act rested on two considerations: first, that HN12[⁸] the addition of indirect purchasers to the litany of possible antitrust plaintiffs threatened to mire courts in unduly complicated and speculative damages proceedings; and second, that permitting indirect purchasers to sue creates a "serious risk of multiple liability for defendants." Illinois Brick, 431 U.S. at 730. Although the Court's concern for the complexity of the damages proceeding is not implicated by a disgorgement action, permitting disgorgement does raise the specter of duplicative recoveries. HN13[⁹] Under the Clayton Act, private parties (including the States) can already pursue direct purchaser actions for treble damages under § 4. 15 U.S.C. § 15. In addition, the States have a cause of action for treble damages under § 4c of the Clayton Act as *parens patriae* on behalf of natural persons. Id. § 15c. Permitting disgorgement under § 16 would provide yet another route to defendants' allegedly ill-gotten gains, and would therefore heighten the possibility [**34] that defendants in antitrust actions could be exposed to multiple liability. While disgorgement would have the additional benefit of permitting the States to compensate indirect purchasers who are excluded from recovery under current law, the Supreme Court weighed this interest against the threat of duplicative recovery and determined that only direct purchasers have standing under the Clayton Act. See Illinois Brick, 431 U.S. at 741; see also Hawaii v. Standard Oil, 405 U.S. 251, 264, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972) (expressing unwillingness to "open the door" [*42] to duplicative recoveries"). The States should not be allowed to circumvent Illinois Brick through a novel interpretation of § 16. Accordingly, the Court will grant defendants' motion to dismiss insofar as the States seek disgorgement and/or restitution under § 16.

In light of the Court's ruling on the above issues, the States' federal claims against defendant are narrowed to the following cause of action: the States may sue the defendants under § 4 of the Clayton Act for any direct purchases that state entities or state citizens may have made of generic clorazepate and lorazepam [**35] from the defendants.⁸ Defendants contend that the States' Amended Complaint fails to allege direct purchases of generic lorazepam or clorazepate tablets from Mylan, and that none of the persons on whose behalf the States purport to sue made such direct purchases from Mylan. Defendants therefore seek dismissal of the States' complaint under Rule 12(b)(6). Although defendants are correct that the States' case is dependent on facts supporting direct purchases by the States, the States have sufficiently alleged direct purchases for the purposes of a motion to dismiss. See State Compl. PP 7, 38, 40, 47, 50, 51. Accordingly, the Rule 12(b)(6) portion of defendants' motion is denied.

⁷ Most notably, American Stores is ambiguous on whether a court should apply the Porter v. Warner principle equally to actions brought by the federal government and actions brought by private parties. Although American Stores cites caselaw for the proposition that a court's equitable jurisdiction should be read more expansively in actions brought by government agencies, see 495 U.S. at 295, the Court also cites Porter v. Warner in the context of § 16 of the Clayton Act, which supplies a private right of action. Id.

⁸ In addition, all states are entitled to be in federal court to seek injunctive relief pursuant to § 16 of the Clayton Act. The Court notes that the States could also have proceeded under § 4c of the Clayton Act, but elected not to do so. See Oral Argument Transcript at 60.

2. Defendant's Motion to Dismiss Under [Rules \[**36\] 12\(b\)\(1\)](#) and [12\(b\)\(6\)](#) - State Law Issues

Finally, there is the issue of whether the States are entitled to the remedies they seek under the state statutes. Defendants argue that the supplemental state law claims should be dismissed to the extent that they fail to meet the requisite standing thresholds or other state law limitations on antitrust suits. Defendants offer six general arguments for why various state law claims must be dismissed. The Court will review those arguments and then address plaintiffs' claims under the individual state statutes.

a. General State Law Issues

i. Interstate Verses Intrastate Violations

Defendants' first argument is that, as a general matter, state law challenges to the interstate conduct alleged here must be dismissed if the state law applies only to intrastate violations of law. On this point, Louisiana, South Carolina, Tennessee and Utah have determined that their state antitrust statutes apply only to violations having solely intrastate impact. This issue requires state-by-state analysis and will be discussed in the individual sections for the five above-mentioned states.

ii. Damages Claims For Direct Purchasers

Defendants' second [\[**37\]](#) argument is that, as previously discussed, damages claims for direct purchasers must be dismissed because no state specifically alleges that either it or its citizens made direct purchases of the products at issue from Mylan. This portion of defendants' motion is denied under each state law as well as under federal law as the States have adequately pleaded direct purchases for the purposes of a motion to dismiss. See [supra at pp. 21-22](#). Whether the States have enough facts to support their direct purchase allegations will be determined at summary judgment.

iii. Umbrella Theory Damages Claims

Defendants' third argument is that, as discussed earlier, all damages claims based on the umbrella theory must be dismissed. Because the States do not suggest an independent state law approach to the "umbrella standing" theory and because state statutes refer to federal **antitrust law** for guidance, this portion of defendants' motion is granted under the state laws for the same reasons that it is granted under federal law. See [supra at I*43\] 13-17](#). Thus, the States' damages claims are dependant on purchases from the defendants and do not involve purchases from third party suppliers or manufacturers.

[**38] iv. Damages Claims On Behalf of Indirect Purchasers

Defendants' fourth argument is that damages claims on behalf of indirect purchasers are barred unless the state statute specifically permits recovery for indirect purchasers. Because federal **antitrust law** bars damages claims by or on behalf of indirect purchasers, see [Illinois Brick, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061](#), and because each of the States' statutes and/or case law require or prompt courts to follow federal statutes and decisions when interpreting state **antitrust law**, unless a state has specifically instituted a right of action for indirect purchasers, that state cannot sue on behalf of indirect purchasers. See, e.g., [Boos v. Abbott Labs., 925 F. Supp. 49 \(D. Mass. 1996\)](#); [Stifflear v. Bristol-Myers Squibb Co., 931 P.2d 471 \(Colo. Ct. App. 1996\)](#); [In Re Wiring Device Antitrust Litig., 498 F. Supp. 79 \(E.D.N.Y. 1980\)](#). The individual state statutes are discussed below.

v. Restitution and/or Disgorgement on Behalf of Direct Purchasers

Defendants' next argument is that the States' claims for restitution or disgorgement should be dismissed [\[**39\]](#) unless specifically authorized by state statute. Defendants repeat arguments from their motion to dismiss the States' claims for restitution and disgorgement under § 16 of the Clayton Act. Several of the state statutes, however, are broader than the Clayton Act in this regard. Additionally, many state appellate court decisions have held that their antitrust statutes explicitly provide for restitution or that the concept of equitable relief, provided for in the statutes, includes restitution. Although Defendants state that a "federal court need not be bound by intermediate

state appellate court ruling," Def. Mem. at 50 (*citing* C.A. Wright, Law of Federal Courts, § 58 at 395, n. 23 (5th ed. 1994)), the Court will follow state appellate court decisions on this point. See *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78, 85 L. Ed. 109, 61 S. Ct. 176 (1940) ("An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination,...in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."). Therefore, States with statutes **[**40]** that explicitly provide for restitution or that have been interpreted by state courts as providing such relief; States with statutes that provide for equitable relief and courts that have held the concept of equitable relief to include restitution; and States with statutes that provide, without explicit limitation, for any other equitable relief the court may order, have authority to seek restitution and disgorgement on behalf of direct purchasers under state law.

vi. Restitution and/or Disgorgement on Behalf of Indirect Purchasers

Defendants also argue that even those States with statutes that explicitly authorize equitable monetary relief do not authorize such relief on behalf of indirect purchasers. As discussed elsewhere in this opinion, providing monetary relief to indirect purchasers increases the risk of duplicative recovery. Therefore, restitution and/or disgorgement on behalf of indirect purchasers will be denied absent express authority for such relief under state law.

vi. Procedural Defects

Defendants contend that California, Colorado, Maine, Michigan and New York have failed to comply with statutory prerequisites to bringing suit. See Def. Mem. at 5 n.5. **[**41]** The Court will not dismiss the States' claims on this basis, but will require that each of these states either comply with the procedures that are required by their individual statutes or submit to **[*44]** the Court a statement as to why such procedures are not required in the instant case within ten days of the issuance of this Opinion.

b. Individual State Law Claims

The Court will now apply the above discussion to each plaintiff State's state law claims. A summary of the Court's holding appears in the chart attached as Appendix A. Claims brought by the states of Illinois, New Mexico, South Dakota and Wisconsin as well as by the District of Columbia are uncontested. Claims brought by the State of California are contested only as to the issue of defective procedure as discussed above. The Commonwealth of Pennsylvania has not made any state law claims.

i. Alaska

Defendants challenge Alaska's claim that the Monopolies Act (*Alaska Stat. 45.50.580*) or the Unfair Trade Practices and Consumer Protection Act (*Alaska Stat. 45.50.501*) allows the state to bring an action for restitution on behalf of indirect purchasers. Although **HN14**↑ the Monopolies Act states that "the court may make additional **[**42]** orders or judgments as may be necessary to restore to a person in interest any money or property...that may have been acquired by an act prohibited by AS 45.50.562 through 45.50.596," the statute fails to address the issue of restitution for indirect purchasers. Alaska cites no authority supporting restitution for indirect purchasers in an antitrust case. Moreover, it is required to interpret its antitrust statutes consistently with analogous federal law. See *West v. Whitney-Fidalgo Seafoods, Inc.*, 628 P.2d 10, 14 (Alaska 1981); Alaska Stat. § 45.550.545. As this Court has already determined that federal law does not permit private plaintiffs to sue for restitution, Alaska's claims are dismissed insofar as the state seeks disgorgement and/or restitution on behalf of indirect purchasers. Defendants do not challenge Alaska's claims for civil penalties, restitution on behalf of direct purchasers, attorney fees and costs, or preliminary or permanent injunctions, and the State has withdrawn all damages claims.

ii. Arkansas

All claims brought by Arkansas under *Ark. Code Ann. §§ 4-75-301, et seq* ("the Antitrust Law") must be dismissed. The only provision Arkansas **[**43]** cites in support of its claims is **HN15**↑ *§ 4-75-310*, which states that "if any person...engaged in the manufacture or sale of any article of commerce...shall, with the intent and purpose of driving out competition or for the purpose of financially injuring competitors, sell within this state at less than cost of manufacture or production or sell in such a way, or give away, in this state their productions...then the

person...shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade." The plain language of this section clearly applies to products which are sold for too little (predatory pricing), not to products such as the generic drugs in the instant case which were sold for too much. Additionally, Arkansas fails to allege that defendants have performed "within this state some act directly tending to carry into effect a conspiracy prohibited by [the statute]." Ark. Code Ann. § 4-75-306. For these two reasons, the Court will dismiss all Arkansas **Antitrust Law** claims.

The Court will permit the State's restitution and damages claims on behalf of direct purchasers under the Arkansas Deceptive Trade Practices Act, [Ark. Code Ann. § 4-88-101 et seq.](#) The ADTPA gives the Attorney General express authority to seek restitution and damages for violations of the section which prohibits "unconscionable, false, or deceptive" acts. There is no support for defendants' argument that the statute does not apply to direct purchasers in this case. As discussed above, damages and restitution for indirect purchasers will be dismissed as there is no express authority for such relief. [\[*45\]](#) Therefore, still standing are the State's claims for civil penalties, injunctive relief, restitution and damages on behalf of direct purchasers, and attorney fees and costs.

iii. Colorado

Defendants challenge Colorado's claim for both civil penalties and damages, and for restitution and/or disgorgement. Because [HN16](#) the Colorado Antitrust Act plainly states that "the election by the attorney general to seek a civil penalty shall preclude the attorney general from...pursuing an action against such person for damages," [Colo. Rev. Stat. Ann. § 6-4-112](#), and because Colorado elects to sue for damages if required to choose one of the above-stated remedies, Colorado's claim for civil penalties will be dismissed. Colorado's claim for restitution and/or disgorgement [\[*45\]](#) on behalf of both direct and indirect purchasers must also be dismissed because those remedies are not expressly authorized by state statute. Remaining claims include damages for direct purchasers, injunctive relief, and attorney fees and costs.

iv. Connecticut

The only disputed issue is whether Connecticut can seek restitution and disgorgement for indirect purchasers. Although the Connecticut Antitrust Act allows for injunctive relief, it does not provide express authority for other equitable relief such as disgorgement or restitution. [Conn. Gen. Stat. § 35-34](#). Additionally, [HN17](#) Connecticut courts are guided by federal court interpretations of federal antitrust statutes. [Conn. Gen. Stat. § 35-44b](#). As discussed above, unless there is specific state authorization, States' claims for restitution or disgorgement on behalf of indirect purchasers must be dismissed. Additionally, Connecticut's claim that the Connecticut Unfair Trade Practices Act (the "CUTPA") authorizes the state to obtain restitution on behalf of indirect purchasers is without merit. While the statute does allow for restitution for direct purchasers, it nowhere addresses the issue of such relief for indirect purchasers. [\[*46\]](#) Because there is no state authority supporting the allegation that CUTPA remedies are available to indirect purchasers and because Connecticut **antitrust law** is guided by analogous federal law discussed above, this claim must be dismissed. Connecticut's remaining state law claims are for civil penalties, injunctive relief, restitution on behalf of the State as a direct purchaser, and attorney fees and costs.

v. Florida

Defendants challenge Florida's claims for damages under the Florida Antitrust Act (the "FAA"), damages under the Florida Deceptive and Unfair Trade Practices Act (the "FDUTPA") and restitution and disgorgement under the FAA or FDUTPA. Florida is seeking damages under the FAA only for direct purchases. As discussed above, the States sufficiently pleaded direct purchases. Thus, Florida's claim for damages is sufficient to survive this motion to dismiss.

The Court will not dismiss Florida's claim seeking damages for indirect purchasers under the FDUTPA. Although allowing such a claim increases the risk of duplicative recovery as discussed above, the Florida Court of Appeals has specifically held that [HN18](#) an indirect purchaser has standing to bring a suit for damages under [\[*47\]](#) the FDUTPA. See [Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100](#) (Fla. 1st Dist. Ct. App. 1996), review dismissed, 689 So. 2d 1068 (Fla. 1997). Because "an intermediate state court in declaring and applying the state

law is acting as an organ of the State and its determination,...in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question," [Fidelity Union Trust Co., 311 U.S. at 178](#), the Court will deny Defendants' motion to dismiss on this issue.

[*46] On the other hand, Florida's contention that the Florida Antitrust Act or the FDUTPA authorizes restitution or disgorgement will be dismissed. Neither statute expressly authorizes such monetary equitable relief, and, as discussed above, this Court follows the logic of [Illinois Brick](#) in denying such additional relief. Claims still standing include civil penalties, injunctive relief, damages for direct and indirect purchasers, and attorney fees and costs.

vi. Idaho

The disputed issues include Idaho's claims for recovery on behalf of indirect purchasers under the Idaho [Antitrust Law](#), and for restitution [*48] for indirect purchasers under the Idaho Consumer Protection Act (the "ICPA"). Idaho's claim that it may recover on behalf of indirect purchasers under the Idaho [Antitrust Law](#) must be dismissed. Neither the statute nor subsequent case law grants standing to indirect purchasers, and Idaho [antitrust law](#) is guided by federal law. [See Pope v. Intermountain Gas Co., 103 Idaho 217, 646 P.2d 988 \(Idaho 1982\)](#) (stating that federal antitrust decisions offer persuasive guidance as to the interpretation of all provisions of the Idaho [Antitrust Law](#) that are based on federal antitrust statutes). Because there is no express [Illinois Brick](#) repealer provision, therefore, Idaho's damages claim on behalf of indirect purchasers must be dismissed.

The Court will not dismiss Idaho's claim that it should be allowed to seek restitution and disgorgement on behalf of indirect purchasers under the ICPA, however. Under Idaho law, great weight is given to the FTC's interpretation of the FTC Act in the construction of the ICPA. [See Idaho Code § 48-604\(a\)](#). Because this Court has found that the FTC Act authorizes equitable monetary relief, [see supra, at 10-13](#), the Court will similarly [*49] deny the motion with regard to the ICPA. Thus, Idaho's remaining state law claims are for civil penalties, injunctive relief, restitution on behalf of direct and indirect purchasers, damages on behalf of direct purchasers, and attorney fees and costs.

vii. Iowa

Defendants contest Iowa's claims for actual damages on behalf of indirect purchasers and for restitution and disgorgement on behalf of indirect purchasers. Both claims must be dismissed. [HN19](#) The Iowa Competition law should be interpreted "to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter." [Iowa Code 553.2](#). Because federal law does not give indirect purchasers standing, as discussed above, absent an explicit statutory grant of authority to the State to sue on behalf of indirect purchasers, these claims must be dismissed. Although the Iowa Competition Law allows the Court to grant equitable relief in an antitrust suit brought by the state or the injured party, it nowhere authorizes the State to seek restitution and disgorgement on behalf of indirect purchasers. Therefore, the Court will follow the reasoning of [Illinois Brick](#) and dismiss both [*50] of Iowa's disputed claims. Remaining claims include civil penalties, injunctive relief, damages on behalf of direct purchasers, restitution on behalf of direct purchasers, and attorney fees and costs.

viii. Kentucky

Defendants challenge Kentucky's allegations that the state may seek relief for indirect purchasers in the form of damages or in the form of restitution and disgorgement. The Court will dismiss both claims. No provision in the Kentucky Consumer Protection Act gives the state express authority to bring such a suit, and state case law is divided on the issue. Kentucky cites one opinion which held that the legislature, in enacting [KRS 367.200](#), intended to grant the State Attorney General authority to seek restitution on behalf of indirect purchasers. [See Commonwealth of Kentucky ex. rel. Beshear v. ABAC Pest Control, Inc., 621 S.W.2d 705](#) [*47] ([Ky. App. 1981](#)). Several more recent cases, however, have determined that "the legislature intended that privity of contract exist between the parties in a suit alleging a violation of the Consumer Protection Act." [Skilcraft Sheetmetal, Inc. v. Kentucky Machinery, Inc., 836 S.W.2d 907, 909](#). [See also](#) [*51] [Kentucky Laborers District Council Health and Welfare Trust Fund v. Hill & Knowlton, Inc., 24 F. Supp. 2d 755 \(W.D. Ky. 1998\)](#); [Anderson v. National Sec. Fire and Casualty Co., 870 S.W.2d 432, 436 \(Ky. App. 1993\)](#). Because Kentucky's case law is divided on the issue and

because authorizing damages or equitable monetary relief to indirect purchasers would increase the risk of duplicative recovery as discussed above, defendants' motion to dismiss will be granted as to this issue. Kentucky's remaining state law claims are for civil penalties, injunctive relief, damages and restitution and/or disgorgement on behalf of direct purchasers, and attorney fees and costs.

ix. Louisiana

The disputed issues include whether Louisiana may assert claims under the Louisiana Monopolies Act, [La. Rev. Stat. Ann. §§ 51:121 et seq.](#), whether indirect purchasers have a right of recovery, whether the State has authority under the Consumer Protection Act (the "CPA") to seek damages on its own behalf, and whether the State has authority to seek restitution and/or disgorgement. [HN20](#) The Monopolies Act applies to "restraint[s] of trade or commerce in this state." [La. Rev. Stat. I**521 Ann. § 51:122](#). The language of the statute is ambiguous as to whether the violation of the Act must occur intrastate. Although the issue has arisen, no state court has answered the question. [See Free v. Abbott Labs.](#), 739 So. 2d 216, 1999 La. LEXIS 784 (1999) (denying certification on the issue of whether the Monopolies Act applies to interstate commerce). Because state courts are undecided on the issue, the Court will allow the claim to stand for the time being and will reassess this claim at summary judgment or thereafter. Even if Louisiana proceeds with its Monopolies Act claims, however, it may not seek relief on behalf of indirect purchasers under the Act. State courts have held that federal [antitrust law](#) should be used as guidance in interpreting the Monopolies Act. [See Louisiana Power & Light Co. v. United Gas Pipe Line Co.](#), 493 So. 2d 1149, 1158 (La. 1986). Therefore, because federal law does not give indirect purchasers standing, the State's claim for relief on behalf of indirect purchasers under the Monopolies Act will be dismissed. Similarly, the State's claim for equitable monetary relief under the Monopolies Act will be dismissed [**53](#) because no statute or state case expressly authorizes such relief, and the Clayton Act, as discussed above, does not grant equitable monetary relief.

Louisiana's claim for damages on behalf of all direct and indirect purchasers under the CPA will also be dismissed. All claims on behalf of purchasers other than the State will be denied because [HN21](#) the CPA provides that an injured person may "bring an action individually but not in a representative capacity to recover actual damages." [La. Rev. Stat. Ann. § 51:1409\(A\)](#). The State's claim for damages on its own behalf under the CPA must also be dismissed because state case law has determined that only consumers and competitors have standing to sue for damages under the CPA, see [Orthopedic & Sports Injury Clinic v. Wang Lab., Inc.](#), 922 F.2d 220, 225-26 (5 Cir. 1991), and that the term "consumer" only applies to natural persons. [See Shaw Industries v. Brett](#), 884 F. Supp. 1054, 1057-58 (M.D. La. 1994). Because the State is neither a competitor nor a consumer under the definition provided by state law, its claim for damages on its own behalf under the CPA will be dismissed. The claims still standing include [**54](#) civil penalties, injunctive relief, and attorney fees and costs. |

x. Maine

Maine's claims seeking damages on behalf of indirect purchasers and [*48](#) seeking restitution and disgorgement under its antitrust statute, as well as all claims under the Unfair Trade Practices Act (the "UTPA") must be dismissed. Nothing in Maine's antitrust statute authorizes Maine to bring an antitrust claim on behalf of indirect purchasers. [See Me. Rev. Stat. Ann. tit. 1, § 1104](#). In [Maine v. M/V Tamano](#), the court held that the State may recover damages in a representative capacity only when it has a "quasi-sovereign interest" in the suit. [See 357 F. Supp. 1097 \(D. Me. 1973\)](#). "Quasi-sovereign interest" is defined as "an interest of the State independent of and behind titles of its citizens, that is...the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." Because Maine has no quasi-sovereign interest in suing on behalf of indirect purchasers and because doing so would increase the risk of multiple recovery, the Court will grant the motion to dismiss on this issue. Additionally, Maine's claim [**55](#) that its antitrust statute authorizes the State to seek equitable monetary relief is incorrect. The statute allows for equitable injunctive relief, but fails to mention restitution or disgorgement. [See Me. Rev. Stat. Ann. tit. 10 § 1104](#). As discussed above, absent express authority from state statutes or case law, restitution and disgorgement are not authorized. Additionally, all claims under the UTPA must be dismissed as the statute does not apply to antitrust claims. [See Me. Rev. Stat. Ann. tit. 5 § 209](#). Maine's remaining state law claims are for civil penalties, damages on behalf of direct purchasers, injunctive relief, and attorney fees and costs.

xi. Michigan

The Court will deny defendants' motion to dismiss all claims under § 445.903(1)(z) of Michigan's Consumer Protection Act (the "MCPA"), as well as the motion to dismiss Michigan's claim for treble damages. Defendants claim that the MCPA applies only to transactions in which a consumer is charged a grossly excessive price for property or services, and state that "State Medicaid programs, wholesalers, retail pharmacy chains and other customers" are not "consumers" under the plain meaning of the word. See [\[**56\]](#) Defendants' Reply at 44. There is no authority, however, for the proposition that such programs and pharmacies that purchased the drugs should not be considered consumers. Defendants' allegation that the MCPA claims should also be dismissed because the drugs were purchased by state agencies and therefore not "primarily for personal, family or household purposes," see Mich. Comp. L. Ann § 445.902(d), is similarly denied. The language of the statute does not indicate whether the above-quoted phrase modifies the way in which the drugs were provided or the drugs themselves. Drugs sold to state medicaid programs or drug stores are not outside the scope of personal, family or household purchases. The Court will also deny defendants' motion to dismiss Michigan's claim for treble damages based on the State's failure to plead that Defendants' violations were flagrant as required by MCLA 445.778(2). The State complaint sufficiently alleges the flagrant nature of defendants' actions. See State Compl. P 38. Restitution and/or disgorgement on behalf of direct and indirect purchasers will be allowed under the Michigan Antitrust Reform Act which states that the State as well as directly [\[**57\]](#) or indirectly injured purchasers may receive injunctive or "other equitable relief." Mich. Comp. Laws 445.778(1), 445.778(2). Thus, remaining claims include civil penalties, damages on behalf of both the State and indirect purchasers, injunctive relief, restitution and disgorgement on behalf of both direct and indirect purchasers, and attorney fees and costs.

xii. Minnesota

Defendants challenge Minnesota's claim for restitution and disgorgement. The Court will grant defendants' motion to dismiss on this issue. The [HN22](#)[↑] **Antitrust Law** [\[*49\]](#) (Minn. Stat. §§ 325D.49-325D.66) does not expressly authorize such relief and Minn. Stat. § 8.31(3) allows "other equitable relief" but limits such relief to injunctions and penalties under \$ 25,000. Because Minnesota is guided by federal antitrust law, see State by Humphrey v. Alpine Air, 490 N.W.2d 888 (Minn. Ct. App. 1992), aff'd, 500 N.W.2d 788 (Minn. 1993), which does not allow monetary equitable relief under the Clayton Act, and because Minn. Stat. § 325D.57 states that Minnesota should "take any steps necessary to avoid duplicative recovery," the State may not seek restitution and disgorgement. The claims still [\[**58\]](#) standing include civil penalties, damages on behalf of both the State and indirect purchasers, injunctive relief, and attorney fees and costs.

xiii. Missouri

The disputed issues include whether Missouri may seek any remedies under the Merchandising Practices Act (the "MPA"), whether the MPA authorizes damages relief for indirect purchasers, whether the MPA authorizes restitution on behalf of government entities, and whether the State may seek civil penalties. The Court will not dismiss all claims under the MPA at this time. [HN23](#)[↑] The administrative rules necessary to the enforcement of the MPA state that an unfair practice includes any practice which "presents a risk of, or causes, substantial injury to consumers." 15 CSR 60-8.020. Because the State complaint sufficiently pleads actions by defendants that present a risk of or cause substantial injury, Missouri is authorized to bring suit under the MPA.

Insofar as Missouri seeks damages relief on behalf of the State or State entities, such claims are authorized under Missouri **Antitrust Law**, Mo. Stat. Ann. §§ 4.16.011 *et seq.* The Court will not dismiss Missouri's claims for equitable monetary relief on its own behalf under the MPA [\[**59\]](#) because it is not clear that the definition of "persons" in Mo. Stat. Ann. § 4.07.0105 excludes the State; it may be included in the category of "other legal entity." Additionally, as discussed above, the requirement that the goods be purchased "primarily for personal, family or household purposes" does not exclude the State or State entities. Defendants do not contest the State's authority to seek restitution and/or disgorgement on behalf of indirect purchasers under the MPA in light of Campos v. Ticketmaster Corp., 140 F.3d 1166, 1172 (8 Cir. 1998) (holding that even if indirect purchasers are barred from seeking damages relief, they may still obtain injunctive relief.). The MPA also authorizes civil penalties up to \$ 1000 per violation. See Mo. Stat. Ann. § 4.07.100.6. Therefore, the State's claim for such relief will not be dismissed. The |

State's claim for damages relief for indirect purchasers must be dismissed, however. Neither the **Antitrust law** nor the MPA provides an Illinois Brick repealer provision; therefore, as discussed above, such relief will be denied. Missouri's remaining state law claims are for civil penalties, injunctive relief, damages [**60] for direct purchasers, restitution and disgorgement on behalf of direct and indirect purchasers, and attorney fees and costs.

xiv. New York

The only disputed issue beyond the procedural defect discussed above is the State's failure to commence the claim in state court. Defendant's motion to dismiss on this issue will be denied. Although the normal procedure for claims brought under New York Executive Law § 63(12) is to apply to the state supreme court, this step would be illogical in the instant case. Federal supplemental jurisdiction is warranted because the facts underlying the federal and state claims are similar enough to create a "common nucleus of operative facts" which would be expected to be tried in one judicial proceeding. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988). Defendants provide no argument supporting the allegation that [*50] claims brought under § 63(12) should be excepted from this rule. New York's remaining state law claims are for civil penalties, damages on behalf of direct and indirect purchasers, injunctive relief, restitution and/or disgorgement on behalf of direct and indirect purchasers, [**61] and attorney fees and costs.

xv. North Carolina

Defendants' motion to dismiss will be denied as to both of the disputed issues: the State's claims for damages on behalf of indirect purchasers and for equitable monetary relief. Although this Court is dismissing most state claims for damages on behalf of indirect purchasers, North Carolina's state case law expressly authorizes such claims. See Hyde v. Abbott Lab., Inc., 123 N.C. App. 572, 573, 473 S.E.2d 680 (1996). Defendants' motion to dismiss on this issue will therefore be denied.

The Hyde opinion does not address the issue of restitution and disgorgement on behalf of indirect purchasers. Although HN24 [↑] § 75-15.1 allows the presiding judge to restore "any moneys or property...obtained by any defendant" as a result of any violation of the antitrust laws, the statute does not address the issue of restitution for indirect purchasers. North Carolina's claims for restitution on behalf of indirect purchasers are therefore dismissed. Claims still standing include civil penalties, damages on behalf of both direct and indirect purchasers, injunctive relief, restitution and disgorgement on behalf of both direct and indirect [**62] purchasers, and attorney fees and costs.

xvi. Ohio

The Court will grant defendants' motion to dismiss as to both disputed issues: Ohio's claim for damages on behalf of indirect purchasers and its claim for restitution on behalf of indirect purchasers. Neither Ohio's antitrust legislation nor its relevant case law explicitly authorizes the State to bring suit on behalf of indirect purchasers. Although Ohio Rev. Code § 1331.0, speaks to conduct that is directly or indirectly anticompetitive, it does not provide relief to indirect purchasers. Because no express authority under state law is given, federal **antitrust law** is used as a guide. Illinois Brick is therefore controlling here, and Ohio's claims on behalf of indirect purchasers must be dismissed. Additionally, because federal **antitrust law** states that duplicative recovery must be avoided, Ohio also may not seek restitution and disgorgement on behalf of indirect purchasers. Thus, Ohio's remaining state law claims are for civil penalties, damages and restitution and/or disgorgement on behalf of direct purchasers, and attorney fees and costs.

xii. Oklahoma

Oklahoma's claims will be dismissed insofar as the State purports [**63] to bring suit on behalf of indirect purchasers and seeks monetary equitable relief on behalf of indirect purchasers. HN25 [↑] Oklahoma's Antitrust Reform Act does not authorize a suit on behalf of indirect purchasers. See Okla. Stat. Ann. tit. 79 § 212. As discussed above, when no state statutory or case law expressly authorizes such relief, federal **antitrust law** serves as a guide and under federal law, indirect purchasers do not have standing. See Illinois Brick, 431 U.S. at 730. The

62 F. Supp. 2d 25, *50L^A 1999 U.S. Dist. LEXIS 10532, **63

State cannot bring the claim under the Consumer Protection Act because that statute fails to apply to indirect purchasers as well. Oklahoma's claim for restitution on behalf of indirect purchasers must also be denied. Nowhere in the antitrust or consumer protection statutes is equitable monetary relief on behalf of indirect purchasers provided for. Thus, Oklahoma's remaining state law claims are for damages on behalf of direct purchasers, restitution on behalf of direct purchasers, injunctive relief, and attorney fees and costs.

xiii. Oregon

The Court will dismiss Oregon's claims under the Oregon Antitrust Act because [HN26](#)[[↑]] [*51] the legislative purpose of the statute is that it apply only to "intrastate [**64] trade or commerce, and to interstate trade or commerce which is primarily of an intrastate nature and over which federal jurisdiction, for whatever reason, has not been exercised by the Federal Trade Commission or the United States Department of Justice." [Or. Rev. Stat. § 646.715](#). Oregon does not deny that this suit is primarily of an interstate nature or that the FTC, in the parallel action, is exercising federal jurisdiction. Although Oregon cites to witness testimony of legislative purpose, and contends that this provision is not jurisdictional, the plain language of the provision states that the Antitrust Act is not applicable in this case. Therefore, all of Oregon's state law claims are dismissed from this case.

xix. South Carolina

Defendants contest all of South Carolina's claims under the Unfair Trade Practices Act (the "UTPA"), the State's claim that the UTPA authorizes damages on behalf of indirect purchasers, the State's claim that the UTPA authorizes damages for itself, and the State's claim that the UTPA authorizes restitution on behalf of indirect purchasers. Defendants' motion to dismiss will be granted only insofar as South Carolina seeks damages and restitution [**65] on behalf of indirect purchasers. The Court will not dismiss all claims under the UTPA at this time. [HN27](#)[[↑]] Although the South Carolina Antitrust statute applies only to intrastate conduct, the UTPA "is not limited to in-state conduct by its own terms..." [Cheshire v. Coca-Cola Bottling Co., 758 F. Supp. 1098, 1101 \(D.S.C. 1990\)](#). Defendants cite no authority disputing this point. Defendant's claim that indirect purchasers may not seek damages or restitution will be granted, however. No provision in the statute expressly authorizes such relief and, as discussed above, absent explicit authorization by state statute or case law, such relief will not be granted. The Court will not dismiss the State's claim for damages for its own direct purchases at this time. Although the definition of "person" under the statute does not list the State, the term "any other legal entity" may well apply to the State or state agencies who were direct purchasers of the drugs. Thus, South Carolina's remaining state law claims are for civil penalties, damages on behalf of direct purchasers, injunctive relief, restitution and/or disgorgement on behalf of direct purchasers, and attorney fees and costs.

[**66] xx. Tennessee

The Court will dismiss all claims by Tennessee under [HN28](#)[[↑]] the Trade Practices Act (the "TPA") and the Tennessee Consumer Protection Act (the "TCPA") because both statutes apply only to violations occurring in intrastate commerce. See [Standard Oil Co. v. State, 117 Tenn. 618, 100 S.W. 705 \(1907\)](#). Tennessee contends that in Standard Oil the court ruled that products that are imported into the state and "become commingled with the common mass of property of the state and subject to its laws" are included in the definition of intrastate commerce. [100 S.W. at 711](#). Because the generic lorazepam and clorazepate tablets manufactured and distributed by defendants eventually came to rest in Tennessee, the State argues that they are part of intrastate commerce. This reading of Standard Oil is overly broad. The challenged conduct as to the product in question in Standard Oil was deemed intrastate because it occurred after the product had been imported, not before as in the instant case. See [id. at 711-12](#). When the challenged conduct occurs before the products arrive in Tennessee, the conduct is considered interstate in nature [**67] and the TPA and TCPA should not apply. See [Dzik & Dzik, P.C. v. Vision Service Plan, 1989 Tenn. App. LEXIS 25, 1989 WL 3082 \(Tenn. App. 1989\)](#). Because this issue is dispositive as to all claims under the TPA and TCPA, defendants' motion to dismiss will be granted. Therefore, all of Tennessee's state law claims are dismissed from this case.

[*52] xxi. Texas

The only disputed issue under law Texas law is Texas' claim for restitution and disgorgement on behalf of indirect purchasers. Because [HN29](#)[↑] Texas is required to follow federal **antitrust law**, see [Tex. Bus. & Com. Code § 15.04](#), and both state and federal law prohibit damage relief on behalf of indirect purchasers, see [Abbott Labs., Inc. v. Segura, 907 S.W.2d 503 \(Tex. 1995\)](#); [Illinois Brick, 431 U.S. at 730](#), Texas' claim for restitution and disgorgement on behalf of indirect purchasers is dismissed. Texas' remaining state law claims are for civil penalties, injunctive relief, restitution and disgorgement on behalf of direct purchasers, and attorney fees and costs.

xii. Utah

The disputed issues are whether Utah can bring suit under the Unfair Trade Practices Act ("UTPA" or "the Act") and whether the State [**68](#) can bring suit on behalf of indirect purchasers for either damages or equitable monetary relief. Utah's claim for relief under the UTPA must be dismissed because the Act applies only to intrastate conduct. Although the drugs eventually came to rest in Utah, no alleged violation occurred in intrastate commerce. There is no Utah case interpreting the intrastate commerce requirement of the UTPA, and the cases cited by the State are inapposite as they deal with violations which occurred within the state. As discussed above, the violation, not just the end location of the product at issue, must have occurred intrastate for the statute to apply.

Utah's claims for damages on behalf of indirect purchasers and for restitution under its antitrust statute must also be dismissed. No statutory or common law authority specifically addresses the issue of damages for such purchasers or for equitable monetary relief. As discussed above, absent express authorization, such relief will not be granted. Thus, Utah's remaining state law claims are for civil penalties, damages on behalf of direct purchasers, injunctive relief, and attorney fees and costs.

xiii. Vermont

The disputed issues include whether [**69](#) Vermont may seek restitutionary and damages relief on behalf of indirect purchasers, and treble damages for its own purchases. Vermont's claim that it may seek equitable monetary relief or damages relief on behalf of indirect purchasers must be dismissed. No provision exists in any state statute expressly allowing indirect purchaser suits. Moreover, in 1980 the court held that [HN30](#)[↑] the [Illinois Brick](#) decision requires plaintiff to allege purchases directly from the alleged price-fixing conspiracy between [supplier] and its Vermont...dealers." See [Vermont v. Densmore Brick Co., 1980 U.S. Dist. LEXIS 11581](#), No. 78-297, 1980 WL 1846 (D. Vt. Apr. 10, 1980). As discussed above, when no express authority exists for damages or monetary equitable claims on behalf of indirect purchasers, such relief is not permitted. Vermont will be permitted to seek restitution and/or disgorgement on behalf of the State under the Vermont Consumer Fraud Act, which states that "the attorney general may request and the court is authorized to render...an order for restituiton of cash or goods on behalf of a consumer..." [Vt. Stat. Ann. tit. 9 § 2458\(b\)\(2\)](#). Defendants' claim that the State has not alleged that it is a consumer [**70](#) and therefore may not sue for treble damages is denied. The State sufficiently pleaded that it was a direct purchaser of the drugs in question. Vermont's remaining claims are for civil penalties, damages on behalf of the State as a direct purchaser, injunctive relief, restitution and/or disgorgement on behalf of direct purchasers, and attorney fees and costs.

xiv. Washington

The only disputed issue is whether the State may sue for restitution and disgorgement on behalf of indirect purchasers under [Wash. Rev. Code § 19.86.080](#) [\[*53\]](#) and in light of [Blewett v. Abbott Labs, 86 Wash. App. 782, 938 P.2d 842 \(1997\)](#). Although the State may not seek equitable monetary relief on behalf of indirect purchasers without express authorization, the Washington Court of Appeals stated that "[HN31](#)[↑] if direct purchasers decide not to sue, the indirect purchaser is not entirely without a remedy. While a private plaintiff must be 'injured in his or her business or property' in order to bring any suit under the Act, this requirement does not exist in the section that enables action by the attorney general." [Id. at 790](#). Although indirect purchasers can not bring actions for damages [**71](#) under Washington law, [Blewett](#) holds that the State may bring restitutionary claims on their behalf. Therefore, defendants' motion to dismiss this claim will be denied. Washington's remaining state law claims are for civil penalties, damages on behalf of direct purchasers, injunctive relief, restitution and/or disgorgement for direct and indirect purchasers, and attorney fees and costs.

xv. West Virginia

Defendants challenge West Virginia's ability to bring a claim under chapter 46 of the Consumer Credit and Protection Act (the "CCPA") and to seek restitution under the West Virginia Antitrust Act for direct and indirect purchasers. The Court holds West Virginia may not bring its claim under the CCPA. Although [HN32](#)[[↑]] Article 6 of the Act states that the legislative purpose of that article is to "complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices," [W. Va. Code §§ 46A-1-102](#), that statement applies only to Article 6, not to the entire chapter. The chapter applies only to consumers who have entered credit arrangements and is inapposite in the instant case.

The Court will also dismiss West Virginia's claim for restitution [**72] under the West Virginia Antitrust Act. [W. Va. Code §§ 47-18-1 et seq.](#) (1998). Because neither the Act nor state case law expressly authorizes such relief, it is not available for the reasons discussed above. West Virginia's claims for damages for its own purchases and on behalf of indirect consumers still stand. Therefore, remaining claims are for civil penalties, damages on behalf of direct and indirect purchasers, injunctive relief, and attorney fees and costs.

xvi. Conclusion

Defendants' motion to dismiss all claims under state statutes that apply only to intrastate violations of law will be granted in part and denied in part. Claims under statutes applying only to intrastate violations in South Carolina, Tennessee and Utah will be dismissed. The legal sufficiency of claims under Louisiana's Monopoly Act will be determined at summary judgment.⁹ Defendants' motion to dismiss all damages claims for direct purchasers due to inadequate pleading will be denied as the States have sufficiently pleaded direct purchases. Defendants' argument that all damages claims based on the umbrella theory must be dismissed is granted under both federal and state law. Defendants' motion to [**73] dismiss damages claims on behalf of indirect purchasers unless expressly permitted by state law is granted; the individual state statutes are discussed above. Defendants' motion to dismiss claims for restitution and/or disgorgement on behalf of direct purchasers unless such relief is specifically authorized by state law is granted. The motion to dismiss restitutionary claims on behalf of indirect purchasers unless such relief is expressly authorized for such purchasers under state law is also granted; individual state statutes are discussed above. Finally, Defendants' arguments to dismiss claims based [*54] on specific state statutes are granted in part and denied in part as discussed in the individual state claims section above.

C. Motions Applicable to Both *FTC v. Mylan* and *State of Connecticut v. Mylan*

The remaining four motions in these cases actually only amount to two, as nearly [**74] identical motions were filed in each case. These motions are considered in turn.

1. Defendants' Motion to Dismiss in Part Under [Rule 12\(b\)\(6\)](#)

Defendants move to dismiss the complaints in both actions pursuant to [Rule 12\(b\)\(6\)](#).¹⁰ Defendants assert that the complaints' monopolization counts are defective because the relevant market is not adequately defined and, in any event, the allegations of monopoly power are insufficient. Defendants challenge the restraint of trade counts on the basis that their conduct was not unreasonable because it did not harm competition.

a. Monopolization

[HN33](#)[[↑]] To state a [Section 2](#) monopolization claim, a plaintiff must allege facts sufficient to establish both "(1) the possession [**75] of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that

⁹ The parties are invited to submit supplemental memoranda to the Court regarding Louisiana's state law claims.

¹⁰ Mylan moves to dismiss the monopolization and restraint of trade claims asserted by plaintiffs in both actions. Defendants Cambrex, Profarmaco and Gyna - which are not named in the plaintiffs' monopolization claims - join with Mylan in moving to dismiss the complaints' restraint of trade claims.

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 Services, Inc.](#), 504 U.S. 451, 480, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (citing [United States v. Grinnell Corp.](#), 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)). Mylan alleges that the complaints fail this legal standard in two ways: (1) they fail to sufficiently identify a relevant market; and (2) the complaints fail to allege facts sufficient to show monopoly power.

On the first issue, the complaints specifically identify four relevant markets: (1) generic lorazepam tablets; (2) generic clorazepate tablets; (3) lorazepam API; and (4) clorazepate API. FTC Compl. P 17. Each of the relevant markets includes only those products approved for sale in the United States. This level of definition is sufficient to survive a motion to dismiss, as it is entirely plausible that plaintiffs will prove a set of facts that supports those market definitions. See [Daniel v. American Bd. of Emergency Med.](#), 802 F. Supp. 912, 925-26 (W.D.N.Y. 1992) [**76] ("The notice pleading system requires only that the allegations in the complaint give notice as to what markets are being brought into issue."); see also [Michael Anthony Jewelers v. Peacock Jewelry](#), 795 F. Supp. 639, 647 (S.D.N.Y. 1992).

Mylan's second claim is that the Amended Complaint fails to establish the monopoly power element of the monopolization claim. In economic terms, "[HN34](#)" monopoly power is the power to raise prices well above competitive levels before customers will turn elsewhere." [Town of Concord v. Boston Edison Co.](#), 915 F.2d 17, 31 (1st Cir. 1990). The complaints meet this standard by alleging that Mylan instituted massive and successful price increases for lorazepam and clorazepate. Furthermore, the complaints allege that Mylan constricted the supply of generic lorazepam and clorazepate tablets by denying its competitors the APIs to manufacture these products. Like the ability to control prices, this is evidence of monopoly power. See [Great Western Directories v. Southwestern Bell Tel.](#), 63 F.3d 1378, 1384 [*55] (5th Cir. 1995). Thus, Mylan's motion is denied on this issue.

b. Unreasonable Restraint of Trade

Defendants [**77] assert that the unreasonable restraint of trade counts must be dismissed as plaintiffs have failed to allege any restraint on competition. This claim is easily disposed of, as the [HN35](#) allegations of massive price increases, when combined with anti-competitive conduct such as the exclusive licensing agreements, are sufficient to support a claim for unreasonable restraint of trade. See, e.g., [Reiter v. Sonotone](#), 442 U.S. 330, 342, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979) (where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her "property" under § 4); [Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic & Sec. Health Plan of Wisconsin](#), 65 F.3d 1406, 1415 (7th Cir. 1995) ("a lawful monopolist may charge what it wants") (emphasis added). Defendants motion is therefore denied on this issue.

c. Price-Fixing Count

Defendants' motion to dismiss in [State of Connecticut v. Mylan](#) contains one additional argument, which is that this Court should dismiss the ninth count included in [**78] the State complaint but omitted from the FTC complaint. This count alleges that Mylan, Cambrex, Profarmaco, Gyma and SST conspired to fix, raise, or stabilize the prices of lorazepam API, a per se violation of [§ 1](#) of the Sherman Act. Defendants Cambrex, Profarmaco and Gyma move to dismiss on the ground that the State complaint fails to allege any facts that show involvement by those defendants in a price-fixing agreement.

The State complaint alleges that Mylan met in Pittsburgh with SST in order to enter an exclusive licensing agreement. The States allege that at this meeting Mylan and SST conspired to raise the price of lorazepam API, thus ensuring a rise in the price of lorazepam tablets. The States further allege that this attempt was made with the full knowledge and consent of Cambrex/Profarmaco and Gyma, who benefitted from the price-fixing agreement through higher profits. See State Compl. P 88.

The allegations in the State complaint are sufficient to survive a motion to dismiss. The States have alleged the existence of circumstantial evidence suggesting a price-fixing conspiracy in violation of [§ 1](#) of the Sherman Act. "[HN36](#)" Proof of a tacit, as opposed to explicit, understanding [**79] is sufficient to show agreement."

Halberstam v. Welch, 227 U.S. App. D.C. 167, 705 F.2d 472, 477 (D.C. Cir. 1983); accord Alvord-Polk, Inc. v. Schumacher and Co., 37 F.3d 996, 1000 (3d Cir, 1994) ("An agreement need not be explicit to result in section 1 liability ..., and may instead be inferred from circumstantial evidence"). Thus, defendants' motion to dismiss this count is denied.

2. Defendant Gyma's Motion to Dismiss Under Rule 12(b)(6)

Gyma has moved to dismiss both complaints insofar as they name Gyma as a defendant. The gist of Gyma's motion to dismiss is that Gyma was not a party to the 10-year exclusive licensing agreements between Profarmaco and Mylan. While plaintiffs concede that Gyma was not a name party to the exclusive licensing agreements, the complaints allege that Gyma materially aided in the creation of the agreements. See FTC Compl. P 21; State Compl. P 35. Specifically, Gyma was present at and participated in the negotiations between Profarmaco and Mylan for the exclusive licenses. Id. Furthermore, Gyma benefitted financially from the existence of the exclusive licenses through its profit sharing agreement with Mylan. [**80] See FTC Compl P 26 ("The Gyma-Mylan profit sharing agreements are the *quid pro quo* for Gyma's aid in furthering the licensing agreements."). These allegations are sufficient to support the complaints' allegations [*56] against Gyma on a motion to dismiss. See Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (legal standard for restraint of trade is whether plaintiff has "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.'"); Pinkerton v. United States, 328 U.S. 640, 646-47, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946) ("once any conspirator takes an act in furtherance of the conspiracy...each member of the conspiracy is liable, whether or not they know or approve of each specific act."). Thus, Gyma's motion is denied.

III. CONCLUSION

For the reasons stated above, defendants' motion to dismiss the States Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6) is granted in part and denied in part. All other motions are denied.

An appropriate Order will accompany [**81] this Memorandum Opinion.

July 7th, 1999

Thomas F. Hogan

United States District Judge

[*57] Appendix A

Remaining State Law Claims

	Injunctive	Restitution	Restitution	Damages
	Relief	Indirect	Direct	Indirect
		Purch.	Purch.	Purchaser
Alaska	X			X
Arkansas	X			X
CA	X	X		X
Colorado	X			
Conn.	X			X
DC	X			X

	Injunctive Relief	Restitution Indirect Purch.	Restitution Direct Purch.	Damages Indirect Purchaser
Florida	X			X
Idaho	X	X		X
Illinois	X	X		X
Iowa	X			X
Kentucky	X			X
Louisiana	X			
Maine	X			
Michigan	X	X		X
Minnesota	X			X
Missouri	X	X		
NM	X	X		X
New York	X	X		X
NC	X	X		X
Ohio	X			X
Oklahoma	X			X
Oregon				
SC	X			X
SD	X	X		X
Tennessee				
Texas	X			X
Utah	X			
Vermont	X			X
Wash	X	X		X
WV	X			X
Wisconsin ¹¹	X	X		X

[**82]

	Damages Direct	Civil Penalties	Atty Fee s
Purchaser			
Alaska		X	X
Arkansas	X	X	X
CA	X	X	X
Colorado	X		X
Conn.		X	X
DC	X		X

¹¹ Wisconsin also seeks judgment declaring void all contracts or agreements directly or indirectly connected with violations of Wis. Sta. § 133.03, and for all payments which relate directly or indirectly to such contracts or agreements.

	Damages	Civil	Atty
	Direct	Penalties	Fee s
Purchaser			
Florida	X	X	X
Idaho	X	X	X
Illinois	X	X	X
Iowa	X	X	X
Kentucky	X	X	X
Louisiana		X	X
Maine	X	X	X
Michigan	X	X	X
Minnesota	X	X	X
Missouri	X	X	X
NM	X	X	X
New York	X	X	X
NC	X	X	X
Ohio	X	X	X
Oklahoma	X		X
Oregon			
SC	X	X	X
SD	X	X	X
Tennessee			
Texas		X	X
Utah	X	X	X
Vermont	X	X	X
Wash	X	X	X
WV	X	X	X
Wisconsin ¹¹	X	X	X

[*58] ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' motion to dismiss the FTC's amended complaint pursuant to [Federal Rules of Civil Procedure 12\(b\)\(1\)](#) and [12\(b\)\(6\)](#) is **DENIED**; it is further

ORDERED that defendants' motion to dismiss the FTC's amended complaint in part pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) is **DENIED**; it is further

ORDERED that defendant Gyna Corporation's motion to dismiss the FTC's amended complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) is **DENIED**; it is further

ORDERED that defendants' motion to dismiss the States' amended complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#) and [12\(b\)\(6\)](#) is **GRANTED IN PART** and **DENIED IN PART**; specifically, the motion is **GRANTED** insofar as

¹¹ Wisconsin also seeks judgment declaring void all contracts or agreements directly or indirectly connected with violations of Wis. Sta. § 133.03, and for all payments which relate directly or indirectly to such contracts or agreements.

Alaska's claim for restitution and/or disgorgement for indirect purchasers is **DISMISSED**;

Arkansas' claims under the Arkansas **Antitrust Law**, its claim for damages relief for indirect purchasers, and its claim for restitution and/or disgorgement for indirect purchasers are **DISMISSED**;

Colorado's claim for civil penalties and its claim for restitution and/or disgorgement for direct and indirect purchasers are **DISMISSED**;

Connecticut's claim for restitution and/or disgorgement for indirect purchasers is **DISMISSED**;

Florida's claim for restitution and/or **[**84]** disgorgement for direct and indirect purchasers is **DISMISSED**;

Idaho's claim for damages relief for indirect purchasers is **DISMISSED**;

Iowa's claim for damages relief for indirect purchasers and its claim for restitution and/or disgorgement for indirect purchasers are **DISMISSED**;

Kentucky's claim for damages relief for indirect purchasers and its claim for restitution and/or disgorgement for indirect purchasers are **DISMISSED**;

Louisiana's claim for damages relief for direct and indirect purchasers and its claim for restitution and/or disgorgement for direct and indirect purchasers are **DISMISSED**;

Maine's claim for damages relief for indirect purchasers, its claim for restitution and/or disgorgement for direct and indirect purchasers, and all claims under the Maine Unfair Trade Practices Act are **DISMISSED**;

Minnesota's claim for restitution and/or disgorgement for direct and indirect purchasers is **DISMISSED**;

Missouri's claim for damages relief for indirect purchasers is **DISMISSED**;

[*59] Ohio's claims for damages relief for indirect purchasers and its claim for restitution and/or disgorgement for indirect purchasers are **DISMISSED**;

Oklahoma's **[**85]** claim for damages on behalf of indirect purchasers and its claim for restitution and/or disgorgement on behalf of indirect purchasers are **DISMISSED**;

All of Oregon's state law claims are **DISMISSED**;

South Carolina's claim for damages relief for indirect purchasers and its claim for restitution and/or disgorgement for indirect purchasers will be **DISMISSED**;

All of Tennessee's state law claims are **DISMISSED**;

Texas' claim for restitution and/or disgorgement for indirect purchasers is **DISMISSED**;

Utah's claim for damages relief for indirect purchasers, its claim for restitution and/or disgorgement for direct and indirect purchasers, and all claims under the Utah Unfair Trade Practices Act are **DISMISSED**;

Vermont's claim for damages relief for indirect purchasers and its claim for restitution and/or disgorgement for indirect purchasers are **DISMISSED**;

West Virginia's claim for restitution and/or disgorgement for direct and indirect purchasers and all claims under the West Virginia Consumer Credit and Protection Act are **DISMISSED**.

All other portions of defendants' motion to dismiss the States' amended complaint pursuant to Fed. R. Civ. P. **[**86] 12(b)(1)** and **12(b)(6)** are **DENIED**; it is further

62 F. Supp. 2d 25, *59L999 U.S. Dist. LEXIS 10532, **86

ORDERED that defendants' motion to dismiss the States' amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) is **DENIED**; it is further

ORDERED that defendant Gyna Corporation's motion to dismiss the FTC's amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) is **DENIED**.

SO ORDERED.

Thomas F. Hogan

United States District Judge

July 7th, 1999

End of Document



North Star Steel Co. v. MidAmerican Energy Holdings Co.

United States Court of Appeals for the Eighth Circuit

April 22, 1999, Submitted ; July 7, 1999, Filed

No. 98-2987

Reporter

184 F.3d 732 *; 1999 U.S. App. LEXIS 15032 **; 1999-2 Trade Cas. (CCH) P72,583

North Star Steel Company, Appellant, v. MidAmerican Energy Holdings Company; MidAmerican Energy Company, Appellees.

Subsequent History: Certiorari Denied December 6, 1999, Reported at: [1999 U.S. LEXIS 8033](#).

Prior History: [**1] Appeal from the United States District Court for the Southern District of Iowa. 4:97-cv-80782. Honorable Charles Woole, District Judge.

Disposition: Judgment of district court affirmed.

Core Terms

electricity, generation, district court, retail, territory, electric service, displacing, service area, supervised, customers, Energy, state action, articulated, argues, retail customer, regulations, grant summary judgment, third party, transmission, doctrine of immunity, issue preclusion, material fact, state court, distributed, immunity, wheeling, Steel, prong, pilot program, declaratory

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

HN1[Entitlement as Matter of Law, Appropriateness

Appellate courts review a district court's grant of summary judgment de novo. Summary judgment is proper if, assuming all reasonable inferences favorable to the non-moving party, 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\(c\)](#). Summary judgment is particularly appropriate when the unresolved issues are legal rather than factual.

[Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel](#)

[Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel](#)

[Civil Procedure > Judgments > Entry of Judgments > General Overview](#)

[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](#)

[Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes](#)

[**HN2**\[\] Decisions, Collateral Estoppel](#)

Issue preclusion prevents a party to a prior action in which a judgment has been entered from relitigating issues that were raised and resolved in that previous action. Federal courts must give state court judgments the same preclusive effect as would a court of the state in which the judgment was entered.

[Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel](#)

[Civil Procedure > Judgments > Preclusion of Judgments > General Overview](#)

[Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview](#)

[**HN3**\[\] Estoppel, Collateral Estoppel](#)

The Iowa Supreme Court has enunciated four conditions that must be met before applying issue preclusion: (1) the issue decided must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Under Iowa law, issue preclusion may be applied to a trial court's ruling on the merits of an issue despite the pendency of an appeal from that ruling. Moreover, issue preclusion applies to the judgments in declaratory rulings. The Iowa Supreme Court has also ruled that mutuality of parties is not required when issue preclusion is used defensively.

[Antitrust & Trade Law > Exemptions & Immunities > General Overview](#)

[Governments > Federal Government > Claims By & Against](#)

[Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities](#)

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties](#)

HN4 [down arrow] Antitrust & Trade Law, Exemptions & Immunities

Application of the state action immunity doctrine is a question of law. The Supreme Court of the United States held that principles of federalism and state sovereignty precluded the application of federal antitrust laws to activity directed by state legislative action. The state action doctrine immunizes a private party from antitrust liability if (1) the private party acts pursuant to a clearly articulated and affirmatively expressed state policy to allow the anti-competitive conduct, and (2) the regulatory policy is actively supervised by the state itself. To satisfy the first prong of the Midcal test, the state as sovereign must clearly intend to displace competition in a particular field with a regulatory structure. In contrast, the second prong of the Midcal test serves essentially an evidentiary function to ensure that there is adequate state supervision of the regulatory policy.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN5 [down arrow] Regulated Industries, Energy & Utilities

See [Iowa Code § 476.25](#) (1997).

Counsel: Counsel who presented argument on behalf of the appellant was Philip L. Chabot, Jr. of Washington, D.C.

Counsel who presented argument on behalf of the appellee was J.A. Bouknight, Jr. of Washington, D.C.

Judges: Before McMILLIAN, LOKEN and MURPHY, Circuit Judges.

Opinion by: McMILLIAN

Opinion

[*733] McMILLIAN, Circuit Judge.

North Star Steel Co. (North Star) appeals from a final order of the United States District Court ¹ for the Southern District of Iowa granting summary judgment in favor of MidAmerican Energy Co. and its parent corporation MidAmerican Energy Holdings Co. (collectively referred to as MidAmerican). The district court held as a matter of law that MidAmerican was immune from federal antitrust liability under the state action immunity doctrine. See [North Star Steel Co. v. MidAmerican Energy Holdings Co., 1998 U.S. Dist. LEXIS 22332](#), No. 4-97-CV-80782 (S.D. Iowa June 23, 1998) (*North Star*). For reversal, North Star argues that the district court erred in finding that: (1) Iowa has a clearly articulated and affirmatively expressed policy displacing competition with regulation in the provision of retail electric service; (2) the regulatory policy is actively supervised by the state; and (3) there exists no genuine issue of material fact. For the reasons discussed below, we affirm the [*2] judgment of the district court.

Jurisdiction

Jurisdiction was proper in the district court based upon [28 U.S.C. §§ 1331, 1337](#). Jurisdiction in this court is proper based upon [28 U.S.C. § 1291](#). The notice of appeal was timely filed pursuant to *Fed R. App. P. 4(a)*.

[*734] Background

¹ The Honorable Charles R. Wolle, Chief Judge, United States District Court for the Southern District of Iowa.

Although the parties basically agree on the relevant facts, they strongly dispute the nature and characteristics of the electric power industry. North Star, a wholly owned subsidiary of Cargill, Inc., operates a steel mill located near Wilton, Iowa. North Star uses a significant amount of electric energy to melt, refine, and shape scrap steel at its Wilton facility. The mill has a peak electric load of 48 megawatts.

MidAmerican is the largest electric utility in Iowa. In fact, MidAmerican owns the only transmission lines capable of supplying the North Star plant, which is located in the area designated under [\[**3\] Iowa Code §§ 476.22-26](#) (1997) as the exclusive electric service territory of MidAmerican. The company purchases, generates, transmits, and sells electric energy in significant portions of Iowa as well as in several neighboring states. MidAmerican generates approximately 75% of the electricity sold in its exclusive service area, while it purchases the remaining 25% from third party generators. All of the electric energy, however, is sold by MidAmerican under its own "brand name."

In 1979, the Iowa General Assembly enacted legislation authorizing the Iowa Utilities Board (Board) to establish exclusive service territories in which specific electric utilities would provide the sole means of service to customers. See [IOWA CODE § 476.25](#) (1997). The legislature found it "in the public interest to encourage the development of co-ordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public." *Id.* The Board implemented this legislation by promulgating regulations, beginning in June of 1979. See [Establishment of Exclusive Service Areas](#) [\[**4\]](#) [for Electric Utilities by the Iowa State Commerce Comm'n](#), Docket No. RMU78-11 (I.C.C. June 29, 1979) (Order Adopting Rules).² In doing so, the state effectively replaced the prior system under which utilities had competed for customers with one in which designated utilities have exclusive service territories.

Even under this regulatory framework, North Star sought to purchase competitively-priced electric energy. North Star, while recognizing MidAmerican as the exclusive distributor of electricity in its territory, wanted either to purchase directly power produced by a third party generator or to have MidAmerican itself purchase power from a third party expressly for transmission to North Star's mill. Under either "retail wheeling"³ scenario, MidAmerican would remain the sole distributor of electricity to North Star but would not be transmitting power that it had itself generated. MidAmerican rejected [\[**5\]](#) North Star's request. North Star brought the present action in federal district court claiming violations of the Sherman Act and Clayton Act by MidAmerican. North Star alleged that MidAmerican violated federal antitrust laws by refusing to allow it access over the transmission lines to alternate sources of electricity, thus preventing North Star from purchasing competitively-priced electricity for its steel mill. North Star alleged that MidAmerican's refusal to allow North Star access to alternate sources of electricity constituted a refusal to deal, monopolization, and an illegal tie-in.

[\[**6\]](#) MidAmerican filed a motion to dismiss which later became a motion for summary [\[*735\]](#) judgment.⁴ However, before the district court ruled on the motion, MidAmerican requested a declaratory ruling from the Board. MidAmerican presented the Board with questions related to MidAmerican's rights and obligations pursuant to the Iowa Code provisions concerning the supply of retail electric service.⁵ The Board held that "Iowa's exclusive

² The Iowa State Commerce Commission is the administrative predecessor to the Iowa Utilities Board.

³ "Retail wheeling" is defined as "allowing a customer to have access to MidAmerican's transmission and distribution facilities so that a customer can procure electricity from a third party to be delivered through MidAmerican's transmission and distribution facilities." [In re MidAmerican Energy Co.](#), Docket No. DRU-98-1, slip op. at 1 (I.U.B. May 29, 1998), [aff'd sub nom. North Star Steel Co. v. Iowa Utils. Bd.](#), No. AA3127 (Iowa Dist. Ct. Polk County Jan. 29 1999), [appeal docketed](#), No. 99-342 (Iowa Feb. 25, 1999).

⁴ The district court treated the motion as one for summary judgment since the parties submitted affidavits.

⁵ MidAmerican specifically presented the state with three questions. The first question is particularly relevant to this matter:

Does the Board's assignment of an exclusive service area to MidAmerican, pursuant to [Iowa Code §§ 476.22 through 476.26](#) and related sections, give MidAmerican the exclusive right and responsibility to sell electricity to retail customers within the assigned service area, or are MidAmerican's rights and obligations limited to the transmission and distribution of electricity that may be provided competitively by other sellers to retail customers.

service territory laws apply to the provision of electricity, and the provision of electricity includes generation, distribution, and transmission." In re MidAmerican Energy Co., Docket No. DRU-98-1, slip op. at 5 (I.U.B. May 29, 1998), aff'd sub nom. North Star Steel Co. v. Iowa Utils. Bd., No. AA3127 (Iowa Dist. Ct. Polk County Jan. 29 1999), appeal docketed, No. 99-342 (Iowa Feb. 25, 1999). The Board stated that MidAmerican has a statutory duty to provide electric service to customers in its exclusive service area. See id. at 7. The Board found that the statutes concerning the supply of retail electric service do not distinguish between the distribution, transmission, and generation of electricity. See id. at 6-7. Rather, the IUB interpreted [**7] the words "electric service" to include the actual supply of electricity. See id. The Board finally noted that there was no substantive difference between a customer directly buying the electricity generated by a third party or making MidAmerican buy the electricity and then distributing it to the customer. See id. at 8. Thus, the Board decided that both means of retail wheeling would violate MidAmerican's rights under the exclusive service territory state law and regulations.

[**8] Less than a month after the Board issued its declaratory ruling, the district court granted summary judgment in favor of MidAmerican. Referring to the Iowa Code provisions concerning retail electric service, the district court found that "Iowa has clearly articulated a state policy to prevent electricity suppliers from competing for retail customers." North Star, slip op. at 4. The district court further found that the Board has actively implemented the regulatory scheme enunciated by the Iowa General Assembly. See id. Having found that MidAmerican had satisfied both requirements for the state action immunity doctrine, the district court held that MidAmerican was accordingly immune from North Star's claim of antitrust violations. See id. at 4-5. The district court further held that there was no genuine issue of material fact and that MidAmerican was entitled to judgment as a matter of law. See id. at 3.

The day after the district court granted summary judgment in favor of MidAmerican, North Star filed a petition for judicial review of the Board's declaratory ruling in the Iowa District Court for Polk County.⁶ The state court held that the Board had the authority [**9] to issue the declaratory ruling on the questions presented by MidAmerican. See North Star Steel Co. v. Iowa Utils. Bd., slip op. at 8-9. The court affirmed the Board's interpretation of the Iowa statutes, holding that the Iowa state exclusive service territory law and regulations include the generation of electricity. See id. at 8-9.

[*736] The Board subsequently approved a pilot program that allowed MidAmerican to sell electricity it purchased from third party generators directly to retail customers, with MidAmerican providing only transmission and distribution service. See In re MidAmerican Energy Co., Docket No. TF-97-229 (I.U.B. Aug. 21, 1998). The pilot program is unavailable to North Star, however, because the program's 10 megawatt limit per customer makes it uneconomical for large-load customers like [**10] North Star. In part based upon these recent developments, North Star appealed the district court's order granting summary judgment.

Discussion

HN1 We review the district court's grant of summary judgment *de novo*. Summary judgment is proper if, assuming all reasonable inferences favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); see, e.g., 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, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is particularly appropriate when the unresolved issues are legal rather than factual. See Crain v. Board of Police Comm'r's, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

North Star first argues that the district court erred in finding that the Iowa statutory provisions concerning assigned exclusive service areas include the generation of electricity. Rather, North Star argues that these regulations apply

Id. Note that North Star proceeded to file comments in opposition to the Petition.

⁶ Under Iowa law, the district court acts in an appellate capacity to correct errors of law by the administrative agency. See Freeland v. Employment Appeal Bd., 492 N.W.2d 193, 196 (Iowa 1992).

only to the distribution of electricity, and not the generation of electricity.⁷ That is, North Star argues [**11] that the Iowa General Assembly may have displaced competition in the distribution of electricity, but not the market for the generation of electricity.

North Star further argues that Iowa's exclusive service regulatory scheme was not enacted with the purpose of displacing competition in the market for generating electricity. North Star recognizes that one can infer a displacement of competition in the distribution market by the exclusive service areas because only one utility distributes electricity to each retail customer. However, North Star contends that the same inference cannot be made [**12] with respect to the generation of electricity, because the utilities do not necessarily generate all of the electricity they distribute. North Star points out that MidAmerican only generates 75% of the electricity it distributes in its exclusive service area. The other 25% is produced by third party generators and then distributed by MidAmerican to the retail customers. North Star also emphasizes the pilot program supporting retail wheeling as demonstrating that Iowa has not displaced competition in the market for generating electricity. Thus, North Star contends that Iowa does not have a clearly articulated or affirmatively expressed policy concerning the generation of electricity.

North Star also maintains that even if Iowa clearly articulated a policy displacing competition in the generation of electricity, the district court erred in finding that policy to be actively supervised by the state. North Star argues that Iowa does not monitor whether utilities wheel electricity produced by third party generators for the benefit of retail customers. In fact, North Star contends that MidAmerican is able to unilaterally decide whether to even request the Board's approval for such a program. [**13] North Star points out that although the Board may regulate the rates MidAmerican charges, the Board exercises no regulatory power with respect [*737] to whose generated power is ultimately distributed to retail customers. Therefore, North Star argues that the state action immunity does not apply because the Board fails to actively supervise MidAmerican's anti-competitive conduct.

Finally, North Star maintains that the district court erred in granting summary judgment because disputed issues of material fact, relating to the nature of the electric industry, have to be resolved before MidAmerican's state action immunity claim can be decided. North Star argues that three distinct markets, including (1) generation, (2) transmission, and (3) distribution, comprise the electric industry. North Star points out that there is conflicting expert evidence in the record concerning the nature of the electric industry. North Star's expert asserted the tripartite view of the electric industry, while MidAmerican's expert maintained that the industry is instead a single regulated monopoly at the retail level.

Before we analyze the applicability of the state action doctrine to the instant case, we must first [**14] determine what effect the decision by the state court has on these proceedings. The state court's decision affirming the Board's ruling raises the issue of collateral estoppel, also referred to as issue preclusion. [HN2](#)[[↑]] Issue preclusion prevents a party to a prior action in which a judgment has been entered from relitigating issues that were raised and resolved in that previous action. See, e.g., Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981). Federal courts must give state court judgments the same preclusive effect as would a court of the state in which the judgment was entered, which in this case is Iowa. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984) (citing the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738).

[HN3](#)[[↑]] The Iowa Supreme Court has enunciated four conditions that must be met before applying issue preclusion: (1) the issue decided must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been [**15] necessary and essential to the resulting judgment. See, e.g., Brown v. Kassouf, 558 N.W.2d 161, 163 (Iowa 1997) (Kassouf). Under Iowa law, issue preclusion may be applied to a trial court's ruling on the merits of an issue despite the pendency of an appeal from

⁷ North Star argues that there are three vertical markets in the industry, each of which has a different level of competition. These markets are: (1) the generation of electric energy; (2) the transmission of high voltage electric power from the generation plants to substations for conversion to delivery voltages; and (3) the distribution of low voltage electricity to retail customers. See Brief for Appellant at 14.

that ruling. See *Peterson v. Eitzen*, 173 N.W.2d 848, 850 (Iowa 1970) (holding that "the judgment of the trial court is res adjudicata until set aside, modified or reversed"); see also *Cochrane v. Cochrane*, 124 F.3d 978, 982 (8th Cir. 1997), cert. denied, 118 S. Ct. 1044 (1998). Moreover, issue preclusion applies to the judgments in declaratory rulings. See *Fournier v. Illinois Casualty Co.*, 391 N.W.2d 258, 260 (Iowa 1986). The Iowa Supreme Court has also ruled that mutuality of parties is not required when issue preclusion is used defensively.⁸ See *Kassouf*, 558 N.W.2d at 164.

[**16] We hold that, under Iowa law, the prior determination by the state court that the Board's assignment of exclusive service areas includes the generation of electricity collaterally estops this court from re-examining that same issue. The issue was identical in both actions and was properly litigated in the state court. Therefore, for purposes of this case, we will assume that under Iowa law the exclusive [*738] service territory provisions include the generation of electricity for retail sales.

We now consider the district court's determination that the state's exclusive service territory policy satisfied the requirements for state action immunity. [HN4](#)[↑] Application of the state action immunity doctrine is a question of law. See, e.g., *FTC v. Hospital Bd. of Directors*, 38 F.3d 1184, 1187 (11th Cir. 1994). In *Parker v. Brown*, 317 U.S. 341, 350-51, 87 L. Ed. 315, 63 S. Ct. 307 (1943), the Supreme Court held that principles of federalism and state sovereignty precluded the application of federal antitrust laws to activity directed by state legislative action. The "state action doctrine" immunizes a private party from antitrust liability if (1) the private party acts pursuant to a "clearly [**17] articulated" and "affirmatively expressed" state policy to allow the anti-competitive conduct, and (2) the regulatory policy is "actively supervised" by the state itself. *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) (Midcal). To satisfy the first prong of the Midcal test, the state as sovereign must clearly intend to displace competition in a particular field with a regulatory structure. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985). In contrast, the second prong of the Midcal test serves essentially an evidentiary function to ensure that there is adequate state supervision of the regulatory policy. See *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 634-35, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992). That is, the second prong ensures that the state exercises sufficient independent judgment and control over the regulated activity and prevents private parties from engaging in unsupervised anti-competitive behavior. See *id.*

We hold that the district court did not err in finding that Iowa "clearly articulated" [*18] and "affirmatively expressed" a policy displacing competition in the market for retail electric service. The state statute expressly provides that its purpose is to create exclusive service areas which have only one supplier of electricity. See *IOWA CODE § 476.25* (1997).⁹ The policy to displace competition in the provision of retail electric service, including the generation of electricity, is unambiguous because the statute has been interpreted to include the generation of electricity. See *In re MidAmerican Energy Co.*, Docket No. DRU-98-1, slip op. at 5. Thus, the exclusive service territory statute is explicit state authorization for displacing competition in both the distribution and generation of retail electric service.

[**19] Furthermore, the fact that MidAmerican does not generate all of its own electricity is irrelevant for our purposes because there is still no competition for retail customers under Iowa's regulatory scheme. See *id.*

⁸The Iowa Supreme Court has found defensive issue preclusion to occur when stranger to the judgment [in the former action], ordinarily the defendant in the second action, relies upon [that] judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense." *Brown v. Kassouf*, 558 N.W.2d 161, 164 (Iowa 1997).

⁹The statute provides that: [HN5](#)[↑]

It is declared to be in the public interest to encourage the development of co-ordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public. In order to effect that public interest, the board may establish service areas within which specified electric utilities shall provide electric service to customers on an exclusive basis.

MidAmerican purchases the other electricity at wholesale, which is an entirely different market from retail.¹⁰ Moreover, the retail wheeling pilot program supports the district court's finding that the state legislature has displaced competition in the electric industry. That program required specific Board approval, which indicates pervasive regulation, and only permits a limited amount of competition in the industry. The pilot program supports the conclusion that there is a clearly articulated policy that does not [*739] generally allow competition for retail customers. We note that this interpretation is consistent with the Eleventh Circuit's decision in *Municipal Utilities Bd. v. Alabama Power Co.*, 934 F.2d 1493, 1502 (11th Cir. 1991). In that case the court found that the Alabama legislature had clearly articulated a policy to displace competition in the retail electric market despite allowing some competition for industrial customers. *See id.*

[**20] The second prong of the *Midcal* test requires the state to actively supervise its regulatory policy that displaces competition. We hold that the district court did not err in finding that the Board actively supervises the exclusive service territories. Contrary to North Star's argument, the Board does more than regulate rates. *See IOWA CODE § 476.8* (1997) (Board is statutorily mandated to ensure that the exclusive service providers supply "reasonably adequate service and facilities" at "reasonable and just" rates). Since establishing the exclusive service areas, the Board has continued to implement the state policy of displacing competition by assigning new customers to exclusive service providers and determining the assigned exclusive service provider in cases of doubt or conflict. Moreover, on numerous occasions the Board has issued administrative decisions applying the exclusive service area statutes to effectuate the policy that provides one retail electric supplier for each customer. *See, e.g., Lamda Energy Marketing Co. v. IES Utilities., Inc.*, Docket No. FCU-96-8 (I.U.B. Aug. 25, 1997). The Board has repeatedly held that violation of the exclusive service territory [**21] statutes for the purpose of providing electric service is illegal. *See, e.g., Harlan Municipal Utilities v. Nishnabotna Valley Rural Electric Coop.*, Docket No. SPU-93-16 (I.U.B. July 27, 1994).

Moreover, even less pervasive regulatory regimes have been held to satisfy the active supervision prong under the state action immunity doctrine. For example, Florida law permits utilities to enter into territorial agreements, if they choose, and requires that their agreements be submitted to the Florida Public Service Commission (FPSC) for approval. Unlike Iowa's statutes, however, Florida law does not empower the FPSC to assign exclusive territories without a territorial agreement between the suppliers. Nevertheless, the Eleventh Circuit held that the FPSC's 1965 approval of an agreement between two utilities dividing service areas satisfied the second prong of the *Midcal* test pursuant to the state's policy of regulating electric service. *See Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609, 613-14 (11th Cir. 1995), cert. denied, 517 U.S. 1190, 134 L. Ed. 2d 781, 116 S. Ct. 1678 (1996). In *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir. [**22] 1996), modified, 86 F.3d 1028, the Eleventh Circuit specifically upheld a utility's refusal to wheel power for cogenerators in its service territory, under the state action immunity doctrine. The court held that the state satisfied the active supervision requirement because it "played an active and substantial role in determining the specifics of the economic policy" pursued by the utilities. *Id. at 1029.*

Finally, North Star argues that the district court erred in granting summary judgment because there were disputed issues of material fact concerning the nature of the electric industry, including the deregulation that has recently taken place. As noted, the Board decided that the electric industry was unitary and the state court affirmed that decision. North Star is collaterally estopped from disputing the nature of the electric industry with respect to Iowa's exclusive service territory statute. Because Iowa has a clearly articulated and affirmatively expressed policy displacing competition in the provision of retail electric service, including generation, and the Board actively supervises that policy, there are no disputed issues of material fact that would preclude judgment [**23] as a matter of law in favor of MidAmerican [*740] under the state action immunity doctrine.

Conclusion

¹⁰ In contrast with wholesale purchases, where the consumer buys electricity for the purpose of resale, retail purchases are meant for actual use by the buyer.

For the reasons stated, we hold that the district court did not err in granting summary judgment in favor of MidAmerican. The judgment of the district court is affirmed.

End of Document



Zenith Elecs. Corp. v. Exzec, Inc.

United States Court of Appeals for the Federal Circuit

July 7, 1999, Decided

98-1288

Reporter

182 F.3d 1340 *; 1999 U.S. App. LEXIS 15003 **; 51 U.S.P.Q.2D (BNA) 1337 ***; 1999-2 Trade Cas. (CCH) P72,571

ZENITH ELECTRONICS CORPORATION, Plaintiff, and ELO TOUCHSYSTEMS, INC., Plaintiff-Appellant, v.
EXZEC, INC., Defendant-Appellee.

Subsequent History: [**1] As Corrected July 12, 1999.

Prior History:Appealed from: United States District Court for the Northern District of Illinois. Judge Blanche M. Manning.

Disposition: AFFIRMED AND REMANDED.

Core Terms

patent, Touch, infringement, bad faith, patent law, patentee, anti trust law, unfair competition, district court, preempted, inequitable conduct, Lanham Act, marketplace, alleges, preemption, decisions, patent infringement, antitrust, federal law, counterclaims, customers, unenforceable, competitor, invalid, tortious interference, manufacture, potential customer, state tort, notice, rights

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN1[] False Designation of Origin, Elements of False Designation of Origin

A patentee's allegedly false representation of patent infringement is not actionable under the Lanham Act, [15 U.S.C.S. § 1125\(a\)](#), but a patentee's allegedly false representation that it is the exclusive source of a certain type of product because of its patent is so actionable.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN2 False Designation of Origin, Elements of False Designation of Origin

False patent claims are not the kind of unfair competitive activity at which the Lanham Act, [15 U.S.C.S. § 1125\(a\)](#), is directed. However, [15 U.S.C.S. § 1125\(a\)](#) does reach a seller who, by exaggerating the scope of a patent, creates a false impression that he is the exclusive source of the product. In other words, the law distinguishes between a patentee's representation that a competitor's product infringes and his representation that the competitor cannot effectively design around the patent. Exclusive-source claims blow a greater chill on competition and are less vital to the patentee's effort to vigorously protect his legitimate interests. The patentee who asserts such claims, therefore is liable for their falsity, regardless of his good faith.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

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

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Trademark Law > ... > Infringement Actions > Jurisdiction > General Overview

HN3 Jurisdiction Over Actions, Exclusive Jurisdiction

The exclusive jurisdiction of the United States Court of Appeals for the Federal Circuit over matters arising in whole or in part under the patent laws is not defeated by the fact that the patent claims have been dismissed with prejudice. The path of appeal is determined by the basis of jurisdiction in the district court, and is not controlled by the district court's decision or the substance of issues that are appealed.

Governments > Legislation > Interpretation

HN4 Legislation, Interpretation

It is a cardinal principle of construction that when there are two acts upon the same subject, the rule is to give effect to both if possible. Unless Congress clearly indicates which of two statutes is to prevail in event of conflict, our responsibility is to interpret and apply them in a way that preserves the purposes of both and fosters harmony between them.

182 F.3d 1340, *1340LÁ1999 U.S. App. LEXIS 15003, **1LÁ51 U.S.P.Q.2D (BNA) 1337, ***1337

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN5 [down] **False Designation of Origin, Elements of False Designation of Origin**

See [15 U.S.C.S. § 1125\(a\)\(1\)](#).

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

HN6 [down] **Defenses, Inequitable Conduct**

As relevant, to show a Lanham Act § 43(a) claim, the plaintiff must allege and ultimately prove: (1) that the defendant made a false or misleading statement of fact in commercial advertising or promotion about the plaintiff's goods or services; (2) that the statement actually deceives or is likely to deceive a substantial segment of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the defendant caused the statement to enter interstate commerce; and (5) that the statement results in actual or probable injury to the plaintiff.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN7 [down] **Inequitable Conduct, Anticompetitive Conduct**

In order to successfully assert a violation of federal law, a party must cite a specific statutory provision that he claims has been violated and prove that violation. The only basis for a federal unfair competition claim is the Lanham Act, [15 U.S.C.S. § 1125\(a\)\(1\)](#).

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN8 [blue download icon] **Inequitable Conduct, Effect of Inequitable Conduct**

The established remedy for inequitable conduct is unenforceability of the patent.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN9 [blue download icon] **Inequitable Conduct, Effect of Inequitable Conduct**

A patent procured through inequitable conduct is not invalidated thereby, but the courts refuse to enforce such a patent as a matter of equitable principle.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN10 [blue download icon] **False Designation of Origin, Elements of False Designation of Origin**

Under the patent laws, an infringement notice is closely related to, and often a precursor of, a suit for infringement, because the failure to provide such a notice can limit the damages recoverable in a patent suit. It makes little sense to say that filing a bad faith patent infringement suit does not violate the Lanham Act, [15 U.S.C.S. § 1125\(a\)](#) but sending a bad faith infringement notice prior to suit does.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

HN11 [blue download icon] **Inequitable Conduct, Effect of Inequitable Conduct**

Though the differences between the Lanham Act, [15 U.S.C.S. § 1125\(a\)](#) and the patent laws may not appear as sharp as those between the patent and antitrust laws, there is a tension. The United States Court of Appeals for the

Federal Circuit has on several occasions recognized that a patentee's statements regarding its patent rights are conditionally privileged under the patent laws, so that such statements are not actionable unless made in bad faith.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

[HN12](#) [💡] Infringement Actions, Exclusive Rights

A patent owner has the right to enforce its patent, and that includes threatening alleged infringers with suit.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

[HN13](#) [💡] Infringement Actions, Exclusive Rights

Federal precedent is that communications to possible infringers concerning patent rights is not improper if the patentholder has a good faith belief in the accuracy of the communication.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Infringement Actions > General Overview

[HN14](#) [💡] Infringement Actions, Exclusive Rights

A patentee must be allowed to make its rights known to a potential infringer so that the latter can determine whether to cease its allegedly infringing activities, negotiate a license if one is offered, or decide to run the risk of liability and/or the imposition of an injunction

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Infringement Actions > General Overview

[HN15](#) [💡] Infringement Actions, Exclusive Rights

Patents would be of little value if infringers of them could not be notified of the consequences of infringement, or proceeded against in the courts. Such action, considered by itself, cannot be said to be illegal.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

[HN16](#) [💡] Infringement Actions, Exclusive Rights

It is not an actionable wrong for one in good faith to make plain to whomsoever he will that it is his purpose to insist upon what he believes to be his legal rights, even though he may misconceive what those rights are.

Governments > Legislation > Statutory Remedies & Rights

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Infringement Actions > Defenses > Marking

HN17 [blue document icon] Legislation, Statutory Remedies & Rights

The privileged right of a patentee to notify the public of its patent rights is statutorily rooted in the patent laws at [35 U.S.C.S. § 287](#), which authorizes patentholders to "give notice to the public" of a patent by marking its patented articles and makes marking or specific notice to the accused infringer a prerequisite to the recovery of damages.

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

HN18 [blue document icon] Defenses, Inequitable Conduct

The United States Court of Appeals for the Federal circuit concludes that, before a patentee may be held liable under the Lanham Act, [15 U.S.C.S. § 1125\(a\)](#), for marketplace activity in support of its patent, and thus be deprived of the right to make statements about potential infringement of its patent, the marketplace activity must have been undertaken in bad faith. This prerequisite is a function of the interaction between [15 U.S.C.S. § 1125\(a\)](#) and patent law, and is in addition to the elements required by [15 U.S.C.S. § 1125\(a\)](#) itself, as [15 U.S.C.S. § 1125\(a\)](#) alone does not require bad faith.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Patent Invalidity > Grounds

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN19 [blue document icon] Inequitable Conduct, Anticompetitive Conduct

Exactly what constitutes bad faith remains to be determined on a case by case basis. Obviously, if the patentee knows that the patent is invalid, unenforceable, or not infringed, yet represents to the marketplace that a competitor is infringing the patent, a clear case of bad faith representations is made out. Furthermore, statements to the effect that a competitor is incapable of designing around the patent are inherently suspect. They are suspect not only because with sufficient effort it is likely that most patents can be designed around, but also because such a statement appears nearly impossible to confirm a priori. For these reasons, the bad faith element may be much easier to satisfy for statements of this type.

Counsel: Vincent L. Johnson, Legal Strategies Group, of Emeryville, California, argued for plaintiff-appellant.

Robert E. Browne, Altheimer and Gray, of Chicago, Illinois, argued for defendant-appellee. With him on the brief was Michael G. Kelber.

Judges: Before PLAGER, Circuit Judge, SKELTON, Senior Circuit Judge, and GAJARSA, Circuit Judge.

Opinion by: PLAGER

Opinion

[***1338] [*1342] PLAGER, Circuit Judge.

This case raises issues of priorities among conflicting federal laws, as well as federal preemption of state law. Specifically, the questions raised are whether a federal unfair competition claim irreconcilably conflicts with and is therefore barred by federal patent or **antitrust law**, and whether, under the same or similar circumstances, the federal law preempts state unfair competition claims.

Exzec, Inc. ("Exzec") alleged that Elo Touchsystems, Inc. ("Elo Touch") had made statements to potential customers of Exzec to the effect that Exzec's product infringes certain Elo Touch patents and that Exzec could not manufacture a noninfringing [**2] product, and that these statements were false. On the basis of that allegation, Exzec alleged violations by Elo Touch of § 43 of the federal Lanham Act, and of the state's unfair competition laws.

In response to the claims, Elo Touch moved pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) to dismiss the two claims for failure to state a [***1339] claim upon which relief can be granted. Elo Touch argued that its activities in support of its patent rights were governed by federal patent law and applicable antitrust rules, and thus the Lanham Act and state unfair competition laws are in effect "preempted." The U.S. District Court for the Northern District of Illinois denied the motion. See Zenith Elecs. Corp. v. Exzec, Inc., 1997 U.S. Dist. LEXIS 20762, No. 93-C-5041, 1997 WL 798907 (N.D. Ill. Dec. 24, 1997) (unreported memorandum and order) ("Zenith I"). However, the court agreed to certify its order for immediate appeal pursuant to [28 U.S.C. § 1292\(b\)](#). See Zenith Elecs. Corp. v. Exzec, Inc., 1998 U.S. Dist. LEXIS 1377, No. 93-C-5041, [1998 LEXIS 13431](#) WL 59570 (N.D. Ill. Feb. 9, 1998) (unreported memorandum and order) ("Zenith II"). This court granted Elo Touch's petition for permission to appeal the order. [**3] See Zenith Elecs. Corp. v. Exzec, Inc., 152 F.3d 946, 1998 WL 171429 (Fed. Cir. 1998) (Table; text of unpublished order in Westlaw) ("Zenith III"); [28 U.S.C. § 1292\(b\)-\(c\)\(1\) \(1994\)](#).

We conclude that Exzec's claims, alleging that Elo Touch's conduct in support of its patent rights violate the Lanham Act and state unfair competition laws, are not absolutely barred by the patent or antitrust laws. This is because the protection otherwise afforded by the patent laws to a patentee's conduct in enforcing its patent may be lost if the patentee acts in bad faith. The question of whether Exzec can prove bad faith by Elo Touch remains for the trial court to determine; on the question presented by the appeal, we affirm the judgment of the district court denying the motion to dismiss the claims.

BACKGROUND

In this action, Zenith Electronics Corporation ("Zenith") and Elo Touch sued Exzec for infringement of patents directed to touch panel systems for computers, i.e., systems that include screens that respond to touching to operate and control a computer. Zenith is the assignee of the patents (the "Zenith patents"), and Elo [**4] Touch is its exclusive licensee which has in turn sublicensed the patents.¹ Zenith and Elo Touch alleged that Exzec's competing touch panel system, known as the "SureTouch" system, infringes the patents.

¹ For purposes of this appeal, we consider Elo Touch as the patentholder, as neither the parties nor the district court have suggested that the outcome should depend upon Elo Touch's status as an exclusive licensee.

In response, Exzec brought the two claims at issue here. Specifically, Exzec asserted two counterclaims against Elo Touch for "unfair competition": one under § 43(a) of the Lanham Act, [15 U.S.C. § 1125\(a\)](#), and the other under Illinois common law. In support of its counterclaims, Exzec alleges that Elo Touch knew or should have known that the Zenith patents are limited to touch panels that utilize surface acoustic wave ("SAW") technology, and that Exzec's SureTouch system, utilizing shear technology, does not infringe the Zenith patents. Notwithstanding, according to Exzec, [**5] Elo Touch falsely stated to potential customers of Exzec that Exzec's SureTouch system infringes the Zenith patents and that Exzec could not manufacture or sell a noninfringing acoustic touch panel system.

In particular, in paragraph 24 of its second amended pleading, Exzec alleges:

On information and belief, Elo Touch falsely stated to its licensees, which were potential customers of Exzec, that Exzec's shear touch technology infringed Zenith's SAW patents when Elo Touch knew, or should have known, that the scope of the Zenith SAW patents was limited to touch panels which utilized SAW technology. On information and belief, Elo Touch falsely stated to its licensees, which were potential customers of Exzec, that Exzec could not manufacture and/or sell an acoustic touch panel or system which did not infringe Zenith's SAW patents when Elo Touch knew, or should have known, that the scope of the Zenith SAW patents was limited to touch panels which utilized SAW technology.

With specific respect to its § 43(a) counterclaim, Exzec alleges in paragraph 48 of its pleading:

The aforesaid false representations of patent infringement and threats of legal action created and [**6] were intended to create confusion, mistake and deception among potential licensees, customers in the trade and to divert prospective licensees and customers of Exzec [and] were made willfully by Zenith and Elo Touch and with the intent to deceive.

And, with specific respect to its state unfair competition claim, Exzec alleges in paragraph 53 of its pleading, "The aforesaid [*1344] bad faith conduct of . . . Elo Touch . . . constitutes unfair competitive acts and trade practices in Illinois and elsewhere."

In response to Exzec's federal Lanham Act § 43(a) claim, Elo Touch argued that "a charge of patent infringement (without more) does not state a claim for unfair competition [**1340] under Section 43(a)." Elo Touch cited in support the district court decisions in [Chromium Industries, Inc. v. Mirror Polishing & Plating Co., 448 F. Supp. 544 \(N.D. Ill. 1978\)](#), [Brandt Consolidated, Inc. v. Agrimar Corp., 801 F. Supp. 164 \(C.D. Ill. 1992\)](#), and [Publications International, Ltd. v. Western Publishing Co., 1994 U.S. Dist. LEXIS 558](#), No. 93- C-3074, 1994 WL 23008 (N.D. Ill. Jan. 25, 1994) (unreported memorandum and order).

Together, these decisions stand for the proposition [**7] that [HN1](#) [↑] a patentee's allegedly false representation of patent infringement is not actionable under § 43(a), but that a patentee's allegedly false representation that it is the exclusive source of a certain type of product because of its patent is so actionable. This distinction was first drawn in [Chromium Industries, 448 F. Supp. at 556-57](#), and was followed in [Brandt Consolidated, 801 F. Supp. at 174](#), and [Western Publishing](#), 1994 WL 23008, at *1. In [Western Publishing](#), the district court described the distinction as, on the one hand, representations of infringement and, on the other hand, representations that a competitor cannot effectively design around the patent (what the court referred to as "exclusive source" representations):

"[HN2](#) [↑] False patent claims are not the kind of unfair competitive activity at which the Lanham Act is directed." [Chromium Industries, Inc. v. Mirror Polishing & Plating Co., Inc., 448 F. Supp. 544, 557 \(N.D. Ill. 1978\)](#). However, § 43(a) does reach a seller who, by exaggerating the scope of a patent, creates a false impression that he is the exclusive source of the product. [Id. at 557](#). [**8] *In other words, the law distinguishes between a patentee's representation that a competitor's product infringes and his representation that the competitor cannot effectively design around the patent.* Exclusive-source claims blow a greater chill on competition and are less vital to the patentee's effort to vigorously protect his legitimate interests. The patentee who asserts such claims, therefore is liable for their falsity, regardless of his good faith.

1994 WL 23008, at *1 (emphasis added).

Contrary to Elo Touch's assertion that these decisions supported dismissal of Exzec's § 43(a) claim because, according to Elo Touch, the claim is based only on infringement representations, the district court concluded that, under these decisions, Exzec's pleading alleges a viable § 43(a) claim. See Zenith I, 1997 WL 798907, at *12. In particular, the court referred to the allegation that Elo Touch had falsely stated to its licensees, which were potential customers of Exzec, that Exzec could not manufacture a device that would not infringe the Zenith patents. See id.

With respect to Exzec's state common law unfair competition claim, Elo Touch [**9] argued that in essence the claim is one for tortious interference with prospective economic advantage and that "the privilege of competition" is an affirmative defense to such a claim. Id. at *14. The district court agreed. Id. at *14-15. However, the court determined that Exzec had adequately pled the elements of tortious interference with prospective economic advantage. See id. Furthermore, the court determined that Elo Touch could not rely on the defense of "privilege" because the defense is not available to a defendant (with respect to this claim, Elo Touch) that has "acted in bad faith," and Exzec's pleading sufficiently alleges that Elo Touch had acted in bad faith. Id.

After having its motion to dismiss denied, Elo Touch moved for reconsideration. In its motion for reconsideration, Elo Touch argued, *inter alia*, that the § 43(a) and state unfair competition claims are "pre-empted by Federal Patent and Antitrust Law." Zenith II, 1998 WL 59570, at [*1345] *2-3, 5. Elo Touch based this argument on this court's decision in Pro-Mold and Tool Co. v. Great Lakes Plastics, Inc., 75 F.3d 1568, 37 U.S.P.Q.2D (BNA) 1626 (Fed. Cir. 1996), and the [**10] unpublished decision of the U.S. District Court for the Eastern District of Wisconsin in Schreiber Foods, Inc. v. Beatrice Cheese, Inc., 1997 U.S. Dist. LEXIS 22241, No. 97-C-11 (E.D. Wis. Nov. 26, 1997), which relied heavily on our Pro-Mold decision.

The district court denied Elo Touch's motion for reconsideration, reasoning that Exzec's allegations "are distinguishable from those in Schreiber and Pro-Mold." Zenith II, 1998 WL 59570, at *4. The court noted in particular Exzec's allegation that Elo Touch made false representations to potential Exzec customers that Exzec could not manufacture or sell a noninfringing acoustic touch panel system. See id.

The district court also rejected Elo Touch's alternative argument that Exzec's counterclaims are, in the least, "preempted" because of the absence of bad faith. In particular, Elo Touch argued that Exzec's counterclaims are "pre-empted because 'statements concerning a valid patent are not actionable under the Lanham Act or under any other law, at least where such statements are made in good faith.'" Id. at *5. The district court found it unnecessary to decide [**1341] whether this is a [**11] correct statement of the law because it determined that Exzec's "allegations reflect that Elo Touch employed bad faith." Id.

After addressing Elo Touch's other arguments, which are not relevant here, the district court denied Elo Touch's motion for reconsideration. The court, however, granted Elo Touch's alternative motion to certify its order for immediate appeal pursuant to 28 U.S.C. § 1292(b), which allows such certification when the district court is "of the opinion that [the] order involves a controlling question of law as to which there is substantial ground for difference of opinion." The district court was of the opinion that the "preemption" issue is such a "controlling question of law." In particular, the district court was concerned that Exzec's § 43(a) and state unfair competition claims may be "preempted" by the federal patent or antitrust laws under the rationale of the Pro-Mold or Schreiber decisions:

The rationale in Schreiber, largely based on Pro-Mold, is that a federal or state unfair competition claim based on the assertion of an invalid patent is pre-empted because Patent and Antitrust laws provide an adequate [**12] remedy. Here, the unfair competition counterclaims against Elo Touch are based on the allegations that Elo Touch falsely and in bad faith represented to potential customers that ExZEC could not manufacture or design a product around Zenith's patent. It appears that an Antitrust claim could provide a remedy in this case and therefore the rationale in Pro-Mold and Schreiber might be deemed applicable.²

Zenith II, 1998 WL 59570, at *7.

² From the last sentence of this quote it appears that the district court was primarily concerned with a possible conflict with the federal antitrust laws. However, possible conflict with the patent laws was also at issue; indeed, that is Elo Touch's principal argument on appeal. Accordingly, we consider both possible conflicts.

Pursuant to the procedure mandated by [28 U.S.C. § 1292\(b\)](#), Elo Touch subsequently petitioned us for permission to immediately appeal the district court's decision, and we, in turn, granted the petition. [**13] See [Zenith III](#), 1998 WL 171429.

DISCUSSION

I. Overview and Jurisdiction

The issue presented is whether Exzec's counterclaims, alleging anticompetitive conduct by Elo Touch, are "preempted" by the federal patent or antitrust laws. Another way to state the question is: if a patentee informs a competitor's customers that the competitor is an infringer (and implicitly or explicitly that the customer who deals with the competitor may become [*1346] one as well), is the patentee protected from the usual standards for unfair trade practices, imposed by federal and state unfair competition laws, on the theory that the rights accorded a patentee to protect and enforce the patent supersede the usual anticompetition rules? The "rights" accorded a patentee are those understood to be available under patent law, and those defined by court-created limitations on antitrust liability. (We note that Elo Touch attempts to raise several issues in addition to the "controlling question" of "preemption" which prompted the district court to certify its decision for immediate appeal. We do not consider these other issues in this interlocutory appeal; nor, of course, do we foreclose Elo Touch from [**14] raising these issues after a final decision on remand, see [28 U.S.C. § 1295\(a\) \(1994\)](#).)

Before considering the merits of this interlocutory appeal, we lay to rest a question regarding our jurisdiction. See [Zenith III](#), 1998 WL 171429. The case comes to us in a somewhat unusual posture. The patent claims and defenses (*i.e.*, the claims and defenses regarding infringement, invalidity, and unenforceability of the Zenith patents) raised by the pleadings are no longer at issue in the case. These claims and defenses have fallen by the wayside as a result of the district court entering a joint stipulation and proposed order by the parties dismissing the patent claims "with prejudice." This occurred prior to the district court's decision on Elo Touch's motion to dismiss Exzec's counterclaims.

This series of events raises the question of whether the appeal on the issue before us is properly lodged in this court, or whether it should have been taken to the regional circuit. We readily conclude that we have jurisdiction over this interlocutory appeal, pursuant to [28 U.S.C. §§ 1292\(c\)\(1\)](#) and [1295\(a\)\(1\)](#). [HN3](#) Our exclusive jurisdiction [**15] over matters arising in whole or in part under the patent laws is not defeated by the fact that the patent claims have been dismissed with prejudice. "The path of appeal is determined by the basis of jurisdiction in the district court, and is not controlled by the district court's decision or the substance of issues that are appealed." [Abbott Lab. v. Brennan, 952 F.2d 1346, 1349-50, 21 U.S.P.Q.2D \(BNA\) 1192, 1195 \(Fed. Cir. 1991\)](#). Because the complaint contained patent infringement claims, [**1342] the district court's jurisdiction arose under [28 U.S.C. § 1338\(a\)](#). This established the path of appeal, giving exclusive jurisdiction in this court pursuant to [28 U.S.C. §§ 1292\(c\)\(1\)](#) and [1295\(a\)\(1\)](#). See [Abbott Lab., 952 F.2d at 1349-50, 21 U.S.P.Q.2D \(BNA\) at 1195](#).

Our decision in [Gronholz v. Sears, Roebuck and Co., 836 F.2d 515, 5 U.S.P.Q.2D \(BNA\) 1269 \(Fed. Cir. 1987\)](#), is not to the contrary. In [Gronholz](#) we held that the dismissal of a patent infringement claim *without prejudice* operated as an amendment of the complaint, leaving in that case only a trade secrets claim. [836 F.2d at 516, 518, 5 U.S.P.Q.2D \(BNA\) at 1269, 1271](#). [**16] Thus the suit, so amended, did not arise under [28 U.S.C. § 1338\(a\)](#). See [id.](#) Here, in contrast, the dismissal of the patent infringement, invalidity, and unenforceability claims with prejudice constitutes an adjudication of the claims on the merits, not an amendment of the complaint. See [Hartley v. Mentor Corp., 869 F.2d 1469, 1473, 10 U.S.P.Q.2D \(BNA\) 1138, 1141 \(Fed. Cir. 1989\)](#). The jurisdiction of the district court over the cause, and the remaining issues, is undisturbed; the statutes mandate that the appeal resides exclusively in this court.

II. The Lanham Act § 43(a) Claim

We turn first to Elo Touch's argument that Exzec does not have a viable cause of action for unfair trade practices under § 43(a) of the Lanham Act. As already noted, the district court was concerned that this claim may be "preempted" by the patent or antitrust laws. However, preemption is not the issue with respect to the § 43(a) claim. The

concept of preemption originates in the *Supremacy Clause of the Constitution*, and focuses on the conflict between state and federal [*1347] law. See, e.g., *United States v. Palumbo Bros.*, 145 F.3d 850, 862 n.6 (7th Cir. [**17]), cert. denied, 142 L. Ed. 2d 310, 119 S. Ct. 375 (1998). Instead, the § 43(a) claim presents the question of a potential conflict between federal statutes--the constitutional issue of preemption is not implicated. See *145 F.3d at 862*.

Our task is to determine whether there is a conflict between the applicable federal laws, and if so, to resolve it. This involves the application of traditional principles of statutory construction. The first principle in a case such as this is to give effect to each federal law. Each has equal standing, and equal claim for recognition. **HN4** [↑] "It is a cardinal principle of construction that . . . when there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198, 84 L. Ed. 181, 60 S. Ct. 182 (1939). Unless Congress clearly indicates which of two statutes is to prevail in event of conflict, our responsibility is to interpret and apply them "in a way that preserves the purposes of both and fosters harmony between them." *Vornado Air Circulation Sys., Inc. v. Duracraft Corp.*, 58 F.3d 1498, 1507 (10th Cir. 1995).

With this [**18] principle in mind, we consider whether the availability of a § 43(a) claim here conflicts with the patent or antitrust laws, and if so, how that conflict can be resolved in a manner that permits each law a proper scope. This issue impacts directly on the patent laws, implicating our area of exclusive jurisdiction, as the context involves statements as to the infringement and scope of patents. Accordingly, we decide the question as a matter of this circuit's law. See *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, , 50 U.S.P.Q.2D (BNA) 1672, 1676 (Fed. Cir. 1999) (holding en banc that Federal Circuit law governs question of whether patent law conflicts with trade dress action under § 43(a) of the Lanham Act or preempts such an action under state law); *Pro-Mold*, 75 F.3d at 1574, 37 U.S.P.Q.2D (BNA) at 1631 (declining to defer to regional circuit law on the issue of whether inequitable conduct constitutes unfair competition). For the same reasons, we apply our law in deciding, below, whether, in the present context, Exzec's state unfair competition claim is preempted by the patent or antitrust laws. See *id.*

A. The nature of the § 43(a) [**19] claim

The district court recognized Exzec's § 43(a) claim only with respect to Exzec's allegation that Elo Touch falsely stated to potential Exzec customers that Exzec could not manufacture a noninfringing product. See *Zenith II*, 1998 WL 59570, at *4. However, in the same paragraph of Exzec's pleading in which this allegation is made (paragraph 24, ante), Exzec also alleges that Elo Touch falsely stated to these same potential customers that Exzec's product infringes the Zenith patents, when, it is alleged, Elo Touch knew or should have known that there is no infringement. To paraphrase, Exzec alleges that Elo Touch made false representations (1) of patent infringement and (2) of Exzec's inability to design around the patents. As we earlier noted, the differences between these two allegations have been thought to be significant to the question before us, and we shall consider each of these allegations in turn.

HN5 [↑] With respect to these allegations, the most relevant portion of § 43(a) provides: ***1343

- (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 [**20] 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 liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1) (1994). This portion of § 43(a) provides the basis for what are generally known as "false advertising," [*1348] "trade libel," and "product disparagement" claims. 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:10, at 27-19 to 27-20 (4th ed. 1998).

There is substantial agreement among the circuits as to the elements of such claims, though the precise wording used varies. See, e.g., B. Sanfield, Inc. v. Finlay Fine Jewelry Corp., 168 F.3d 967, 971 (7th Cir. 1999); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997); Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1383 n.3 (5th Cir. 1996); Diti v. Coldwell Banker Residential Affiliates, Inc., 954 F.2d 869, 872 (3d Cir. 1992); [**21] Alpo Petfoods, Inc. v. Ralston Purina Co., 286 U.S. App. D.C. 192, 913 F.2d 958, 964 (D.C. Cir. 1990); see also 4 McCarthy § 27:24, at 27-39. [HN6](#)[↑] As relevant here, the plaintiff (with respect to this claim, Exzec) must allege and ultimately prove: (1) that the defendant (Elo Touch) made a false or misleading statement of fact in commercial advertising or promotion about the plaintiff's goods or services; (2) that the statement actually deceives or is likely to deceive a substantial segment of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the defendant caused the statement to enter interstate commerce; and (5) that the statement results in actual or probable injury to the plaintiff. See id. For purposes of this interlocutory appeal, in which we decide whether recognizing Exzec's § 43(a) claim presents a conflict with the patent or antitrust laws, we assume (without deciding) that the conduct alleged here is within the scope of § 43(a), and that Exzec has sufficiently pled the necessary elements for such a claim.³

[**22] B. The case law that concerned the district court

We first consider the prior decisions that gave rise to the district court's concerns-our Pro-Mold decision and the unreported district court Schreiber decision. We shall also consider our decision in Concrete Unlimited Inc. v. Cementcraft, Inc., 776 F.2d 1537, 227 U.S.P.Q. (BNA) 784 (Fed. Cir. 1985), because Elo Touch argues so strenuously that that decision, like Pro-Mold, indicates that Exzec's § 43(a) claim is not viable.

In Pro-Mold, the patentee ("Pro-Mold") sued another company ("Great Lakes") for patent infringement. Great Lakes counterclaimed for unfair competition, alleging that Pro-Mold "acted in bad faith by filing its lawsuit knowing that the patent was [unenforceable] because of inequitable conduct." Pro-Mold, 75 F.3d at 1571, 37 U.S.P.Q.2D (BNA) at 1628. This court concluded that the allegations did not give rise to a § 43(a) claim, stating:

The basis for Great Lakes' assertion of unfair competition was inequitable conduct. However, there is no legal basis for a holding that inequitable conduct, or the assertion of a patent procured through inequitable conduct, constitutes [**23] unfair competition. [HN7](#)[↑] In order to successfully assert a violation of federal law, a party must cite a specific statutory provision that he claims has been violated and prove that violation. Great Lakes has not done so here. The only basis for a federal unfair competition claim is Section 43(a) of the Lanham Act. 15 U.S.C. § 1125(a)(1) (1994). That provision prohibits false designations [**1344] of origin or false or misleading descriptions of [*1349] goods or services which are likely to cause confusion. Obtaining a patent through inequitable conduct does not violate this statute.

[HN8](#)[↑] The established remedy for inequitable conduct is unenforceability of the patent. If a trial court considers that the case is an exceptional one, which is often found when the patent has been improperly procured, attorney fees can be awarded. Moreover, the Supreme Court has held that "enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present." Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174, 86 S. Ct. 347, 349, 15 L. Ed. 2d 247, 147 U.S.P.Q. (BNA) 404, 406 (1965). [**24] Thus, there are

³ At this stage of the case it appears that neither the parties nor the district court have explicitly analyzed the relevant text of § 43(a), or the required elements of a claim arising therefrom, to determine whether § 43(a) reaches Exzec's allegations. We note in passing, without any assessment of the merits, that several district courts in recent years have recognized particular § 43(a) claims involving marketplace representations of patent infringement. See, e.g., Wicker Group v. Standard Register Co., 1994 U.S. Dist. LEXIS 20236, 33 U.S.P.Q.2D (BNA) 1678, 1680 (E.D. Va. 1994); Minebea Co. v. Papst, 13 F. Supp. 2d 35, 44 (D.D.C. 1998); Laser Diode Array, Inc. v. Paradigm Lasers, Inc., 964 F. Supp. 90, 95, (W.D.N.Y. 1997); Brandt Consol., 801 F. Supp. at 174. We leave it to the parties and the district court to more fully consider whether Exzec's particular allegations in its pleading state the necessary elements of a § 43(a) claim.

adequate remedies to deal with inequitable conduct when it is found. Resort to federal unfair competition law is not one of them.

Id. at 1575, 37 U.S.P.Q.2D (BNA) at 1631.

Pro-Mold must be understood in the context of general patent law. [HN9](#) A patent procured through inequitable conduct is not invalidated thereby, but the courts refuse to enforce such a patent as a matter of equitable principle. Pro-Mold tells us that the remedy under federal law available to a defendant who is made the subject of an infringement suit, when the defendant alleges that the suit is based on a patent procured through inequitable conduct in dealing with the Patent Office, is the traditional remedy of having the patent adjudged unenforceable, or perhaps, in appropriate circumstances, holding the patentee liable for an antitrust violation. The remedy for such an insupportable patent suit is not a suit for unfair trade practices under the Lanham Act.

Here, in contrast, Exzec's § 43(a) claim is not premised on a suit by Elo Touch for patent infringement and a defense that the patent is unenforceable for inequitable conduct before the Patent Office. Rather, the counterclaim against Elo [**25](#) Touch is based on alleged marketplace statements, *i.e.*, the alleged Elo Touch statements to potential Exzec customers that Exzec's product is infringing and that Exzec is unable to design around the patents. The gravamen of Exzec's claim is marketplace misconduct, not abuse of the administrative and judicial process.

In the unreported district court Schreiber opinion, cited in the arguments in this case, the district court, based on its view of the import of Pro-Mold, dismissed a § 43(a) claim against a patentee that was based in part on the patentee sending letters to the § 43(a) claimant's customers, accusing the claimant of patent infringement, when allegedly the patentee knew there was no infringement. [1997 U.S. Dist. LEXIS 22241](#), at *3, 17-18. The Schreiber court opined that the above quoted Pro-Mold language

applies equally to the filing of a lawsuit and the sending of an infringement notice [to customers of the accused infringer.] Indeed, [HN10](#) under the patent laws, an infringement notice is closely related to, and often a precursor of, a suit for infringement, because the failure to provide such a notice can limit the damages recoverable [**26](#) in a patent suit. [35 U.S.C. § 287\(a\)&\(b\)\(5\)](#). It makes little sense to say that filing a bad faith patent infringement suit does not violate the Lanham Act but sending a bad faith infringement notice prior to suit does.

Id. at *18.

The Schreiber court observation, that sending infringement notices to a party's customers can be closely related to a suit for infringement, is correct. The difference, however, is that the initiation of an infringement suit is clearly not covered by the text of § 43(a), while a communication to the customers of the accused infringer, in certain circumstances, may be. We cannot agree with the Schreiber court's conclusion, which fails to adequately take that difference into account.

The statement in Pro-Mold that "there are adequate remedies [in patent law] to deal with inequitable conduct," [75 F.3d at 1574, 37 U.S.P.Q.2D \(BNA\) at 1631](#), does not indicate [**1350](#) that a claim under § 43(a) for marketplace misconduct involving a patent is barred by the patent or antitrust laws. That statement says no more than that Great Lakes was not without a remedy under patent law for the claim it brought; the court was not [**27](#) stating a general principle for determining priority among federal laws.

Indeed, the fact that certain conduct is actionable under one federal law, and, in conjunction with other additional conduct, is also actionable under another federal law, does not, without more, create an impermissible conflict between the federal acts. To the contrary, as previously discussed, the overriding principle for resolving apparent conflicts among federal laws is to give appropriate effect to each.

Nor is Exzec's § 43(a) claim foreclosed by this court's decision in Concrete Unlimited. In that case, Cementcraft, Inc. ("Cementcraft"), in response to being sued for patent infringement, counterclaimed that the patentee ("Concrete Unlimited") "competed" [***1345](#) unfairly by attempting to enforce its patent because it was fraudulently obtained." [Concrete Unlimited, 776 F.2d at 1538, 227 U.S.P.Q. \(BNA\) at 785](#). The district court agreed, holding that Concrete

Unlimited had competed unfairly by enforcing its invalid patent, and awarding \$ 150,000 therefor. See id. at 1537, 227 U.S.P.Q. (BNA) at 784. We however disagreed, and reversed the unfair competition judgment, stating (in entirety):

The [**28] district court concluded that Concrete Unlimited's actions during the present litigation "may be considered in regard to unfair competition" and that Concrete Unlimited is "guilty of acts of unfair competition by taking business away from the Defendant by threats and infringement actions based on the fraudulently obtained patent." That conclusion, asserted by Cementcraft, effectively means that Concrete Unlimited should not have enforced its patent rights during the course of this litigation because its patent was later held invalid.

The '028 patent carried a presumption of validity into this litigation that placed the burden of persuasion by clear and convincing evidence to the contrary upon the challenger. 35 U.S.C. § 282; SSIH Equipment, S.A. v. United States International Trade Commission, 718 F.2d 365, 375, 218 U.S.P.Q. (BNA) 678, 687 (Fed. Cir. 1983). Concrete Unlimited had the right to exclude others from making, using, and selling the invention and to enforce those rights until the '028 patent was held invalid. Concrete Unlimited did only what any patent owner has the right to do to enforce its patent, and that includes threatening alleged [**29] infringers with suit. See 35 U.S.C. § 281. Concrete Unlimited's actions in this case were not unfair competition, and we reverse the district court's holding to the contrary.

Id. at 1539, 227 U.S.P.Q. (BNA) at 785.

Thus, Concrete Unlimited, like Pro-Mold, dealt with threats of and actual infringement suits; it did not involve marketplace assertions of infringement and inability to design around. Furthermore, the specific question of the applicability of § 43(a) was not considered; the court merely spoke of "unfair competition" generally. Accordingly, Concrete Unlimited did not address or resolve the question before us.

In sum, neither Pro-Mold nor Concrete Unlimited mandate that Exzec's § 43(a) claim be held barred by the patent or antitrust laws. We note that this conclusion is supported by our recent decisions in Dow Chemical Co. v. Exxon Corp., 139 F.3d 1470, 46 U.S.P.Q.2D (BNA) 1120 (Fed. Cir. 1998), and Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318, 47 U.S.P.Q.2D (BNA) 1769 (Fed. Cir. 1998). Those decisions do not address directly the question of whether Exzec's *federal* unfair competition claim [**30] under § 43(a) is barred by the patent or antitrust laws, because the decisions considered whether *state* unfair competition claims were preempted by the patent laws rather than the issue of conflict among different federal laws. The decisions are, however, analogous because they [*1351] addressed conflict between the patent laws and unfair competition claims premised on a patentee's marketplace conduct, albeit from the perspective of federal preemption of state law.

Significantly, in those decisions we held that the state law claims were not preempted by the patent laws and that our prior decision in Concrete Unlimited was not to the contrary. In particular, in Dow Chemical we held that state unfair competition claims asserted against a patentee for tortious interference with actual and prospective contractual relations were not preempted by the patent laws, despite the fact that the claims relied on proving that the patent was obtained through inequitable conduct. 139 F.3d at 1473, 46 U.S.P.Q.2D (BNA) at 1123. The court reasoned that the claims are not preempted by the patent law remedy for inequitable conduct--i.e., unenforceability of the patent--because the state law [**31] causes of action did not clash with the objectives of the patent laws, and because they included additional elements not found in the patent law remedy. See id. at 1473, 1475, 1477, 46 U.S.P.Q.2D (BNA) at 1123-26. In reaching this decision, we distinguished Concrete Unlimited on the ground that that case involved "good faith enforcement of a patent," whereas the claims in Dow Chemical were premised on bad faith patent enforcement, the patentee allegedly having known that the patent was unenforceable due to inequitable conduct. Id. at 1476, 46 U.S.P.Q.2D (BNA) at 1126. We emphasized that the state tort claims at issue were premised on "bad faith misconduct in the marketplace." Id. at 1477, 46 U.S.P.Q.2D (BNA) at 1126. Bad faith marketplace conduct played a central role in our Hunter Douglas decision as well. In that case we opined that there is no conflict-type preemption of various state law claims based on publicizing an allegedly invalid and unenforceable patent in the marketplace as long as the claimant can show that the patent holder acted in bad faith

in publication of the patent. See [Hunter Douglas, 153 F.3d at 1336-37, 47 U.S.P.Q.2D \(BNA\) at 1782](#). [***1346] [**32]

C. The conflict analysis

Since nothing in our prior case law dictates the answer to the question of whether recognizing a § 43(a) claim in the context here would present an irreconcilable conflict with the patent or antitrust laws, we address the issue as a matter of first impression.

1. Antitrust laws

We first turn to the question of whether Exzec's § 43(a) claim may be barred by the federal antitrust laws. In this regard, the district court stated, "It appears that an Antitrust claim could provide a remedy in this case and therefore the rationale in [Pro-Mold](#) . . . might be deemed applicable." [Zenith II, 1998 WL 59570](#), at *7. The court appears to be referring to the latter part of the above-quoted passage in [Pro-Mold](#):

The Supreme Court has held that "enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present." Thus, there are adequate remedies to deal with inequitable conduct when it is found. Resort to federal unfair competition law is not one of them.

[75 F.3d at 1575, 37 U.S.P.Q.2D \(BNA\) at 1631](#) (citation omitted). The [**33] point of this statement is simply that there is in federal law established remedies for infringement suits wrongfully brought, and that this includes, in addition to remedies provided under patent law, remedies within the ambit of the antitrust laws. See, e.g., [Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068, 46 U.S.P.Q.2D \(BNA\) 1097, 1104](#) (Fed. Cir.), cert. denied, 142 L. Ed. 2d 145, 119 S. Ct. 178 (1998).

The issue is not whether Exzec has adequate remedies under the antitrust laws. Rather, the question is whether allowing Exzec to pursue a § 43(a) claim under the facts of this case would somehow conflict with the purpose and scope of that body of law. There is no conflict. First, rather [**1352] than conflicting, the Lanham Act and the antitrust laws share a common purpose--fostering fair and unfettered competition. See [Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 198, 83 L. Ed. 2d 582, 105 S. Ct. 658 \(1985\)](#) (noting that Congress enacted the Lanham Act to "foster competition"); [Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 877, 228 U.S.P.Q. \(BNA\) 90, 101](#) (Fed. Cir. 1985) ("the underlying goal of the [**34] antitrust laws is to promote competition").

Second, the elements of a federal antitrust claim and a § 43(a) claim are substantially different. For example, unlike a § 43(a) claim, a Sherman Act § 2 antitrust claim requires, among other things, identification of the relevant market and establishment of monopoly power in that market. See, e.g., [United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#) ("The offense of monopoly power 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 as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."). See also [Loctite Corp., 781 F.2d at 875, 228 U.S.P.Q. \(BNA\) at 100](#) (noting that to establish an illegal attempt to monopolize the claimant must establish a specific intent to monopolize and a dangerous probability of success). We need not belabor the point. Recognizing a § 43(a) claim in the context here will in no way thwart the congressional purpose embodied in the antitrust laws.

2. Patent laws

[**35] We turn now to the question of whether Exzec's § 43(a) claim may be barred by the patent laws. That is, we consider the potential conflict between the patent laws and the federal proscription against unfair trade practices contained in the Lanham Act. Our task in this regard is not unlike that which this and other courts encountered in resolving the tension between the federal patent and antitrust laws, when an accused infringer seeks to impose antitrust liability on a patentee in response to the patentee seeking judicial enforcement of the patent. The patent and antitrust laws are complementary in purpose in that they each promote innovation and competition, see [Loctite Corp., 781 F.2d at 876-77, 228 U.S.P.Q. \(BNA\) at 100-01](#), yet a conflict seemingly arises when an accused infringer

attempts to use "the long reach of antitrust law" to frustrate an honest patentee's right to enforce a patent. See Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 996 (9th Cir. 1979).

Decisions in this area have aimed at achieving a suitable accommodation between the differing mechanisms of the patent and antitrust laws. The accommodation has been achieved by erecting certain [**36] barriers to antitrust suits against a patentee attempting to enforce its patent. For example, in Handgards the plaintiff based its antitrust action upon its contention that the antitrust defendant had earlier initiated a series of patent infringement suits against the plaintiff in bad faith, that is, with knowledge that the patents, though lawfully-obtained, were invalid. Id. at 987, 994. To accommodate the [***1347] tension such an action presented with the patent laws, the Ninth Circuit required proof of bad faith by clear and convincing evidence. See id. at 996. Similarly, for an antitrust counterclaim premised on the patentee allegedly having brought suit on its patent without any belief in infringement, we have required clear and convincing proof of bad faith by the patentee. See Locite Corp., 781 F.2d at 876-77, 228 U.S.P.Q. (BNA) at 100-01. More recently, this court stated that a patentee who brings an infringement suit may be stripped of its exemption from the antitrust laws and "subject to antitrust liability . . . if the alleged infringer (the antitrust plaintiff) proves [among other things] (1) that the asserted patent was obtained through [**37] knowing and willful fraud . . . , or (2) that the infringement suit was 'a mere sham' Nobelpharma, 141 F.3d at 1068, 46 U.S.P.Q.2D (BNA) at 1104.

HN11[[↑]] Though the differences between the Lanham Act and the patent laws may not [*1353] appear as sharp as those between the patent and antitrust laws, there is a tension. We have on several occasions recognized that a patentee's statements regarding its patent rights are conditionally privileged under the patent laws, so that such statements are not actionable unless made in bad faith. In Hunter Douglas we recently stated that "federal patent law bars the imposition of liability for publicizing a patent in the marketplace unless the plaintiff can show that the patentholder acted in bad faith." 153 F.3d at 1336, 47 U.S.P.Q.2D (BNA) at 1782. Similarly, in Concrete Unlimited we recognized that **HN12**[[↑]] a "patent owner has the right to . . . enforce its patent, and that includes threatening alleged infringers with suit." 776 F.2d at 1538, 227 U.S.P.Q. (BNA) at 785.

We have made similar statements in a number of other cases. See, e.g., Mikohn Gaming Corp. v. Acres Gaming, Inc., 165 F.3d 891, 897, 49 U.S.P.Q.2D (BNA) 1308, 1312 (Fed. Cir. 1998) [**38] ("**HN13**[[↑]] Federal precedent is that communications to possible infringers concerning patent rights is not improper if the patentholder has a good faith belief in the accuracy of the communication."); Virginia Panel Corp. v. MAC Panel Co., 133 F.3d 860, 869, 45 U.S.P.Q.2D (BNA) 1225, 1232 (Fed. Cir. 1997) **HN14**[[↑]] ("[A] patentee must be allowed to make its rights known to a potential infringer so that the latter can determine whether to cease its allegedly infringing activities, negotiate a license if one is offered, or decide to run the risk of liability and/or the imposition of an injunction."), cert. denied, 142 L. Ed. 2d 40, 119 S. Ct. 52 (1998); Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 709, 24 U.S.P.Q.2D (BNA) 1173, 1180 (Fed. Cir. 1992) (stating that a patentholder "that has a good faith belief that its patents are being infringed violates no protected right when it so notifies infringers"). See also Virtue v. Creamery Package Mfg. Co., 227 U.S. 37-38, 57 L. Ed. 393, 33 S. Ct. 202 (1913) ("**HN15**[[↑]] Patents would be of little value if infringers of them could not be notified of the consequences of infringement, or proceeded against in the courts. [**39] Such action, considered by itself, cannot be said to be illegal."); Kaplan v. Helenhart Novelty Corp., 182 F.2d 311, 314, 85 U.S.P.Q. (BNA) 285, 287 (2d Cir. 1950) ("**HN16**[[↑]] It is not an actionable wrong for one in good faith to make plain to whomsoever he will that it is his purpose to insist upon what he believes to be his legal rights, even though he may misconceive what those rights are.").

HN17[[↑]] This privileged right of a patentee to notify the public of its patent rights is statutorily rooted in the patent laws at 35 U.S.C. § 287, which authorizes patentholders to "give notice to the public" of a patent by marking its patented articles and makes marking or specific notice to the accused infringer a prerequisite to the recovery of damages. See Hunter Douglas, 153 F.3d at 1336, 47 U.S.P.Q.2D (BNA) at 1782.

The previously-described principles for resolving conflict among federal acts require us to recognize this precept of patent law. See Palumbo Bros., 145 F.3d at 862. **HN18**[[↑]] Accordingly, we conclude that, before a patentee may be held liable under § 43(a) for marketplace activity in support of its patent, and thus be deprived of the right to [**40] make statements about potential infringement of its patent, the marketplace activity must have been

undertaken in bad faith. This prerequisite is a function of the interaction between the Lanham Act and patent law, and is in addition to the elements required by § 43(a) itself, as § 43(a) alone does not require bad faith, see, e.g., Seven-Up Co., 86 F.3d at 1383 n.3; Brandt Consol., 801 F. Supp. at 174 ("bad faith is not an element of this [§ 43(a)] cause of action"); Procter & Gamble Co. v. Chesebrough-Pond's, Inc., 747 F.2d 114, 119 (2d Cir. 1984) (plaintiff need not prove bad faith to establish § 43(a) liability).

Requiring bad faith in this context is closely analogous to the conclusion we reached in Hunter Douglas--i.e., that, to impose *state* tort liability against a patentee for publicizing its patent, bad faith in publication of the patent must be established to avoid preemption by patent law, regardless of whether the state cause of [*1354] action otherwise requires bad faith. See Hunter Douglas, 153 F.3d at 1336-37, 47 U.S.P.Q.2D (BNA) at 1782. [***1348]

By adding a bad faith requirement to a § 43(a) claim in [**41] the context of this case, we give effect both to the rights of patentees as protected by the patent laws under ordinary circumstances, and to the salutary purposes of the Lanham Act to promote fair competition in the marketplace. As thus understood, there is no conflict between the demands of the Lanham Act and the Patent Act, and a patentee is easily able to comply with both Acts. Furthermore, patent law is not frustrated because bad faith marketplace statements concerning patents do not further the purposes of the patent law. Cf. Handgards, 601 F.2d at 993 ("Infringement actions initiated and conducted in bad faith contribute nothing to the furtherance of the policies of either the patent law or the antitrust law.").

Indeed, recognizing a § 43(a) claim for such conduct should have no discernible effect on the three objectives of the patent laws identified by the Supreme Court in Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480-81, 40 L. Ed. 2d 315, 94 S. Ct. 1879 (1974), namely, providing an incentive to invent, promoting the full disclosure of inventions, and ensuring that ideas in the public domain remain there. Cf. Dow Chem., 139 F.3d at 1475, 46 U.S.P.Q.2D (BNA) at 1124 [**42] (opining that the three objectives of patent law are not adversely affected by recognizing a state tort remedy for a patentee threatening to sue on a patent obtained through inequitable conduct).

On the other hand, with respect to the Lanham Act, recognizing a § 43(a) claim in this context will further the statutory purposes of § 43(a) of "preventing deception and unfair competition" in the marketplace, Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 773, 120 L. Ed. 2d 615, 112 S. Ct. 2753 (1992), and requiring bad faith will not unduly thwart those purposes. In sum, imposing § 43(a) liability on a patentee for marketplace statements regarding infringement and scope of its patent, assuming such statements otherwise satisfy the elements of § 43(a), does not impermissibly conflict with the patent laws as long as the statements are proven to have been made in bad faith.

In the case before us, there are two allegedly false statements at issue: (1) that Exzec's product infringes the Zenith patents; and (2) that Exzec could not manufacture a noninfringing product (which we read as stating that Exzec could not design around the patents). Only statements of the [**43] latter type would be actionable under § 43(a) if we were to follow the distinction drawn in the previously discussed district court opinions in Western Publishing, 1994 WL 23008, at *1, Brandt Consolidated, 801 F. Supp. at 174, and Chromium Industries, 448 F. Supp. at 556-57. However, we decline to draw that distinction. Both statements, if made in bad faith, are damaging to competition and are not the type of statements protected by the patent laws. Furthermore, such line drawing would unnecessarily complicate the law, creating the issue as to whether a particular statement falls in the former or latter category. Thus either or both such statements, if made in bad faith, can be reached by § 43(a) (assuming the elements of such a claim are otherwise made out) without conflicting with the patent or antitrust laws.

HN19 Exactly what constitutes bad faith remains to be determined on a case by case basis. Obviously, if the patentee knows that the patent is invalid, unenforceable, or not infringed, yet represents to the marketplace that a competitor is infringing the patent, a clear case of bad faith representations is made out. Furthermore, [**44] statements to the effect that a competitor is incapable of designing around the patent are inherently suspect. They are suspect not only because with sufficient effort it is likely that most patents can be designed around, but also because such a statement appears nearly impossible to confirm *a priori*. For these reasons, the bad faith element may be much easier to satisfy for statements of this type. See Mikohn [*1355] Gaming, 165 F.3d at 897, 49

U.S.P.Q.2D (BNA) at 1312 (noting that "bad faith" may encompass subjective as well as objective considerations, and that the patentee's particular statements themselves are not irrelevant to determining bad faith).

III. The State Unfair Competition Claim

Finally, we address the question of whether Exzec's state-law tortious interference claim may be preempted by the patent or antitrust laws. The issue of preemption by patent law has been substantially resolved by our recent Dow Chemical and Hunter Douglas decisions. As noted previously, in Dow Chemical we held that state tortious interference with contractual relations claims were not preempted by the patent laws (despite the fact that the claims relied on proving inequitable [**45] conduct), in part because the claims involved allegations of bad faith marketplace conduct by the patentee (i.e., asserting its patent in the marketplace allegedly having known that the patent was unenforceable due to inequitable conduct). 139 F.3d at 1476-77, 46 U.S.P.Q.2D (BNA) at 1126. While the tortious interference claims in Dow Chemical involved inequitable conduct, we also noted that a holder of a valid and enforceable patent who knowingly makes baseless infringement [***1349] assertions against a competitor's customers may also be subject to such liability. Id.

In Hunter Douglas, we concluded that state tort claims, including tortious interference claims, based on publicizing a patent in the marketplace are not preempted by the patent laws if the claimant can show that the patentholder acted in bad faith in its publication of the patent. 153 F.3d at 1322, 1336-37, 47 U.S.P.Q.2D (BNA) at 1771, 1782. Thus, under the Hunter Douglas analysis, to avoid patent law preemption of such state law tort claims, bad faith must be alleged and ultimately proven, even if bad faith is not otherwise an element of the tort claim. Id. at 1336-37, 47 U.S.P.Q.2D (BNA) at 1782. [**46]

Guided by our Dow Chemical and Hunter Douglas decisions, and consistent with the analysis previously set forth with regard to the application of federal unfair trade practice law, we hold that bad faith is a prerequisite to Exzec's state-law tortious interference claim; without it, the claim is preempted by patent law.

With regard to possible preemption of Exzec's state tort claim by federal antitrust law, for the reasons discussed above regarding the relationship of federal antitrust law and federal unfair trade law, we conclude that the state tort claim is not preempted by federal antitrust law. Preemption can occur in any one of three ways--explicit, field, or conflict preemption. See Hunter Douglas, 153 F.3d at 1332, 47 U.S.P.Q.2D (BNA) at 1779. We perceive no preemption in any of these ways. Cf. California v. Arc Am. Corp., 490 U.S. 93, 100, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989) (holding state law claim for price fixing not preempted by federal antitrust laws based in part on presumption against preemption in areas such as unfair business practices traditionally regulated by states). Indeed, Elo Touch has not even attempted to explain how the [**47] antitrust laws preempt Exzec's state tort claim. The antitrust laws are not at issue in the context here.

IV. Summary

We have considered, in this interlocutory appeal, the specific issue of whether, under the facts and circumstances of this case, Exzec's § 43(a) and state unfair competition claims are barred by the patent or antitrust laws. We conclude that they are not, but that the right of a patentee afforded by patent law to assert that a competitor is engaged in wrongful conduct with respect to the patent requires that a complaining competitor allege and prove bad faith for each such claim. The district court, assuming that bad faith might be required, determined that Exzec had adequately alleged bad faith. The correctness of that determination is not before us. Based on the assumption that the district court was correct, we affirm the district court's decision on the issue presented.

[*1356] CONCLUSION

The judgment of the district court denying the motion to dismiss is affirmed, and the matter is remanded to the court for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED

COSTS

Each party shall bear its own costs.

End of Document



Big Bear Lodging Ass'n v. Snow Summit, Inc.

United States Court of Appeals for the Ninth Circuit

February 1, 1999, Argued and Submitted, Pasadena, California ; July 8, 1999, Filed

No. 97-56042

Reporter

182 F.3d 1096 *; 1999 U.S. App. LEXIS 15055 **; 1999-2 Trade Cas. (CCH) P72,577; 99 Cal. Daily Op. Service 5431; 99 Daily Journal DAR 6939

BIG BEAR LODGING ASSOCIATION; SLEEPY FOREST RESORTS, a California corporation; ROBERT POOL, dba Cathy's Country Cottages; MARK TWAIN HANNAH, dba Front Desk Vacation Rentals, Plaintiffs-Appellants, v. SNOW SUMMIT, INC., a California corporation; RICHARD KUN, an individual; FRITZ UPPENLATZ, dba Forest Shores Estates (Inn); JOYCE REED, dba Grey Squirrel Resort; GERRY TAYLOR, dba Bear Mountain Trading Co.; BRUCE VOIGHT, dba Alpine Slide at Magic Mountain; LOREN HAFFEN, dba Boulder Creek Resort, dba Holloway's Marina & RV Park, dba North Shore Landing; ROBERT MCDONALD, dba Shores Acres Lodge & Vacation Rentals; BIG BEAR LAKE RESORT ASSOCIATION; BEAR MOUNTAIN, INC., dba Bear Mountain Ski Resort, a business entity, form unknown, and DOES 1-500, Defendants-Appellees.

Prior History: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-97-00451-R. Manuel L. Real, District Judge, Presiding.

Disposition: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Core Terms

Resort, lodging, tickets, lift, antitrust, discount, leave to amend, anticompetitive, ski, price-fixing, non-members, effects, district court, ski resort, monopolization, allegations, conspiracy, packages, referral, accommodations, Defendants', Practices, antitrust violation, Sherman Act, clarification, competitors, sanctions, Commerce, Mountain, markets

LexisNexis® Headnotes

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

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

HN1[] Standards of Review, De Novo Review

An appellate court reviews a dismissal of a complaint without leave to amend de novo. All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

[HN2](#)[] Defenses, Demurrsers & Objections, Motions to Dismiss

A court may dismiss a complaint 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 allegations in the complaint, however, must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

[HN3](#)[] Amendment of Pleadings, Leave of Court

A complaint may be dismissed without leave to amend only when it is clear that the complaint cannot be saved by further amendment.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Contracts Law > Types of Contracts > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

[HN4](#)[] Practices Governed by Per Se Rule, Boycotts

The Sherman Act [§ 1, 15 U.S.C.S. § 1](#), prohibits agreements that unreasonably restrain trade. Certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. An agreement of such a kind is unlawful per se. Horizontal price-fixing, market division, and certain types of group boycotts are unlawful per se. Other alleged violations are subject to rule of reason analysis to determine whether particular concerted conduct unreasonably restrains competition.

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

Rule of reason analysis is a case-by-case study in which the fact finder weighs all of the circumstances of a case. Proving injury to competition in a rule of reason case almost uniformly requires a claimant to prove the relevant market and to show the effects upon competition within that market. Elaborate market analysis and case-by-case evaluation are unnecessary in cases involving per se antitrust violations because the anticompetitive effects of the practice are presumed.

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

[HN6](#) [] **Private Actions, Standing**

To have standing to bring an antitrust case, a plaintiff must demonstrate that the harm the plaintiff has suffered or might suffer from the practice is an antitrust injury, that is, an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury must be attributable to an anti-competitive aspect of the practice under scrutiny.

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**

Because price-fixing is a per se antitrust violation, price inflation is presumed if price fixing is established. Courts do not evaluate the reasonableness of the price when determining whether price-fixing agreements are unlawful.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

[HN8](#) [] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

An agreement among competitors for the purpose of coercing more favorable terms of trade from third parties than they could obtain through the normal play of competitive forces violates antitrust law.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

[HN9](#) [] **Regulated Practices, Trade Practices & Unfair Competition**

Group boycotts that cut off competitors' access to essential competitive inputs are often deemed per se unlawful.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

[HN10](#) [] **Monopolies & Monopolization, Conspiracy to Monopolize**

Monopolization claims can only be evaluated with reference to properly defined geographic and product markets.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN11**](#) [L] **Monopolies & Monopolization, Attempts to Monopolize**

Two essential elements of an attempted monopolization claim are (1) intent to monopolize, and (2) a dangerous probability of success of achieving monopoly power in a particular market.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

[**HN12**](#) [L] **Price Discrimination, Competitive Injuries**

California's Unfair Practices Act, [*Cal. Bus. & Prof. Code § 17000 et seq.*](#), prohibits several specific anticompetitive practices, but chiefly prohibits selling articles below cost, or giving them away, for the purpose of injuring competitors and destroying competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

[**HN13**](#) [L] **Regulated Practices, Market Definition**

Except when alleging a per se antitrust violation, a plaintiff bringing an antitrust lawsuit must identify the relevant geographic and product markets in which the plaintiff and the defendant competes, and must allege facts demonstrating that the defendant's conduct has an anticompetitive effect on those markets. Market definition is also essential to establish a monopolization claim.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Torts > Business Torts > Commercial Interference > General Overview

[**HN14**](#) [L] **Amendment of Pleadings, Leave of Court**

[*Fed. R. Civ. P. 15\(a\)*](#) specifies that when litigation is still in its early stages, leave should be liberally granted unless amendment would be futile.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

[**HN15**](#) [L] **Reviewability of Lower Court Decisions, Preservation for Review**

Issues appealed but not briefed are deemed abandoned.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN16 [blue icon] **Reviewability of Lower Court Decisions, Preservation for Review**

Issues raised in a brief which are not supported by argument are deemed abandoned.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

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 > Judgments > Preclusion of Judgments > Res Judicata

HN17 [blue icon] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

After a federal district court concludes that a plaintiff has failed to state valid federal antitrust claims, it is free to decide in its discretion, per [28 U.S.C.S. § 1367\(c\)\(3\)](#), whether to continue to exercise supplemental jurisdiction over any state claims or to dismiss those claims for lack of subject matter jurisdiction. If the district court dismisses the state claims for lack of jurisdiction, those claims are not res judicata and the plaintiff may pursue them in state court.

Civil Procedure > Sanctions > Baseless Filings > General Overview

Governments > Courts > Rule Application & Interpretation

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN18 [blue icon] **Sanctions, Baseless Filings**

C.D.Cal. L. Civ. R. 7.19 authorizes a court to sanction parties who file frivolous motions, and C.D.Cal. L. Civ. R. 27(b) authorizes an award of costs and attorneys' fees to opposing counsel if the court finds that the conduct rises to the level of bad faith and/or a willful disobedience of a court order.

Counsel: James G. Allen, Allen & Pappas, Thousand Oaks, California, for the plaintiffs-appellants.

Patrick M. Kelly, Wilson, Elser, Moskowitz, Edelman & Dicker, Los Angeles, California, for the defendants-appellees.

Douglas L. Day, Crowe & Day, Santa Monica, California, for the defendants-appellees.

Evan Eickmeyer and Timothy M. Smith, McKinley & Smith, Sacramento, California, for the defendants-appellees.

Judges: Before: Procter Hug, Jr., Chief Judge, James R. Browning and John T. Noonan, Circuit Judges. Opinion by Judge Browning.

Opinion by: JAMES R. BROWNING

Opinion

[*1099] OPINION

BROWNING, Circuit Judge:

Plaintiffs are lodge operators and lodging referral services in a ski resort area in Southern California. They allege antitrust violations by other lodge operators and two ski resorts in the area, allegedly injuring Plaintiffs. The district court dismissed the complaint without leave to amend. We affirm in part and reverse in part.

I

Plaintiffs base their claims on the following [**2] allegations, which we accept as true for purposes of reviewing dismissal of a complaint for failure to state a valid claim. See *Fed. R. Civ. P. 12(b)(6)*; *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*.

Plaintiffs provide lodging accommodations and lodging referral services in the Big Bear Valley recreational area in the San Bernardino mountains of Southern California. For years, the two ski resorts [*1100] in the area, Snow Summit, Inc., and Bear Mountain, Inc., offered bulk discounts on ski lift tickets to lodges and tourist businesses, including several Plaintiffs. By virtue of these discounts, Plaintiffs were able to offer "ski packages," combinations of lodging and lift tickets, at attractive prices. Sales of such "ski packages" constituted a substantial portion of the business done by some Plaintiffs.

In about January 1994, Richard Kun, president of Snow Summit, helped form the Defendant Big Bear Lake Resort Association. Kun asked the City of Big Bear Lake to refrain from enacting a tax on Snow Summit or Bear Mountain in exchange for the Resort Association's commitment to collect funds from the lodges and ski resorts in Big Bear Valley and to use said funds [**3] to promote Big Bear Valley. He also asked the city to reduce its transient occupancy tax on local lodges from eight to six percent. The Resort Association eventually entered into an agreement with the Big Bear Chamber of Commerce, providing that the organizations would grant reciprocal memberships to each other at no cost, and that inquiries for lodging received by the Chamber of Commerce would be referred to the Resort Association.

Kun advised Plaintiff Robert Pool that Snow Summit would continue to sell discount lift tickets to Pool and Plaintiff Sleepy Forest Resorts only if Pool joined the Resort Association. Plaintiffs Pool, Sleepy Forest, Mark Twain Hannah, and members of the Big Bear Lodging Association joined the Resort Association. Because their businesses were located within the city of Big Bear Lake, Plaintiff lodges paid 2.5% of their lodging accommodation income as dues to the Association. Lodges located outside the city were charged only 0.5% of their income as dues.

Since its formation, the Resort Association has engaged in activities discriminatory to certain members, including some Plaintiffs. The Resort Association favored friends of directors of the Association [**4] by providing them with choice lodging referrals and preferential advertising, and removed advertisements purchased by Pool and Sleepy Forest from magazines the Resort Association mailed to potential customers. In the fall of 1995, Pool and Sleepy Forest quit the Resort Association because of these discriminatory practices. In October 1995, Kun advised Pool that, unless Pool and Sleepy Forest rejoined the Resort Association, neither Snow Summit nor Bear Mountain would sell them discount lift tickets nor would they honor any tickets purchased by them. Moreover, he said Snow Summit would no longer supply discount lift tickets to Sleepy Forest. Snow Summit and Bear Mountain agreed that they would refuse to sell discount lift tickets to non-members of the Resort Association. Kun advised Resort Association members that they were prohibited from selling, trading or conveying Snow Summit discount lift tickets to Pool or Sleepy Forest.

In 1996, the Resort Association adopted rules prohibiting members from belonging to other local referral services in which non-members participated, and from referring any business to non-members. In about 1996, the Resort Association suspended Doc's Getaway, [**5] which is operated by Sleepy Forest, because Sleepy Forest allegedly referred a call received by Doc's Getaway to a non-member. The Resort Association terminated Hannah's membership in November 1996 because he refused to remove a listing for the Big Bear Lake Area Chamber of

Commerce, a referral service established by Hannah, from the local phone directory. The Resort Association objected to the listing because Hannah was receiving calls that might otherwise go to the Resort Association per its agreement with the Chamber of Commerce. Some Plaintiffs were threatened or denied membership in the Resort Association because of their personal relationships with Resort Association members who violated Resort Association rules.

Resort Association members also engaged in a price-fixing conspiracy, agreeing [*1101] on uniform rates and charges for lodge accommodations, ski packages and resort services; publishing and disseminating advertising materials reflecting the agreed-upon rates; communicating for the purpose of implementing this conspiracy; and charging and collecting the agreed-upon rates.

Plaintiffs assert the Defendants' alleged conduct violated [sections 1](#) and [2](#) of the Sherman Act and California's [**6] Cartwright Act, and breached Plaintiffs' subscription agreements with the Resort Association. The district court dismissed Plaintiffs' complaint without leave to amend, stating only: "This is not an antitrust case, period." Plaintiffs filed a timely appeal.

II

HN1[] We review dismissal of a complaint without leave to amend *de novo*.¹ See [Cahill, 80 F.3d at 337](#) (dismissal for failure to state a claim); [Dumas v. Kipp, 90 F.3d 386, 389 \(9th Cir. 1996\)](#) (dismissal without leave to amend). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." [Cahill, 80 F.3d at 337-38](#). "**HN2**[] A court may dismiss a complaint 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 [Cahill, 80 F.3d at 338](#). The allegations in the complaint, however, must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." [Conley v. Gibson, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#). **HN3**[] A complaint may be dismissed without [**7] leave to amend only "when it is clear that the complaint cannot be saved by further amendment." [Dumas, 90 F.3d at 389](#).

A. Antitrust Claims

HN4[] Sherman Act [§ 1](#) prohibits agreements [**8] that unreasonably restrain trade. See [15 U.S.C. § 1; NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 142 L. Ed. 2d 510, 119 S. Ct. 493, 497 \(1998\)](#).² "Certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. An agreement of such a kind is unlawful *per se*." [NYNEX, 119 S. Ct. at 497](#) (citations omitted). Horizontal price-fixing, market division, and certain types of group boycotts are unlawful *per se*. See *id.* Other alleged violations are subject to "rule of reason"

¹ Defendants, citing [Janicki Logging Co. v. Mateer, 42 F.3d 561, 566 \(9th Cir. 1994\)](#), argue that the district court's decision to deny leave to amend should be reviewed for abuse of discretion. The motion in Janicki involved the court's management of its own docket: the plaintiff sought to name an additional defendant eighteen months after it had filed its complaint, a year after the deadline for naming additional parties in the court's scheduling order had expired, and eighteen months after plaintiff's separate action against the proposed defendant had been dismissed by a different court. See *id.* In contrast, the motion to amend in this case turns on the merits: whether Plaintiffs have alleged valid causes of action. We therefore review both the motion to dismiss and the motion for leave to amend *de novo*.

² California's Cartwright Act, [Cal. Bus. & Prof. Code §§ 16700-16770](#), is patterned after the Sherman Act. California courts look to federal case law interpreting the Sherman Act for guidance in interpreting the Cartwright Act. See [Chicago Title Ins. Co. v. Great Western Fin. Corp., 69 Cal. 2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481 \(1968\)](#).

analysis to determine "whether particular concerted conduct unreasonably restrains competition." [Oltz v. St. Peter's Community Hosp.](#), [861 F.2d 1440, 1445 \(9th Cir. 1988\)](#).

[**9] [HN5](#)

Rule of reason analysis "is a case-by-case study in which the fact finder weighs all of the circumstances of a case." *Id.* (internal quotation marks omitted). "Proving injury to competition in a rule of reason case almost uniformly requires a claimant to prove the relevant market and to show the effects upon competition within that market." [861 F.2d at 1446](#). Elaborate [\[*1102\]](#) market analysis and case-by-case evaluation are unnecessary in cases involving *per se* antitrust violations because the anticompetitive effects of the practice are presumed. See [id. at 1445](#).

[HN6](#) To have standing to bring an antitrust case, a plaintiff must demonstrate that the harm the plaintiff has suffered or might suffer from the practice is an "antitrust injury," that is, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." [Atlantic Richfield Co. v. USA Petroleum Co.](#), [495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#) (internal quotation marks omitted). The injury must be "attributable to an anti-competitive aspect of the practice under scrutiny." *Id.*

1. Price Fixing

Plaintiffs sufficiently allege a conspiracy [\[**10\]](#) to fix prices of lodging accommodations, lift tickets, and ski packages, a *per se* antitrust violation. Plaintiffs, however, have failed to allege antitrust injury resulting from all aspects of the alleged price-fixing conspiracy.

Certain Plaintiffs have alleged antitrust injury resulting from the alleged price-fixing of lift tickets. Pool, Sleepy Forest, and Plaintiff Lodging Association purchase lift tickets and thus suffer injury due to the presumably inflated price ³ of those tickets. ⁴ The remaining Plaintiffs should be granted leave to amend to allege, if they are able to do so, that they too purchase resort services at prices fixed by Defendants or were otherwise injured by Defendants' price-fixing.

[\[**11\]](#) Plaintiffs have not alleged antitrust injury resulting from the price-fixing of ski packages and lodging accommodations. They are competitors to, rather than customers of, Defendants in the sale of these services. Thus, Plaintiffs stand to benefit from the fact that prices for those services are inflated. See [Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.](#), [475 U.S. 574, 583, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#) (competitors stand to gain from conspiracy to charge supracompetitive prices); 2 Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#) Par. 373b (1995). Competitors, however, may have standing to challenge practices used to enforce a price-fixing conspiracy. See *id.* Par. Par. 373d, 373e. Plaintiffs have alleged injuries resulting from their exclusion from the Resort Association, but have not alleged that these injuries resulted from the price-fixing conspiracy. Plaintiffs allege the Resort Association favored certain members in advertising and referrals, and that some Plaintiffs quit the Resort Association because they refused "to participate in the wrongful acts versus and discriminatory treatment of lodge owners." However, Plaintiffs attribute this favoritism [\[**12\]](#) to personal relations rather than participation or non-participation in an antitrust conspiracy. Plaintiffs should be granted leave to amend to allege, if they are able to do so, injury resulting from practices used to enforce the alleged price-fixing conspiracy.

We reverse the district court's dismissal of the claims of Plaintiffs Pool, Sleepy Forest and Plaintiff Lodging Association for price fixing of lift tickets in violation of Sherman Act [§ 1](#) and the Cartwright Act. We affirm the dismissal of the remaining Plaintiffs' claim for price-fixing of lift tickets and of all Plaintiffs' claims for price-fixing of

³ [HN7](#) Because price-fixing is a *per se* antitrust violation, price inflation is presumed. Courts do not evaluate the reasonableness of the price when determining whether price-fixing agreements are unlawful. See [Arizona v. Maricopa County Med. Soc'y](#), [457 U.S. 332, 350](#) & n.22, [73 L. Ed. 2d 48, 102 S. Ct. 2466 \(1982\)](#).

⁴ Defendants argue that Plaintiffs have standing to bring an antitrust action only if they compete with Defendants. This is incorrect. Consumers have standing to challenge antitrust violations that cause them injury. Indeed, purchasers are preferred antitrust plaintiffs in price-fixing cases. See 2 Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#) Par. 370 (1995).

lodging accommodations and ski packages, but reverse the district court's [*1103] denial of leave to amend the complaint to state such claims, if Plaintiffs are able to do so.

2. Agreement by Snow Summit and Bear Mountain to Sell Discount Lift Tickets on Fixed Terms

Plaintiffs allege that the ski resorts agreed to sell discount lift tickets to lodge operators only if they joined the Resort Association. [HN8](#)[] An agreement among competitors "for the purpose of coercing more favorable terms of trade from third parties than they could obtain through the normal play of competitive forces" [**13] violates antitrust law. [De Jong Packing Co. v. United States Dep't of Agric.](#), 618 F.2d 1329, 1336 (9th Cir. 1980) (meat packers' agreement to purchase cattle from stockyards only on "subject to inspection" basis was unlawful restraint of trade); see also [Paramount Famous Lasky Corp. v. United States](#), 282 U.S. 30, 41-42, 75 L. Ed. 145, 51 S. Ct. 42 (1930) (film distributors' agreement that they will only do business with exhibitors according to the terms of a standard contract requiring arbitration violated Sherman Act). Plaintiffs allege that the condition that lodges must belong to the Resort Association is a "more favorable term of trade" for the ski resorts, because it permits the resorts to shift the costs of promoting tourism in the region from themselves (imposed through a threatened city tax) to the broader tourism business community (imposed through Resort Association dues).

Pool, Sleepy Forest and Plaintiff Lodging Association purchased lift tickets for resale and thus allege sufficient antitrust injury to challenge this agreement. As to these Plaintiffs, we reverse the district court's dismissal of the claim that the ski resorts have unlawfully conspired to sell [**14] discount lift tickets only to Resort Association members in violation of Sherman Act [§ 1](#) and the Cartwright Act. The court should grant the remaining Plaintiffs leave to amend the complaint to allege antitrust injury with respect to this claim, if they can do so.

3. Group Boycott

Plaintiffs have alleged a (group boycott by the Resort Association ⁵ and its members against non-members. Resort Association rules allegedly bar members from belonging to any other referral associations, and from forwarding lodging referrals to non-members. The ski resorts also allegedly refuse to sell discount lift tickets to non-members and at least Snow Summit allegedly informed Resort Association members that they cannot resell discount lift tickets to certain non-members. Thus, the boycott restricts non-members' access to customers (by blocking referrals) and supplies (by withholding discount ski lift tickets) that may be necessary for effective competition. Cf. [Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.](#), 472 U.S. 284, 294, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985) [HN9](#)[] (group boycotts that cut off competitors' access to essential competitive inputs are often deemed [**15] per se unlawful). Plaintiffs are all non-members of the Resort Association and thus suffer an antitrust injury as the direct targets of the boycott.⁶

[**16] [*1104] We reverse the district court's dismissal of Plaintiffs' claim that Defendants participated in a group boycott in violation of Sherman Act [§ 1](#) and the Cartwright Act.

4. Dues Differential Between City and Non-City Businesses

⁵ Defendants argue that the Resort Association cannot be liable for antitrust violations because it is a nonprofit association. A nonprofit organization that engages in commercial activity, however, is subject to federal antitrust laws. See [Dedication and Everlasting Love to Animals v. Humane Soc'y of the United States, Inc.](#), 50 F.3d 710, 713 (9th Cir. 1995) (dictum); 1A Areeda & Hovenkamp Par. 261a; cf. [Goldfarb v. Virginia State Bar](#), 421 U.S. 773, 787-88, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975) (learned professions are subject to antitrust laws). The RA provides its members with access to discount lift tickets and lodging referrals and markets its members' services, all of which are commercial activities.

⁶ Plaintiff referral associations that allege a loss of membership due to the RA's policies may establish standing in their own right, cf. [Thompson v. Metropolitan Multi-List, Inc.](#), 934 F.2d 1566, 1571 (11th Cir. 1991), and otherwise may be able to establish standing to sue on behalf of their members, see 2 Areeda & Hovenkamp Par. 379b.

Plaintiffs allege Defendants "joined together . . . to preclude lodge owners in the city from competing in [the ski package] market unless they paid 2.5% of their gross income" in dues to the Resort Association, which was five times the dues rate for lodge owners outside the city. This dues differential does not fit within any category of *per se* antitrust violation and Plaintiffs have not alleged anticompetitive effects. See *infra* Part II(A)(7). Absent allegations of anticompetitive effects, it is impossible to determine whether Plaintiffs have alleged an antitrust violation or antitrust injury.

We affirm the district court's dismissal of Plaintiffs' claim that the dues differential violates Sherman Act [§ 1](#) and the Cartwright Act, but reverse the district court's denial of leave to amend the complaint to allege such a claim, if Plaintiffs have a factual basis for doing so.

5. Monopolization

Plaintiffs allege Defendants monopolized or attempted [\[**17\]](#) to monopolize commerce. [HN10](#)[↑] Monopolization claims can only be evaluated with reference to properly defined geographic and product markets. See *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, [875 F.2d 1369, 1373 \(9th Cir. 1989\)](#). Plaintiffs do not sufficiently identify the markets affected by Defendants' alleged antitrust violations. See *infra* Part II(A)(7). Plaintiffs also fail to allege [HN11](#)[↑] two essential elements of an attempted monopolization claim: (1) intent to monopolize, and (2) a dangerous probability of success of achieving monopoly power in a particular market. See *Spectrum Sports, Inc. v. McQuillan*, [506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 \(1993\)](#). However, these deficiencies may be curable by amendment.

We affirm the district court's dismissal of Plaintiffs' Sherman Act [§ 2](#) and Cartwright Act monopolization and attempted monopolization claims, but reverse the court's denial of leave to amend to state such claims, if Plaintiffs are able to do so.

6. Unfair Practices Act

Plaintiffs allege Defendants violated [HN12](#)[↑] California's Unfair Practices Act, [Cal. Bus. & Prof. Code §§ 17000-17101](#). This statute prohibits several specific anticompetitive practices, but [\[**18\]](#) "chiefly prohibits selling articles *below cost*, or giving them away, for the purpose of injuring competitors and destroying competition." 5 B.E. Witkin, *Summary of California Law* § 591 (9th ed. 1987). Plaintiffs do not allege that Defendants sold products or services below cost. The statute bars price discrimination in sales to different geographic locations, see [Cal. Bus. & Prof. Code §§ 17031, 17040](#), which might seem to apply to the difference in Resort Association dues charged to lodge operators in and outside the city. Such discrimination is unlawful, however, only if accompanied by anticompetitive intent. See *id.* [§ 17040](#). Plaintiffs have failed to allege facts that would support an inference that the Resort Association acted with anticompetitive intent when it adopted its two-tiered dues structure. None of the other specific prohibitions in the Unfair Practices Act are clearly implicated in the complaint. We cannot say, however, that Plaintiffs can allege no set of facts that might entitle them to relief under this statute. We affirm the district court's dismissal of Plaintiffs' Unfair Practices Act claim, but reverse the denial of leave to amend.

7. Anticompetitive [\[**19\]](#) Effects: Market Definition

[HN13](#)[↑] Except when alleging a *per se* antitrust violation, Plaintiffs must identify the relevant geographic and product markets in which Plaintiffs and Defendants compete and allege facts demonstrating that Defendants' conduct has an anticompetitive [\[*105\]](#) effect on those markets. See *supra* Part II(A)(4); [Oltz, 861 F.2d at 1446](#). Market definition is also essential to establish a monopolization claim. See *supra* Part II(A)(5).

Plaintiffs' complaint refers to the geographic market of Big Bear Valley and to product markets for lodging accommodations and ski packages. Plaintiffs do not, however, allege that Big Bear Valley is the area of effective competition in which buyers of these products can find alternative sources of supply, or that there are no other goods or services that are reasonably interchangeable with lodging accommodations or ski packages within this

geographic market. See [Oltz, 861 F.2d at 1446](#). Nor have Plaintiffs alleged that Defendants' conduct resulted in anticompetitive effects within appropriately defined markets. Plaintiffs should be granted leave to amend their complaint to allege anticompetitive effects within a particular **[**20]** market, if they are able to do so.

B. State-Law Breach of Contract and Tortious Interference Claims

Plaintiffs allege Defendants breached certain Plaintiffs' subscription agreements with the Resort Association. Although Defendants did not address this claim in their briefs supporting their motion to dismiss, the district court dismissed the claim without explanation and without providing Plaintiffs an opportunity to be heard on the issue. We reverse and remand for the court to consider and decide the sufficiency of the breach of contract allegations after affording the parties an opportunity to submit argument.

In their appellate brief, Plaintiffs assert a claim for breach of the Resort Association's contract with the Chamber of Commerce and state-law claims for tortious inducement of breach of contract, intentional interference with prospective economic advantage, and negligent interference with contractual relations. None of these claims appears in the current complaint. On remand, Plaintiffs may seek leave to amend their complaint to state these additional claims, if they wish to do so. [HN14](#)[↑] Because this litigation is still in its early stages, leave should be liberally granted **[**21]** unless amendment would be futile. See [Fed. R. Civ. P. 15\(a\)](#).

III

Plaintiffs' complaint contained class allegations, and allegations that the ski resorts violated the terms of their Special Use Permits issued by the United States Forest Service. Defendants moved to strike these allegations as immaterial. The district court granted the motion without explanation.

Although Plaintiffs appealed this order, their appellate brief does not address it. [HN15](#)[↑] Issues appealed but not briefed are deemed abandoned. [Pierce v. Multnomah County, 76 F.3d 1032, 1037 n.3 \(9th Cir. 1996\)](#). Plaintiffs mention that they brought a breach of contract claim based the ski resorts' alleged violation of the Special Use Permits, but offer no supporting argument or citations to authority. [HN16](#)[↑] "Issues raised in a brief which are not supported by argument are deemed abandoned." [Acosta-Huerta v. Estelle, 7 F.3d 139, 144 \(9th Cir. 1993\)](#) (quoting [Leer v. Murphy, 844 F.2d 628, 634 \(9th Cir. 1988\)](#)).

IV

Plaintiffs moved for reconsideration or clarification of the order of dismissal. The court denied the motion as frivolous and ordered Plaintiffs to pay a total of \$ 4,000 in attorneys' fees and costs to Defendants. **[**22]** Plaintiffs timely appealed.

Plaintiffs' motion was a reasonable attempt to clarify whether the district court had ruled on Plaintiffs' state law claims, and, if so, whether they were dismissed on the merits or for lack of jurisdiction. It was reasonable for Plaintiffs to seek clarification to ensure that the court had considered all of Plaintiffs' claims when ruling on Defendants' motion to dismiss and had not neglected or overlooked their state claims. Such a motion was **[*1106]** appropriate under [Rule 60\(a\) of the Federal Rules of Civil Procedure](#)⁷ or Local Rule 7.16(c).⁸

⁷ The Federal Rules of Civil Procedure provide that "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party . . ." [Fed. R. Civ. P. 60\(a\)](#) (emphasis added). The United States District Court for the Central District of California has no local rules recognizing or governing motions for modification or clarification.

⁸ The United States District Court for the Central District of California permits parties to file motions for reconsideration on the grounds, *inter alia*, of "a manifest showing of a failure to consider material facts presented to the Court before such decision." C.D. Cal. L. Civ. R. 7.16(c).

[**23] Plaintiffs' request to be relieved of the *res judicata* effects of the court's ruling also was reasonable. The district court had federal question jurisdiction over Plaintiffs' federal claims and supplemental jurisdiction over their state claims. [HN17](#)[↑] After the court concluded that Plaintiffs had failed to state valid federal antitrust claims, it was free to decide in its discretion whether to continue to exercise supplemental jurisdiction over Plaintiffs' state claims or to dismiss those claims for lack of subject matter jurisdiction. See [28 U.S.C. § 1367\(c\)\(3\)](#). If the court dismissed the state claims for lack of jurisdiction, those claims would not be *res judicata* and Plaintiffs could pursue them in state court. Because the district court did not explain the basis for its rulings, it was appropriate for Plaintiffs to seek clarification, and to specifically request that the court dismiss the state claims without prejudice.⁹

[**24] In light of our holding that the district court erred in its initial order dismissing Plaintiffs' complaint without leave to amend, we need not review the court's ruling on the merits of Plaintiffs' motion for reconsideration or clarification. It was an abuse of discretion, however, to impose sanctions on Plaintiffs for filing the motion. [HN18](#)[↑] Local Rule 7.19 authorizes the court to sanction parties who file frivolous motions and Local Rule 27 authorizes an award of costs and attorneys' fees to opposing counsel "if the Court finds that the conduct rises to the level of bad faith and/or a willful disobedience of a court order." C.D. Cal. L. Civ. R. 27(b); see also [Chambers v. NASCO, Inc., 501 U.S. 32, 45-46, 115 L. Ed. 2d 27, 111 S. Ct. 2123 \(1991\)](#). For the reasons stated, Plaintiffs' motion was not frivolous. The district court also made no finding of bad faith or vexatious conduct, and the record would not support such a finding.

We reverse the district court's order imposing sanctions on Plaintiffs for filing the motion for reconsideration or clarification.

V

Defendants have noted serious deficiencies in Plaintiffs' briefs.¹⁰ While we do not condone these deficiencies, we decline [**25] to impose the sanctions requested by Defendants. Because Plaintiffs failed [[*1107](#)] to identify standards of review, Defendants urge us to adopt Defendants' statements of the standards of review, regardless of whether they are legally correct. This sanction would never be appropriate. They also urge dismissal of Plaintiffs' appeal. This court has imposed the ultimate sanction of dismissal only in egregious cases of noncompliance, primarily where parties failed to cite to the record. See [N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 \(9th Cir. 1997\)](#); [Mitchel v. General Elec. Co., 689 F.2d 877, 878-79 \(9th Cir. 1982\)](#); see also Fed. R. App. P. 28-2 Ninth Circuit advisory committee's note (citing *Mitchel* and providing that sanctions may be imposed for failure to comply with the briefing rules, "particularly with respect to record references"). Here, Plaintiffs cited to the record extensively and their appeal is largely meritorious. We therefore decline to dismiss the appeal; we trust Plaintiffs' counsel will faithfully comply with our rules if he continues to practice before this court.

[**26] CONCLUSION

The order dismissing Plaintiffs' complaint without leave to amend is reversed in part and affirmed in part. Plaintiffs have abandoned their appeal of the district court's order striking portions of the complaint as immaterial. The district court's order sanctioning Plaintiffs for filing their motion for reconsideration or clarification is reversed. We decline to impose sanctions for Plaintiffs' noncompliance with this court's briefing rules.

⁹ At oral argument, Plaintiffs stated they would still prefer to dismiss their federal claims and have the case remanded to state court. On remand, the district court may, in its discretion, grant Plaintiffs leave to amend their complaint to eliminate their federal claims, decline to exercise supplemental jurisdiction over the remaining state law claims, and remand the case to state court.

¹⁰ Although it contains a section entitled, "Appellate Court Jurisdiction," Plaintiffs' brief does not identify the source of the court's jurisdiction in this section, as required by [Fed. R. App. P. 28\(a\)\(4\)](#) and [9th Cir. R. 28-2.2](#). The brief also fails to identify the standard of review for any of the issues raised on appeal, as required by [Fed. R. App. P. 28\(a\)\(9\)\(B\)](#) and [9th Cir. R. 28-2.5](#). Finally, the brief does not contain a statement of issues, as required by [Fed. R. App. P. 28\(a\)\(5\)](#). Plaintiffs' failure to comply with the briefing rules is all the more unjustified because we had already rejected Plaintiffs' initial brief as deficient: it did not include a certificate of compliance, [Fed. R. App. P. 32\(a\)\(7\)\(c\)](#); [9th Cir. R. 32-1](#), a statement of related cases, [9th Cir. R. 28-2.6](#), or excerpts of record, [9th Cir. R. 30-1](#).

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Each side shall bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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Den Norske Stats Oljeselskap A.S. v. Heeremac Marine Contrs.

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

July 9, 1999, Decided; July 12, 1999, Entered

CIVIL ACTION NO. H-98-4274

Reporter

1999 U.S. Dist. LEXIS 23595 *; 1999 WL 34997094

DEN NORSKE STATS OLJESELSKAP A.S., Plaintiff VS. HEEREMAC, v.o.f.; HEEREMAC MARINE CONTRACTORS; HEEREMA OFFSHORE SERVICES U.S., INC.; HEEREMA OFFSHORE CONSTRUCTION GROUP, INC.; JAN MEEK; PIETER HEEREMA; McDermott International Inc.; McDermott Incorporated; J. RAY McDermott, Inc. S.A.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston, L.L.C.; J. RAY McDermott Gulf Contractors, Inc.; SAIPEM SpA; SAIPEM International BV; SAIPEM UK LIMITED; and SAIPEM (PORTUGAL) -- COMERCIO MARITIMO, SOCIEDADE UNIPESSOAL, S.A., Defendants

Subsequent History: Affirmed by [*Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420, 2001 U.S. App. LEXIS 1522 \(5th Cir. Tex., 2001\)*](#)

Core Terms

commerce, conspiracy, Sherman Act, anti trust law, antitrust, subject matter jurisdiction, projects, courts, motion to dismiss, foreseeable, Petroleum, marine, extraterritorial, rigging, bid

Counsel: [*1] For Den Norske Stats Oljeselskap A S, Plaintiff: Craig B Glidden, LEAD ATTORNEY, McFall Sherwood et al, Houston, TX; Jacob Dweck, Karen L Grimm, Rebecca L Hirsch, LEAD ATTORNEYS, Sutherland Asbill et al, Washington, DC; James R McGibbon, LEAD ATTORNEY, Sutherland Asbill et al, Atlanta, GA.

For Heerema Marine Contractors, Heerema Offshore Services U S Inc, Heerema Offshore Construction Group Inc, Defendants: William J Linklater, LEAD ATTORNEY, Baker McKenzie, Chicago, IL.

For McDermott International Inc, McDermott Inc, J Ray McDermott SA, J Ray McDermott Inc, Defendants: Charles Alan Gilman, LEAD ATTORNEY, Cahill Gordon et al, New York, NY; Innes A Mackillop, LEAD ATTORNEY, White Mackillop Gallant, P.C., Houston, TX.

For J Ray McDermott Gulf Contractors Inc, McDermott Engineers & Constructors (USA) Inc, McDermott Engineering Houston LLC, McDermott-ETPM Inc, Defendants: Innes A Mackillop, LEAD ATTORNEY, White Mackillop Gallant, P.C., Houston, TX.

For Saipem SpA, Saipem International BV, Saipem UK Limited, Saipem (Portugal)-Comercio Maritimo, Sociedade Unipessoal, SA, Defendants: Robin C Gibbs, LEAD ATTORNEY, Gibbs & Bruns, Houston, TX.

Judges: MELINDA HARMON, UNITED STATES DISTRICT JUDGE.

Opinion by: MELINDA [*2] HARMON

Opinion

MEMORANDUM AND ORDER OF DISMISSAL

Pending before the Court in the above referenced action, alleging violations of United States **antitrust law**, specifically Sections 1 and 2 of the Sherman Act, and common law causes of action for fraud and fraudulent inducement, tortious interference with prospective business advantage, and civil conspiracy arising out of a global conspiracy and attempted monopolization of heavy-lift marine construction and installation services and related services, involving unlawful market allocation, price fixing, and bid rigging, are the following motions:

- (1) Defendants Saipem SpA, Saipem International, B.V., Saipem UK Limited, and Saipem (Portugal) -Comercio Maritimo, Sociedade Unipessoal, S.A.'s (collectively, "Saipem Defendants") motion to dismiss under Federal Rule 12(b) (instrument # 26);
- (2) Defendants McDermott International, Inc., J. Ray McDermott, Inc., J. Ray McDermott, S.A., McDermott Engineers and Constructors (USA), Inc., McDermott Engineering Houston, L.L.C, J. Ray McDermott Gulf Contractors, Inc., and McDermott-ETPM, Inc.'s (collectively, "the McDermott Defendants") motion to dismiss pursuant to Rules 12(b)(1) and 12(b) (6) (# 27);
- (3) Defendants [*3] Heerema Marine Contractors Nederland B.V., Heerema Offshore Services U.S., Inc., and Heerema Offshore Construction Group, Inc.'s (collectively, "Heerema Defendants") motion to dismiss pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure (# 28);
- (4) Plaintiff Den norske stats oljeselskap's ("Statoil's") ¹ motion to stay (# 30) proceedings until resolution of the motions to dismiss;
- (5) McDermott Defendants' cross-motion for immediate dismissal or acceleration (# 32), joined by Heerema Defendants (# 35);
- (6) Saipem Defendants' motion to accelerate (# 34);
- (7) Heerema Defendants' motion for immediate dismissal (# 35).

According to Statoil's first amended complaint (# 21), pursuant to its business of exploring for, producing, refining, transporting and selling crude oil, natural gas, and other petroleum products, since 1988 Statoil has contracted with Defendants to design, engineer, fabricate, transport, and install or remove offshore structures required for offshore production and transportation [*4] of these petroleum products. Statoil emphasizes that the global market for the provision of heavy lift derrick barges and related marine construction and transport services has been dominated by a handful of companies, Defendants here, during the period at issue (approximately 1993-1997 ²), with fewer than

¹ Statoil is proceeding individually and on behalf of each of the ventures and other participants in oil and gas ventures located in the North Sea, of which Statoil is the operator.

² In 1993 a criminal complaint was filed against Defendants HeereMac and Jan Meek alleging that they and unnamed others had combined and conspired "to suppress and eliminate [*5] competition by rigging bids for the sale of heavy-lift derrick barge and related marine construction services in the United States and elsewhere" from "at least as early as 1993 and continuing until May 1997." Criminal Information, Ex. A to First Amended Complaint. HeereMac and Jan Meek pled guilty to the criminal information on December 23, 1997 and agreed to pay fines of \$ 49 million and \$ 100,000 respectively. Ex. B, Transcript of guilty plea hearing. Plaintiffs here and in Phillips claim that only when the criminal case became public did they learn of the conspiracy.

HeereMac provided heavy-lift marine construction services to customers in three distinct geographic markets--the Mahogany platform in the Gulf of Mexico, several platforms in the North Sea, and the Xijiang platform off the coast of China in the Far East. The plea agreement addressed separately issues related to commerce affected by HeereMac's conduct in the Gulf of Mexico and commerce affected by HeereMac's conduct in the North Sea and Far East. Thus issues regarding price fixing activities in the Gulf of Mexico and in the North Sea were treated separately. Moreover, in the plea agreement HeereMac contended that the [*6] Department of Justice would not be able to establish (1) how conduct related to foreign commerce violated the United States antitrust laws and (2) how this foreign conduct affected United States commerce for purposes of the Federal Sentencing Guidelines. The Department of Justice, moreover, admitted establishing liability for foreign conduct would be difficult. The plea agreement makes no reference to the Hewett or Judy projects in the North Sea, does not suggest that those projects were part

ten of the much needed heavy-lift derrick barges existing in the world, most or all of which are owned or controlled by Defendants. Although holding themselves out as competitors in the relevant market, Defendants allegedly have conspired and illegally combined outside the United States to eliminate or lessen competition and exert monopoly power throughout the world, including the North Sea, the United States, and the Gulf of Mexico, by price fixing, bid rigging, dividing markets, and allocating customers, resulting in higher prices and limited alternative access to such services. Thus Defendants' bids on projects worldwide were not competitive, but were rigged and were substantially and artificially inflated.

Relevant to the issue of subject-matter jurisdiction here, Statoil is a Norwegian corporation with its principal place of business in Norway and is the operator of and working interest owner in several oil and gas production facilities in the North Sea. While the first amended complaint conclusorily asserts that this global conspiracy was intended to and did have a foreseeable and substantial effect on United States foreign and interstate commerce, including that of the state of Texas³, it makes clear that Statoil's business was exclusively in the North Sea and that Statoil's injuries and "damages have been incurred in connection with projects in the Norwegian Sector of the North Sea" First Amended Complaint at 2. There is no direct, substantial connection between the United States commerce and Statoil's claims. It has not alleged that it has any United States subsidiaries, any platforms [*8] in United States waters, or any business in the United States.

The instant action is one of several pending in this district that have arisen out of the same alleged conduct of conspiracy and attempted monopolization in [*9] the heavy-lift marine construction industry. One of these suits, Phillips Petroleum Company et al. v. HeereMac, v.o.f., et al., H-98-CV-1697 (consolidated with H-98-CV-1698), is also on the undersigned judge's docket. The Defendants in Phillips are the same as those here with a few additions, while counsel for Statoil represented the Phillips plaintiffs in H-98-CV-1697. The jurisdictional allegations are very similar in the two suits. Furthermore the parties here have referenced their briefs and the Court's order of January 22, 1999 (# 128) in Phillips in support of their arguments in this suit. At issue in both cases *inter alia* is the scope of extraterritorial subject-matter jurisdiction of United States antitrust law, specifically the Sherman Act, 15 U.S.C. §§ 1 and 2.⁴ Because the Court's ruling in Phillips is dispositive of this case, the Court addresses only that

of any conspiracy, does not admit that activity or projects in the North Sea had a "direct, substantial and foreseeable" effect on United States commerce, and alone does not establish the existence of a conspiracy.

In Phillips, this Court concluded that the collateral estoppel effect of the guilty plea is

limited to HeereMac's admission that it was a participant in a price-fixing conspiracy involving heavy lift marine construction services in the major oil producing regions of the world (the Gulf of Mexico, the North Sea, and the Far East) from 1993 through 1997 and that \$ 65,000,000 in commerce in the Gulf of Mexico was affected. The guilty plea and conviction do not establish the extent of the [*7] Court's jurisdiction here, that liability exists as to the Phillips jobs at issue here or that other Defendants here were involved in the conspiracy. It does not establish that the conspiracy caused antitrust injury to these named Defendants, nor, if it did, what damages are appropriate.

³ Statoil, referring to the complaint (# 21) that it amended after the Court's order issued in Phillips, asserts at p. 4 of its Consolidated Response to Defendants' Motions to Dismiss (# 41),

. . . Defendants' conspiracy had a substantial effect on U.S. foreign and interstate commerce by reducing the supply of crude oil production in the North Sea, which in turn increased the prices paid by U.S. consumers for North Sea crude oil, a significant source of U.S. supply. Complaint at PP 52, 78. Further, many of the licensees of the affected North Sea projects of which Statoil is the operator include subsidiaries of U.S. oil companies.

Preamble to Complaint; Statoil's Supplemental Disclosure of Interested Persons dated February 4, 1999. These subsidiaries have suffered their pro rata share of applicable damages as a result of the increase in prices of heavy lift services and they will enjoy a corresponding share of Statoil's recovery in this litigation. Complaint at PP 70-81.

⁴ Sections 1 and 2 of [*10] the Sherman Act, prohibit restraints of trade, monopolization and attempts to monopolize.

Section 1 of the Sherman Act reads,

jurisdictional matter, reiterates its ruling, applies it to the facts here, and explains the reasons why, as a matter of law, it concludes that Defendants' motions to dismiss in the instant case should be granted.

A foreign party may sue for damages under the Sherman Act for antitrust conduct occurring outside the United States only where the conduct is meant to produce and does produce a "direct, substantial, and reasonably foreseeable effect" within the United States. Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), [15 U.S.C. § 6a](#)⁵; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 769, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993).

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, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred fifty thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[15 U.S.C. § 1. Section 2](#) of the Sherman Act 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 ten million dollars if a corporation, or, if any other person, three hundred fifty [*11] thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[15 U.S.C. § 2.](#)

⁵The FTAIA was added to the Sherman Act in 1982. Although the Sherman Act, [15 U.S.C. §§ 1-2](#), prohibits monopolization and attempted monopolization of any line of interstate or foreign commerce, section 1 of the FTAIA, [15 U.S.C. § 6a](#), restricts and makes it inapplicable to certain kinds of commerce. The FTAIA provides in relevant part,

[Section 1-7 of the Sherman Act] shall not apply to conduct involving trade or commerce (other than 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 [*12] 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; and

(2) such effect gives rise to a claim under the provisions of [this Act], other than this section.

According to an additional proviso, if [sections 1 to 7](#) of this title apply to such conduct only because of the operation of 1 (B), then sections 1-7 of this title shall apply to such conduct only for injury to export business in the United States.

Here, [clause 1\(A\)](#), rather than [1\(B\), of the FTAIA](#) governs, so the location of the Defendants as suppliers of services is not relevant to the question of whether the alleged conspiracy directly, substantially and reasonably foreseeably affected United States commerce.

The FTAIA was intended to exempt from United States [antitrust law](#) any conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves United States-owned entities operating abroad. *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1106 (S.D.N.Y. 1984); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 813 (9th Cir. 1988) (finding allegations of refusal [*13] to deal in foreign markets which injured only foreign customers and plaintiff insufficient to confer antitrust jurisdiction under the FTAIA); *The "In" Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 498-99 (M.D.N.C. 1987) (finding that French garment distributor had no cause of action under United States antitrust laws absent evidence of injury in the United States); *Liamuiga Tours v. Travel Impressions*, 617 F. Supp. 920, 924 (E.D.N.Y. 1985) (finding lack of jurisdictional nexus under the FTAIA where restraint of trade and conspiracy claims involved lost business and anti-competitive effects exclusively in St. Kitts); P. Areeda & H. Hovenkamp, [Antitrust Law](#) P 236a (1993 Supp.).

The Court quotes the following relevant sections from its memorandum and order in Phillips, pp. 174-81:

Federal courts are courts of limited jurisdiction, which encompasses only cases authorized by the Constitution and laws of the United States. Coury v. Prot. 85 F.3d 244, 248 (5th Cir. 1996).

Because the reach of United States antitrust statutes is a matter of law, the Court can address the matter now. "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not [*14] outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." Continental Ore, 370 U.S. at 704.

There is not a clear, rigid test for determining extraterritorial subject matter jurisdiction under the federal antitrust statutes. A brief review of the modern development of the case law reveals the general scope and factors applied in determining whether jurisdiction exists. Although the Sherman Act by its own terms applies to commerce with foreign nations, originally the statute was interpreted as not providing for jurisdiction based solely on conduct taking place abroad. American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909). In United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945)(holding that the Sherman Act applies to agreements made in foreign jurisdictions outside of the United States "[i]f they were intended to affect imports and did affect them"), Judge Learned Hand laid the groundwork for what became known as the "effects" test applied today. The test was gradually adopted in some version by most courts.

Because of its expansive scope, considerations of international comity in the face of protest by [*15] other countries came to bear on the assertion of extraterritorial jurisdiction. In Timberlane Lumber Co. v. Bank of America National Trust & Savings Ass'n, 549 F.2d 597, 613 (9th Cir. 1976), the Ninth Circuit in an influential opinion established a balancing test including comity factors for defining the scope of jurisdiction over foreign defendants: a court must find "some effect--actual or intended--on American foreign commerce," must decide whether that effect is "sufficiently large to present a cognizable injury," and must determine "whether the interests of, and links to, the United States--including the magnitude of the effect on American foreign commerce--are sufficiently strong vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." For the third prong, the Ninth Circuit set out seven factors to aid in determining whether subject matter jurisdiction should be found: (1) the degree of conflict with foreign law or policy; (2) the nationality, location and principal places of business of the parties; (3) the extent to which enforcement by either country can achieve compliance; (4) the relative significance of effects on the United States as compared [*16] with those elsewhere; (5) the existence of intent to harm or affect American commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. Id. at 614-15. Other courts, including the Fifth Circuit, adopted similar comity-informed analyses regarding subject matter jurisdiction. Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007, 103 S. Ct. 1244, 75 L. Ed. 2d 475 (1983)(remanded for review of standing issues in light of Associated General Contractors, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723), on remand, 704 F.2d 709 (5th Cir. 1983), cert. denied, 464 U.S. 961, 104 S. Ct. 393, 78 L. Ed. 2d 337 (1983); Montreal Trading, Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981); In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979). See also American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n, 701 F.2d 408, 413 (5th Cir. 1983) (citing Timberlane, Mannington Mills, and In re Uranium for examinations of the extraterritorial reach of the Sherman Act). Actually, distinguishing its view from that of the Ninth Circuit and agreeing with [*17] the Third Circuit majority in Mannington Mills and the Seventh Circuit In re Uranium, the Fifth Circuit did not read the Timberlane test as a test for subject matter jurisdiction, but stated that "[a] district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law, or international law," which, "when applicable, prevents the court from entertaining a claim." 671 F.2d at 884 and n.7. In doing so, it emphasized the definition of subject matter jurisdiction established by Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946), which does not embrace "[t]he wide-ranging inquiry suggested by Timberlane and its progeny." Id. The Fifth Circuit made clear that, unlike the panel in In re

Uranium, it did not conclude that the trial judge has discretion in deciding whether to entertain an antitrust suit and that the decision not to utilize the antitrust laws "must be based on solid legal ground." Id.

Other courts have rejected any comity restrictions. Laker Airways v. Sabena Belgium World Airlines, 731 F.2d 909, 235 U.S. App. D.C. 207 (D.C. 1984); National Bank of Canada v. Interbank Card Ass'n, 666F.2d 6 (2d Cir. 1981)(requiring only proof of [*18] actual anticompetitive effects in the United States). In actual practice, subject matter jurisdiction is rarely declined by United States Courts when there is more than a de minimis effect on United States Commerce. Irving Scher, ed., I Antitrust Advisor 6-10 (4th ed., West 1998).

Thus the Sherman Act . . . can apply to projects outside the United States as long as there is a direct, substantial, reasonably foreseeable effect on United States commerce. The Supreme Court in 1993 observed that it is well established 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." Hartford Fire Ins., 509 U.S. at 796. It further noted that "[t]he only substantial question in this case is whether 'there is a true conflict between domestic and foreign law.'" [It then concluded there was no actual conflict because there was no showing of conflict between United States and the relevant foreign countries' laws.]

After reviewing the pleadings and the applicable law, the Court finds that Plaintiffs have alleged a conspiracy, within the ambit of the Sherman Act, of a number of foreign and domestic entities that had [*19] a direct, substantial and reasonably foreseeable effect on United States commerce, i.e., on consumers in the United States, including Phillips Petroleum Company, relating to the Mahogany project in the territorial waters of the United States in the Gulf of Mexico, where a significant part of the conspiracy targeted restraints on competition over heavy lift marine construction services. Indeed, HeereMac was allegedly given exclusive rights to service this area by the conspiracy. Phillips has made allegations that the McDermott Defendants, headquartered in New Orleans, Louisiana, and Heerema and Saipem Defendants, with offices in Texas and Louisiana from which they conducted significant business related to heavy lift marine services, participated in the conspiracy, as did the wholly owned, foreign-based subsidiaries of Phillips Petroleum Company, with resulting antitrust injury to Phillips Petroleum Company in regard to the Mahogany Platform job. . . .

Nevertheless, and this matter relates to the jurisdictional reach of the United States antitrust laws and to standing, while the Court finds that the allegations of Phillips Petroleum Company, a substantial, United States-based corporation, [*20] sufficiently state a claim that it has suffered actual injury, antitrust injury proximately caused by the conspiracy, and proper plaintiff status because it was allegedly directly and substantially injured by the conspiracy, the Court does not find that the claims of the foreign-based, wholly-owned Phillips subsidiaries (Phillips U.K., Phillips Norway, and Phillips China) regarding injuries sustained in relation to the foreign platforms (the Judy, the Hewett, the Ekofisk 2/4 J and 2/4 X, and the Xijiang Platforms) have a direct and substantial effect on United States commerce. Although Phillips Norway was incorporated under the law of Delaware, the mere fact that an injured party might be a United States citizen or corporation is not enough to establish jurisdiction; the primary injury to that party must be caused in the United States and substantially affect United States commerce. Therefore the Court lacks subject matter jurisdiction over these claims under federal . . . antitrust law and they should be dismissed. [emphasis added]

In the instant case, Norwegian corporation Statoil's damages arise from its projects in the Norwegian sector of the North Sea. While the alleged foreign, [*21] global anticompetitive conspiracy to fix prices, rig bids, and allocate markets in the North Sea and resulting injuries to Statoil's projects in the North Sea may have very indirectly had an attenuated effect on projects in the United States and in its waters in the Gulf of Mexico, they did not have a direct, substantial, and reasonably foreseeable anticompetitive effect on United States trade or commerce. Statoil's claims are therefore not within the ambit of the United States antitrust law. Statoil, a foreign corporation, works exclusively in the North Sea and alleges no United States subsidiary or business conduct in the United States.⁶ Because it

⁶ Even if the injured party is a United States citizen or corporation, that fact is not sufficient to establish jurisdiction. McGlinch v. Shell Chemical Co., 845 F.2d 802 (9th Cir. 1988). Furthermore, a court should not exercise jurisdiction when the primary injury caused by the alleged anticompetitive activity occurs outside the United States. The "In" Porters, S.A. v. Hanes Printables, Inc.,

does not trade in and because it was allegedly injured outside the United States by Defendants' bid rigging on jobs located in the Norwegian sector of the North Sea having no direct, substantial effect on United States commerce, Statoil lacks standing to bring a claim under United States antitrust laws because its alleged injuries are not of the type that the antitrust statute was intended to redress. United States antitrust laws do not extend to protect foreign markets from anticompetitive effects and "do not regulate the competitive [*22] conditions of other nations' economies." [Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#). Thus this Court concludes that it does not have subject-matter jurisdiction over Statoil's claims of injury and damages based on Norwegian projects.

Because there is no federal question jurisdiction, the Court in its discretion also dismisses without prejudice the common law claims over which it had supplemental jurisdiction pursuant to [28 U.S.C. § 1337\(c\)\(3\)](#)("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) [*24] the district court has dismissed all claims over which it has original jurisdiction"). [Bass v. Parkwood Hosp., 180 F.3d 234, 246 \(5th Cir. July 1, 1999\)](#).

Accordingly, the Court

ORDERS that Defendants' motions to dismiss for lack of subject-matter jurisdiction are GRANTED and that this case is DISMISSED without prejudice. All remaining pending motions are MOOT.

SIGNED at Houston, Texas, this 9th day of July, 1999.

/s/ Melinda Harmon

MELINDA HARMON

UNITED STATES DISTRICT JUDGE

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[663 F. Supp. 494, 499-500 \(M.D.N.C. 1987\)](#)(French garment distributor has no cause of action under federal antitrust laws without evidence of injury within the United States and to United States interests operating abroad); [S. Megga Telecommunications, Ltd. v. Lucent Technologies, Inc., No. 96-357-SLR, 1997 U.S. Dist. LEXIS 2312, 1997 WL 86413 \(D. Del. Feb. 14, 1997\)](#); [Coors Brewing Co. v. Miller Brewing Co., 889 F. Supp. 1394, 1397 \(D. Colo. 1995\)](#)(FTAIA interpreted by cases "to mean that with the exception of claims brought by domestic importers, the Sherman [*23] Act will not apply to conduct affecting foreign markets, consumers or producers unless there is also a direct, substantial, and reasonably foreseeable effect on the domestic market ([subsection \(1\) \(A\)](#) or on opportunities to export from the United States ([\(1\) \(B\)](#)"); [Optimum, S.A. v. Legent Corp., 926 F. Supp. 530 \(W.D. Pa. 1996\)](#) (standard applies even when antitrust conduct involves United States-owned entities operating abroad); [Caribbean Broadcast System, Ltd. v. Cable and Wireless P.L.C., No. 93-2050, 1995 U.S. Dist. LEXIS 19225, 1995 WL 76164, *2 \(D.D.C. Dec. 21, 1995\)](#)(FTAIA "makes clear that the concern of the antitrust laws is protection of American consumers and American exporters, not foreign consumers or producers"). Thus Statoil's argument that a number of licensees on the North Sea projects are subsidiaries of United States Oil companies is not enough to establish jurisdiction.



Sea-Land Serv. v. Atlantic Pac. Int'l

United States District Court for the District of Hawaii

July 12, 1999, Decided ; July 12, 1999, Filed

CV. NO. 98-00369 DAE

Reporter

61 F. Supp. 2d 1092 *; 1999 U.S. Dist. LEXIS 10915 **; 1999-2 Trade Cas. (CCH) P72,669; 2000 AMC 233

SEA-LAND SERVICE, INC., Plaintiff, vs. ATLANTIC PACIFIC INTERNATIONAL, INC.; A & A CONSOLIDATORS, INC.; FLEMING COMPANIES, INC.; JOHN DOES 1-25, Defendants. and FLEMING COMPANIES, INC., Defendant/Third-Party Plaintiff, vs. JACK BORJA and HEIDI L. BORJA, Third-Party Defendants, and ATLANTIC PACIFIC INTERNATIONAL, INC., Defendant/Third-Party Plaintiff, vs. MATSON NAVIGATION SERVICES, INC., a Hawaii corporation; COSTCO WHOLESALE CORPORATION, a Washington corporation; WAL-MART STORES, INC. dba SAM'S CLUB, a Delaware corporation; TAG/ICIB SERVICES, INC., a Delaware corporation, Third-Party Defendants, and SEA-LAND SERVICE, INC., Plaintiff/Fourth-Party Plaintiff, vs. JACK BORJA and HEIDI L. BORJA, Fourth-Party Defendants.

Disposition: [**1] Sea-Land Service, Inc.'s Motion to Dismiss and/or for Summary Judgment on Fleming Companies, Inc.'s Counterclaim GRANTED in part and DENIED in part.

Core Terms

containers, purchaser, customer, summary judgment, market power, counterclaim, tied product, transportation, antitrust, shipping, products, tying arrangement, charges, seller, genuine issue of material fact, carriers, tariff, cargo, rates, market share, commerce, indirect, supplier, argues, concerted action, antitrust claim, consumer demand, alleges, freight, economic interest

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > ... > Discovery > Methods of Discovery > 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

Pursuant to [Fed. R. Civ. P. 56](#), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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\(c\)](#). All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Implausible Claims

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

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

HN2 Burdens of Proof, Implausible Claims

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. The substantive law defines which facts are material. A genuine issue of material fact requires more than some metaphysical doubt as to the material facts. Only disputes over outcome determinative facts under the applicable substantive law will preclude the entry of summary judgment. If the factual context makes a respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

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

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

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 > Genuine Disputes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

HN3 Supporting Materials, Affidavits

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. Once the movant's burden is met by presenting evidence which, if uncontested, would entitle the movant to a directed verdict at trial, the burden shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. In meeting this burden, parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient.

Civil Procedure > Judgments > Summary Judgment > General Overview

[**HN4**](#) Judgments, Summary Judgment

The summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

[**HN5**](#) Purchasers, Direct Purchasers

The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers. It also serves to eliminate multiple recoveries. Finally, the rule provides the direct purchasers, those in the best position to observe an alleged violator's conduct, with incentives to bring private antitrust actions and thus promotes the vigorous enforcement of the antitrust laws. The rule applies to suits alleging an illegal tying arrangement.

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

[**HN6**](#) Private Actions, Purchasers

The Supreme Court has declined to carve out any exceptions to the direct purchaser rule: The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

[**HN7**](#) Private Actions, Standing

Haw. Rev. Stat. § 480-2 prohibits unfair methods of competition and unfair or deceptive acts or practices in the practice of any trade or commerce. Only consumers may maintain a private action under this section. § 480-2(d). A consumer is defined as a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment. § 480-1. A party that does not meet the definition of a consumer lacks standing to sue for deceptive practices under § 480-2.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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HN8 Regulated Practices, Price Fixing & Restraints of Trade

Haw. Rev. Stat. § 480-4(a) provides as follows: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the state, or in any section of this state is illegal. In this sense, § 480-4(a) mirrors § 1 of the Sherman Act, which likewise prohibits joint action that impairs competition.

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

HN9 Private Actions, Standing

Haw. Rev. Stat. § 480-3 provides: This chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes, except that lawsuits by indirect purchasers may be brought as provided in this chapter. Therefore, even though a party is an indirect purchaser, it has standing to bring antitrust claims under § 480-4.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > 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 > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > Sherman Act > General Overview

HN10 Tying Arrangements, Clayton Act

Pursuant to Haw. Rev. Stat. § 480-3, § 480-4 is to be construed in accordance with § 1 of the Sherman Act. Section 1 declares illegal every contract, combination, or conspiracy, in restraint of trade or commerce. 15 U.S.C.S. § 1. Tying arrangements have long been considered per se unlawful under § 1. To establish a tying arrangement that is illegal per se, the plaintiff must show: (1) the tying of two products, (2) that defendant had sufficient economic power in the tying product market to affect the tied product market, and (3) an effect on a substantial volume of commerce in the tied product market. A tying arrangement exists when a seller refuses to sell one product, the tying product, unless the purchaser agrees to purchase another product, the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN11 Price Fixing & Restraints of Trade, Tying Arrangements

To prevail on a tying claim, a plaintiff must first show that the scheme involves two separate products. To be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide one product separately from the other.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

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[**HN12**](#) [blue document icon] Price Fixing & Restraints of Trade, Tying Arrangements

Before concluding that a link between two products constitutes a tying arrangement, a plaintiff must show that the buyer is required to purchase or lease the unwanted product.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN13**](#) [blue document icon] Regulated Practices, Market Definition

Tying arrangements are per se illegal where the seller has market power. Market power is the ability to force a purchaser to do something that he would not do in a competitive market. Market definition is the first step in the assessment of market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Business & Corporate Compliance > ... > Patent Law > Ownership > Federal Government Inventions

[**HN14**](#) [blue document icon] Regulated Practices, Market Definition

The Supreme Court has identified three sources of market power. First, when the government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power. The second is when the seller's share of the market is high. The third is when the seller offers a unique product that competitors are not able to offer.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN15**](#) [blue document icon] Regulated Practices, Market Definition

Lower courts have used the 30 percent market share as a minimum threshold for showing market power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN16**](#) [blue document icon] Price Fixing & Restraints of Trade, Tying Arrangements

A defendant's economic interest is sufficient where the seller of the tying product is also the seller of the tied product. Only when the tied product is sold by a separate company must the seller of the tying product have an economic interest in the sale of the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN17**](#) [blue document icon] Price Fixing & Restraints of Trade, Tying Arrangements

In a per se tying violation, a not insubstantial amount of commerce in the tied product market must be affected by the tie. The not insubstantial requirement can be satisfied by the foreclosure of a single purchaser, so long as the purchaser represents a not insubstantial dollar-volume of sales.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

[HN18](#) [+] **Monopolies & Monopolization, Conspiracy to Monopolize**

Because a conspiracy cannot usually be established by direct evidence, antitrust plaintiffs may rely upon circumstantial evidence from which a violation may be inferred. For example, a plaintiff may satisfy the concerted action requirement by demonstrating that the conspirators acted in the same fashion and that their conduct was against their own self-interest, or that a high-level of interfirm communication existed in conjunction with the parallel actions.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Memoranda of Law

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

[HN19](#) [+] **Supporting Materials, Memoranda of Law**

Where a party does not purport to have personal knowledge regarding the contents of a brief, it cannot be considered as evidence on a summary judgment motion. [Fed. R. Civ. P. 56\(e\)](#).

Counsel: For SEA-LAND SERVICE, INC., plaintiff: Gregory W. Kugle, Damon Key Bocken Leong & Kupchak, Honolulu, HI.

For SEA-LAND SERVICE, INC., plaintiff: Deborah E. Barack, Carlsmith Ball Wichman Case & Ichiki, Honolulu, HI.

For ATLANTIC PACIFIC INTERNATIONAL INC., A & A CONSOLIDATORS, INC., defendants: Timothy J. Hogan, Lynch Ichida Thompson & Kim, Honolulu, HI.

For FLEMING COMPANIES, INC., defendant: Craig K. Shikuma, Kobayashi Sugita & Goda, Honolulu, HI.

For ATLANTIC PACIFIC INTERNATIONAL INC., counter-claimant: Timothy J. Hogan, Lynch Ichida Thompson & Kim, Honolulu, HI.

For SEA-LAND SERVICE, INC., counter-defendant: Gregory W. Kugle, Damon Key Bocken Leong & Kupchak, Honolulu, HI.

For SEA-LAND SERVICE, INC., counter-defendant: Gary G. Grimmer, Deborah E. Barack, Carlsmith Ball Wichman Case & Ichiki, Honolulu, HI.

For FLEMING COMPANIES, INC., cross-claimant: Craig K. Shikuma, Kobayashi Sugita & Goda, Honolulu, HI.

For FLEMING COMPANIES, INC., third-party plaintiff: Craig K. Shikuma, Kobayashi Sugita [**2] & Goda, Honolulu, HI.

For ATLANTIC PACIFIC INTERNATIONAL INC., A & A CONSOLIDATORS, INC., cross-defendants: Timothy J. Hogan, Lynch Ichida Thompson & Kim, Honolulu, HI.

For JACK BORJA, HEIDI L. BORJA, third-party defendants: David C. Farmer, Ashford & Wriston, Honolulu, HI.

For SEA-LAND SERVICE, INC., fourth party plaintiff: Gregory W. Kugle, Damon Key Bocken Leong & Kupchak, Honolulu, HI.

For SEA-LAND SERVICE, INC., fourth party plaintiff: Deborah E. Barack, Carlsmith Ball Wichman Case & Ichiki, Honolulu, HI.

For JACK BORJA, HEIDI L. BORJA, fourth party defendants: Paul B. Shimomoto, Ashford & Wriston, Honolulu, HI.

For ATLANTIC PACIFIC INTERNATIONAL INC., A & A CONSOLIDATORS, INC., third-party plaintiffs: Timothy J. Hogan, Lynch Ichida Thompson & Kim, Honolulu, HI.

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For TAG/ICIB SERVICES, INC., third-party defendant: Kenneth A. Remson, Jones Day Reavis & Pogue, Los Angeles, CA.

For TAG/ICIB SERVICES, INC., third-party defendant: Jeffrey S. Portnoy, Cades Schutte Fleming & Wright, Honolulu, HI.

For FLEMING COMPANIES, INC., counter-claimant: Craig K. Shikuma, Kobayashi Sugita & Goda, Honolulu, HI.

For SEA-LAND SERVICE, INC., counter-defendant: **[**3]** Deborah E. Barack, Carlsmith Ball Wichman Case & Ichiki, Honolulu, HI.

For JACK BORJA, HEIDI L. BORJA, third-party defendants: David C. Farmer, Paul B. Shimomoto, Ashford & Wriston, Honolulu, HI.

Judges: DAVID ALAN EZRA, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: DAVID ALAN EZRA

Opinion

[*1093] ORDER GRANTING IN PART AND DENYING IN PART SEA-LAND SERVICE, INC.'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT ON FLEMING COMPANIES, INC.'S COUNTERCLAIM

The court heard Sea-Land's motion on May 18, 1999. Gary G. Grimmer, Esq., and Deborah E. Barack, Esq., appeared at the hearing on behalf of Sea-Land Service, Inc.; Bert T. Kobayashi, Jr., Esq., and Craig K. Shikuma, Esq., appeared at the hearing on behalf of Defendant Fleming Companies, Inc. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS in part **[*1094]** and DENIES in part Sea-Land Service, Inc.'s Motion to Dismiss and/or for Summary Judgment on Fleming Companies, Inc.'s Counterclaim.

BACKGROUND

On May 7, 1998, Plaintiff Sea-Land Service, Inc. ("Sea-Land") filed a Complaint against Defendants Atlantic Pacific International, Inc. ("API"), A & A Consolidators, Inc. ("A & A"), and Fleming Companies, Inc. ("Fleming") **[**4]** (collectively "Defendants"), seeking to recover unpaid ocean freight charges. In response, Fleming asserted a counterclaim against Sea-Land, alleging state and federal antitrust violations.

API, a freight consolidator, arranged with Sea-Land, a common carrier, to ship cargo from the West Coast to Hawaii on behalf of Fleming, a wholesale food marketer and distributor. Sea-Land provides transportation services based on rates contained in tariffs. These tariffs are published and filed with the Surface Transportation Board ("STB"). Although Sea-Land does not assess a separate charge for the use of its cargo containers during transportation, the cost of the containers is included in the cost of shipping. Once the cargo reaches its destination, Sea-Land charges a detention fee for continued use of the containers after the period of time ("free time") allowed by the tariff. Essentially, customers have a specified period of time in which to unload their cargo and return the containers to Sea-Land before Sea-Land will impose the detention fee.

Rule 884 of Freight Tariff No. 486 allows shippers to transport goods on Sea-Land's vessels in shipper-owned or leased containers, provided that such **[**5]** containers meet Sea-Land's construction and size specifications. At least two of Sea-Land's customers use shipper-owned containers. Sea-Land charges the same shipping rates regardless of whether a customer employs shipper-owned containers or uses Sea-Land's containers.

TAG/ICIB Services, Inc. ("TAG") is an independent contractor which inspects cargo on behalf of carriers to ensure tariff compliance. TAG obtains information from the carriers that customers furnish regarding their cargo. TAG may open and examine the contents of shipments to verify the accuracy of that information. If TAG determines that the

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cargo has been misdeclared by the customer, TAG will rebill the customer the difference, if any, between the freight charges for the actual type, origin and quantity of the commodity shipped, and the freight charges for the type, origin and quantity declared by the customer. TAG may also bill the customer a misdeclaration charge provided by the tariff. If the customer owes any charges, TAG will impound the shipment until the charges are paid. When cargo containers are detained by the customer beyond the free time authorized by Sea-Land's tariff, TAG will bill and collect the detention [**6] charges according to the tariff.

On January 20, 1999, Sea-Land filed the instant Motion to Dismiss and/or for Summary Judgment on Fleming's Counterclaim. Because matters outside the pleadings were relied upon and cited to the court, pursuant to [Federal Rule of Civil Procedure 12\(b\)](#), Sea-Land's motion will be treated as one for summary judgment.

STANDARD OF REVIEW

HN1[] Pursuant to [Federal Rule of Civil Procedure 56](#), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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\(c\)](#). All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. [Brinson v. Linda Rose Joint Venture](#), 53 F.3d 1044, 1050 (9th Cir. 1995). **HN2**[] A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the [*1095] truth. [S.E.C. v. Seaboard Corp.](#), 677 F.2d 1301, 1305-06 [<**7] (9th Cir. 1982)]. The substantive law defines which facts are material. [Anderson v. Liberty Lobby](#), 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A genuine issue of material fact requires more than some "metaphysical doubt" as to the material facts. [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Only disputes over outcome determinative facts under the applicable substantive law will preclude the entry of summary judgment. *Id.* If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

HN3[] The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. [Metro Indus., Inc. v. Sammi Corp.](#), 82 F.3d 839, 847 (9th Cir.), cert. denied, 519 U.S. 868, 136 L. Ed. 2d 120, 117 S. Ct. 181 (1996). Once the movant's burden is met by presenting [**8] evidence which, if uncontested, would entitle the movant to a directed verdict at trial, the burden shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. [Liberty Lobby](#), 477 U.S. at 250. In meeting this burden, parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. [Keenan v. Allan](#), 91 F.3d 1275, 1278 (9th Cir. 1996).

The Supreme Court cases cited above establish that **HN4**[] the "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" [Celotex Corp.](#), 477 U.S. at 327 (quoting [Fed. R. Civ. P. 1](#)).

DISCUSSION

Fleming's counterclaim alleges that:

1. Sea-Land engaged in an illegal tying arrangement in violation of the Sherman Act, [15 U.S.C. § 1](#);
2. Sea-Land contracted, conspired and combined [**9] with others for the purpose of restraining competition in the marketplace for shipping container-related services, in violation of the Sherman Act, [15 U.S.C. § 1](#);
3. Sea-Land engaged in unfair competition, in violation of Hawaii Revised Statute ("H.R.S.") [§ 480-2](#); and

4. Sea-Land violated [H.R.S. § 480-4](#).

Sea-Land argues that each of Fleming's allegations either fails to state a claim upon which relief may be granted or fails to raise a genuine issue of material fact. The court addresses each in turn.

I. *Federal Antitrust Claims*

Because API's and Fleming's counterclaims alleging antitrust violations are duplicative, Sea-Land argues that the "direct purchaser" rule precludes Fleming, as an indirect purchaser, from pursuing these claims. The undisputed facts show that during the relevant period of time, API purchased transportation services from Sea-Land and resold them to Fleming.¹ Fleming has not alleged that it purchased transportation directly from Sea-Land after 1994.

[**10] The United States Supreme Court described the "direct purchaser" doctrine:

In [Illinois Brick Co. v. Illinois](#), 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977), . . . the State of Illinois sued Illinois Brick and other concrete block manufacturers for conspiring to raise [*1096] the cost of concrete blocks in violation of § 1 of the Sherman Act, as amended, [15 U.S.C. § 1](#). We ruled that the State had suffered no injury within the meaning of § 4 [of the Clayton Act] because Illinois Brick had not sold any concrete blocks to it. . . . We decided that . . . it would risk multiple liability to allow suits by indirect purchasers. See [431 U.S. at 730-31](#).

[Kansas v. Utilicorp United, Inc.](#), 497 U.S. 199, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990). In Kansas, the Supreme Court reaffirmed its commitment to the rule, holding that when natural gas suppliers and power companies violate antitrust laws by overcharging a public utility for natural gas and the utility passes on the overcharge to its customers, only the utility has an antitrust cause of action, as it alone suffered an antitrust injury. *Id.*

[**11] The Supreme Court explained the rationale behind the rule: "[HN5](#)" The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers." [Kansas](#), [497 U.S. at 208](#). It also "serves to eliminate multiple recoveries." [Id. at 212](#). Finally, the rule provides the direct purchasers, those in the best position to observe an alleged violator's conduct, with incentives to bring private antitrust actions and thus promotes the vigorous enforcement of the antitrust laws. [Id. at 214-15](#) (citations omitted).

The rule applies with equal force to suits alleging an illegal tying arrangement. For example, in [Summerwood Corp. v. CADO Systems Corp.](#), 1986 U.S. Dist. LEXIS 19615, 1986 WL 308 (E.D. Pa. 1986), Summerwood sued under § 4 of the Clayton Act for damages resulting from the alleged antitrust violations of defendants. Summerwood alleged that the defendants violated the Sherman and Clayton Acts by tying together the sale of computer hardware and software. The court applied the reasoning of *Illinois Brick* and granted the defendant suppliers' motion to dismiss Summerwood's antitrust claims with [**12] prejudice:

Summerwood's allegations that [the supplier] adjusted its software program so that it could only function with CADO hardware and that [the supplier] required the two be sold together suggest that [the distributor] may have suffered some anticompetitive injury of its own. A distributor forced to pay inflated prices for the tied good and prevented from selling products separately to meet consumer demands clearly has standing to sue the supplier who illegally shielded the tied product from the market forces. . . . Allowing Summerwood to sue [the supplier] for the same violation for which it is vulnerable to suit by [the distributor] would clearly expose [the supplier] to duplicate liability.

Summerwood, 1986 WL at *2. The *Summerwood* court recognized that in the tying context, a court is also faced with the difficulty of apportioning damages:

Determining what part of the inflated price [the distributor] absorbed and what part was passed on to each indirect purchaser of the tied good would involve economic calculations so elusive that they would amount to little more than guesswork. . . . It would be no more appropriate to entangle [**13] a factfinder in these elusive

¹ Any claims by Fleming arising before API took over its transportation functions in 1994 are barred by the 4-year statute of limitations applicable to antitrust claims. See [15 U.S.C. § 15b](#).

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calculations in the context of an alleged tying scheme than the [United States Supreme] Court found it in the context of price-fixing.

Summerwood, 1986 WL at *2 (citing *Illinois Brick*, 431 U.S. at 742).

Moreover, [HN6](#) the Supreme Court has declined to carve out any exceptions to the rule: "The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." [Kansas](#), 497 U.S. at 216.

The process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should [\[*1097\]](#) be drawn in a particular class of cases would inject the same massive evidence and complicated theories into treble-damages proceedings, albeit at a somewhat higher level of generality.

[Kansas](#), 497 U.S. at 216-17 (citing *Illinois Brick*, 431 U.S. 720 at 744-45). Thus, because the court concludes that the *Illinois Brick* "direct purchaser" rule applies, Fleming cannot [\[*14\]](#) maintain its federal antitrust claims.

II. State Statutory Claims

a. [H.R.S. § 480-2](#)

[HN7](#) [Section 480-2](#) prohibits "unfair methods of competition and unfair or deceptive acts or practices in the practice of any trade or commerce." Only "consumers" may maintain a private action under this section. [H.R.S. § 480-2\(d\)](#). A "consumer" is defined as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." [H.R.S. 480-1](#). Because Fleming does not meet the definition of a consumer, it lacks standing to sue for deceptive practices under [H.R.S. § 480-2](#).

b. [H.R.S. § 480-4](#)

[HN8](#) [Section 480-4\(a\)](#) provides as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is illegal.

In this sense, [§ 480-4\(a\)](#) mirrors [§ 1](#) of the Sherman Act, which likewise prohibits joint action that impairs competition.

The United States Supreme Court held, in [California v. ARC America Corp.](#), 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989), [\[*15\]](#) that the "direct purchaser" doctrine does not preempt state antitrust statutes that expressly allow suit by indirect purchasers. [HN9](#) [H.R.S. § 480-3](#) provides:

This chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes, except that lawsuits by indirect purchasers may be brought as provided in this chapter.

[H.R.S. § 480-3](#). Therefore, even though Fleming is an indirect purchaser, it has standing to bring antitrust claims under [§ 480-4](#).

Within the purview of [§ 480-4](#), Fleming asserts two claims against Sea-Land: (1) that it engaged in an illegal tying arrangement; and (2) that it works in concert with Matson to impair competition.

1. Tying Claim

[HN10](#) Pursuant to [H.R.S. § 480-3](#), [§ 480-4](#) is to be construed in accordance with [Section 1](#) of the Sherman Act. [H.R.S. § 480-3](#). [Section 1](#) declares illegal "every contract, combination . . . , or conspiracy, in restraint of trade or commerce." [15 U.S.C. § 1](#). Tying arrangements have long been considered per se unlawful under [Section 1](#).

Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). To establish [**16] a tying arrangement that is illegal per se, the plaintiff must show (1) the tying of two products; (2) that defendant had sufficient economic power in the tying product market to affect the tied product market, and (3) an effect on a substantial volume of commerce in the tied product market. Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1411 (9th Cir. 1991). A tying arrangement exists when a seller refuses to sell one product (the tying product) unless the purchaser agrees to purchase another product (the tied product). Northern Pacific, 356 U.S. at 5; Bhan, 929 F.2d at 1411.

In this case, Fleming alleges that Sea-Land tied the purchase of its shipping services (the tying product) to the purchase of the use of Sea-Land's containers (the tied product). Fleming contends that it only wanted to purchase Sea-Land's shipping services. Because, however, Sea-Land's shipping rates include the cost of the containers, Fleming maintains that it was also forced to purchase the use of Sea-Land's containers. Although the record [*1098] clearly demonstrates that Rule 884 of Tariff 486 did not require API or any other shipper to use Sea-Land's containers, Sea-Land [**17] charged the same rate to API regardless of whether the customer used Sea-Land's or its own containers. Fleming alleges that API then passed along to it the cost of using Sea-Land's containers.

(a). Separate Tied Product

HN11 [+] To prevail on a tying claim, a plaintiff must first show that the scheme involves two separate products. Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 462, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 18-25, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). Sea-Land argues that the use of containers is a functional part of the ocean transportation of goods, rather than a separate product. In developing an approach to determine if two products are separate for tying purposes, the United States Supreme Court rejected a test based upon the functional relationship between the products. Jefferson Parish, 466 U.S. at 21 ("We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices."). In Jefferson Parish, the Supreme Court concluded that products are separate if "two [**18] distinguishable product markets [are] involved." *Id.* Subsequently, the Court refined this approach in Eastman Kodak Company v. Image Technical Services, Inc.: "To be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide [one product] separately from [the other]." Kodak, 504 U.S. at 462.

Thus, under Jefferson Parish and Kodak, Fleming must show that there is "sufficient consumer demand" in the Hawaii-Mainland ocean transportation market to make it efficient for carriers to offer a lease of containers as a service separate from the carriage. Fleming relies on the evidence adduced by API. This evidence shows that at least two of Sea-Land's Hawaii-Mainland customers regularly use their own containers, and that other shippers may do so sporadically. Evidence also demonstrates that containers are interchangeable with other forms of transportation, including motor and rail transport, and that they can be used solely as a means to store goods. In addition, API clearly demanded separate services, as demonstrated by its attempts to negotiate with Sea-Land for reduced rates that would reflect [**19] the cost of shipping without the cost of using Sea-Land's containers. Simply because Sea-Land refused to sever the cost of the services does not mean that demand for separate services did not exist. As further "evidence" of lack of demand, Sea-Land points to the fact that even shippers who use their own containers pay the same rate as customers who elect to use containers provided by Sea-Land. Rather than establish an absence of consumer demand, this fact merely bolsters Fleming's claim that shippers who choose to use their own containers are still forced to pay for services that they do not want or need.

The court concludes that a genuine issue of material fact exists as to whether there is "sufficient consumer demand" for separate transportation and container services. Enough doubt is cast on Sea-Land's claim of a unified market that it should be resolved by the trier of fact. Before denying Sea-Land's Motion for Summary Judgment, however, the court must examine the other elements of a tying claim.

(b). Sale of the Tied Product/Coercion

HN12 [↑] Before concluding that a link between two products constitutes a tying arrangement, a plaintiff must show that the buyer is required to purchase [**20] or lease the unwanted product. *Kellam Energy, Inc. v. Duncan*, 668 F. Supp. 861, 881 (D. Del. 1987). Sea-Land argues that because it does not assess a separate charge for the use of its containers, neither API nor Fleming was forced to purchase anything. Sea-Land characterizes the use of its containers [*1099] as a free service provided to its customers. Other courts, however, have rejected similar contentions, holding that to do otherwise would permit escape from antitrust laws prohibiting illegal tie-ins, by the simple device of offering both products as a unit at a single price, while claiming that one of the two is a "free giveaway." See, e.g., *Hill v. A-T-O, Inc.*, 535 F.2d 1349 (2nd Cir. 1976). This court agrees. Thus, Sea-Land's inclusion of the cost of containers in its shipping rates belies its claim that there was no sale of container services.

Moreover, Sea-Land's pricing scheme may also establish the requirement of "coercion." "When a buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Northern Pacific Ry.*, 356 U.S. at 5-6. In [**21] this case, however, Sea-Land does not offer the products separately. Because Sea-Land charges one price, which includes both products, there is evidence customers may be coerced through their purchase of the first product to also purchase the second unwanted product.

(c). Market Power

HN13 [↑] Tying arrangements are per se illegal where the seller has market power. *Jefferson Parish*, 466 U.S. at 14. "Market power is the ability 'to force a purchaser to do something that he would not do in a competitive market.'" *Kodak*, 504 U.S. at 464 (quoting *Jefferson Parish*, 466 U.S. 2 at 14). Market definition is the first step in the assessment of market power. *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468 (3rd Cir.), cert. denied, 506 U.S. 868, 121 L. Ed. 2d 139, 113 S. Ct. 196 (1992) (relevant market was all automobiles, not just Chrysler automobiles). Both Sea-Land and Fleming apparently agree that the relevant market in this case is Hawaii-Mainland ocean carriage of goods in containers.

HN14 [↑] The Supreme Court has identified three sources of market power. First, when the government has granted [**22] the seller "a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power." *Jefferson Parish*, 466 U.S. at 16 (citing *United States v. Loew's, Inc.*, 371 U.S. 38, 45-47, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)). The second is when "the seller's share of the market is high." *Id.* (citing *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611-13, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)). The third is when "the seller offers a unique product that competitors are not able to offer." *Id.*

Sea-Land contends that its share of this market is 33%, while Matson controls the other 66%. Sea-Land argues that its 33% market share is insufficient, as a matter of law, to constitute "market power." In *Jefferson Parish*, the Supreme Court held that a 30% market share did not give rise to the inference of market power necessary for application of the per se rule against tying. *466 U.S. at 27*. **HN15** [↑] Lower courts have subsequently used the 30% market share as a minimum threshold for showing market power. See *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 [**23] (6th Cir. 1993) (11% market share cannot confer market power); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986) (2-4% insufficient); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985) ("pygmy among large, national firms" had no market power), cert. denied, 475 U.S. 1129, 90 L. Ed. 2d 201, 106 S. Ct. 1659 (1986); *M. Leff Radio Parts, Inc. v. Mattel Inc.*, 706 F. Supp. 387 (W.D. Pa. 1988) (30% market share of home video games sufficient to demonstrate market power).

In this case, Fleming disputes Sea-Land's calculation of its market share. Evidence proffered by API shows that Sea-Land operates seven vessels in the Hawaii-Guam market and that, as of January 1999, Matson had reduced its Hawaii-Mainland [*1100] fleet to six ships. The record is unclear as to whether the number of Sea-Land ships in the Hawaii-Guam market is the same as those in the Hawaii-Mainland market. The court need not pursue this mystery further, however, as the evidence relied upon by API is inadmissible pursuant to *Federal Rule of Civil Procedure 56(e)*. The information regarding Matson was apparently taken from [**24] Matson's website. Although incorporated into API's counsel's affidavit, counsel does not purport to have any personal knowledge of the underlying facts. Moreover, this evidence would be inadmissible as hearsay.

Nevertheless, the court finds that Sea-Land's now undisputed 33% market share, coupled with the unique factors that 1) the market consists of only two participants, and 2) the Jones Act may prevent entry of new competitors into the market, renders the existence of Sea-Land's market power a question of material fact for the jury.

(d). *Economic Interest*

Sea-Land argues that no tying arrangement exists because it does not have an economic interest in the tied product market, that is, the container market. Relying on *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 491 F. Supp. 1199, 1209 (D. Haw. 1980), aff'd, 732 F.2d 1403 (9th Cir. 1984), Sea-Land maintains that Fleming must show that Sea-Land "participates for profit" in the tied product market. Sea-Land's reliance on *Robert's* is misplaced. The *Robert's* decision made it clear that [HN16](#)[↑] the defendant's economic interest is sufficient where, as here, the seller of [\[**25\]](#) the tying product is also the seller of the tied product. Only when the tied product is sold by a separate company must the seller of the tying product have an economic interest in the sale of the tied product. *Robert's*, 732 F.2d at 1407-08. Thus, Fleming need not demonstrate that Sea-Land has an economic interest in the container market.

(e). *Effect on Commerce*

The final requirement [HN17](#)[↑] in a per se tying violation is that a "not insubstantial" amount of commerce in the tied product market must be affected by the tie. "The 'not insubstantial' requirement can be satisfied by the foreclosure of a single purchaser, so long as the purchaser represents a 'not insubstantial' dollar-volume of sales." *Datagate, Inc. v. Hewlett Packard Co.*, 60 F.3d 1421 (9th Cir. 1995). In this case, API has established that approximately \$ 3.4 million dollars worth of containers were not purchased as a result of Sea-Land's tying arrangement. Clearly, this arrangement has more than an insubstantial effect on commerce.

Because the court concludes that genuine issues of material fact exist with respect to 1) whether there is "sufficient consumer demand" in the market for [\[**26\]](#) separate transportation and container services, and 2) whether Sea-Land has "market power," Sea-Land's Motion for Summary Judgment on the tying claim is DENIED.

2. Concerted Action

Fleming alleges that Sea-Land works in concert with Matson to impair competition. [HN18](#)[↑] Because a conspiracy cannot usually be established by direct evidence, *Souza v. Estate of Bernice Pauahi Bishop*, 821 F.2d 1332, 1334-35 (9th Cir. 1987), antitrust plaintiffs "may rely upon circumstantial evidence from which a violation may be inferred." *Id. at 1335*. For example, a plaintiff may satisfy the concerted action requirement by demonstrating that the conspirators acted in the same fashion and that their conduct was against their own self-interest, *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 884 (9th Cir. 1982), or that a high-level of interfirm communication existed in conjunction with the parallel actions. See, e.g., *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1242 (3rd Cir. 1993).

Fleming concedes that it has no "smoking gun" evidence of a conspiracy between Sea-Land and Matson. Nevertheless, it contends [\[**27\]](#) that Sea-Land's conduct in "charging all customers for use of containers they don't want" is against its self-interest [\[*1101\]](#) and can only be explained by an agreement with Matson. Fleming, however, offers no evidence to support such a theory. Thus, its mere assertion that "the chances that Sea-Land and Matson have acted separately . . . are unlikely[,] fails to raise a genuine issue of material fact where Fleming has not demonstrated that Sea-Land's conduct is against its self-interest.

Fleming next argues that Sea-Land is "so closely tied to Matson that it is impossible to imagine that they could act on their pricing policies without each others' concurrence." Although Fleming identifies two documents as support, neither establishes that Sea-Land and Matson communicated in regards to their parallel actions.

First, Fleming relies on a Space Sharing Agreement between the two carriers. The Space Sharing Agreement merely provides for emergency shipping of cargo on each other's vessels "in the event of a vessel casualty or severe operational problems unrelated to vessel casualty." This Agreement does not implicate antitrust concerns as

it does not affect either the freight rate billed to **[**28]** the customer by the original carrier or either carrier's container policy.²

Second, Fleming points to the State of Hawaii's Comments in Response to the U.S. Department of Transportation's Request for Public Comment on Competition in the Noncontiguous Domestic Offshore Trades (the "State Comment"). The State Comment is a brief filed by certain State agencies, unsuccessfully advocating a return to a close regulation of the carriers' rates or at least a repeal of the "zone of reasonableness" provision in the ICC Termination Act, [49 U.S.C. § 13701](#) **[**29]** [\(d\)](#), which established a presumption of validity of the carriers' rates so long as the upward annual increase of the rates did not exceed 7.5%. In that brief, the State agencies opine and argue that there is a concerted action instead of competition between Sea-Land and Matson. Importantly, the State agencies' opinions regarding the alleged concerted action were not the result of any judicial or quasi-judicial administrative fact finding. [HN19](#)[↑] Because Fleming does not purport to have personal knowledge regarding the contents of the brief, it cannot be considered as evidence upon this motion. [Fed. R. Civ. P. 56\(e\); Kim v. United States, 121 F.3d 1269, 1276-77 \(9th Cir. 1997\); Keenan v. Allan, 91 F.3d 1275, 1278 \(9th Cir. 1996\); Anheuser-Busch, Inc. v. Natural Beverage Distrib., 69 F.3d 337, 345 n. 4 \(9th Cir. 1995\).](#)

Because the court concludes that Fleming has not raised a genuine issue of material fact as to whether Sea-Land has engaged in concerted action with Matson, Sea-Land is entitled to summary judgment on this claim.

Of the claims presented in Fleming's counterclaim, only the tying claim under [H.R.S. § 480-4](#) survives summary **[**30]** judgment. Thus, the court briefly considers the issue of federal jurisdiction. Fleming's counterclaim was properly brought before the federal court, either on the basis that 1) it was a compulsory counterclaim within the court's jurisdiction over the original claim, or 2) that it was a permissive counterclaim that presented a federal question under [28 U.S.C. § 1331](#). If Fleming's counterclaim is compulsory, the court has federal jurisdiction because it has jurisdiction over the original claim. However, even if the counterclaim is permissive, the court, in its discretion, may exercise supplemental jurisdiction pursuant to [28 U.S.C. § 1367](#).

[Section 1367](#) provides that a district court may decline to exercise supplemental **[*1102]** jurisdiction over a state claim if the district court has dismissed all claims over which it has original jurisdiction. In this case, the court concludes that Fleming lacks standing to pursue the federal antitrust claims. Nevertheless, because the court must proceed with API's identical tying claim, considerations of judicial economy and convenience of the parties and witnesses persuade the court to retain jurisdiction. **[**31]** Thus, Fleming may proceed before this court on the tying claim.

CONCLUSION

For the reasons stated above, the court GRANTS in part and DENIES in part Sea-Land Service, Inc.'s Motion to Dismiss and/or for Summary Judgment on Fleming Companies, Inc.'s Counterclaim. Fleming lacks standing to bring its federal antitrust claims because it is not a "direct purchaser" of Sea-Land's services. Fleming also lacks standing to pursue its [H.R.S. § 480-2](#) claim, as it does not meet Hawaii's definition of a "consumer." Finally, although Fleming has presented no genuine issue of material fact with respect to its [H.R.S. § 480-4](#) claim for concerted action, Fleming does present a viable claim under [§ 480-4](#) for an illegal tying arrangement. Therefore, Sea-Land is entitled to summary judgment on all claims presented in Fleming's Counterclaim except the tying claim.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 12 1999.

² In fact, the Agreement is pro-competitive because it enables either carrier to compete with the other notwithstanding unexpected operational problems. For example, if a Sea-Land vessel were disabled, a prospective shipper would still have the option of shipping under Sea-Land's tariff and its Bill of Lading, although the cargo would actually be carried on board Matson's vessel. Without the Agreement, the shipper could only ship under Matson's terms.

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DAVID ALAN EZRA

CHIEF UNITED STATES DISTRICT JUDGE

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Sea-Land Serv. v. Atlantic Pac. Int'l

United States District Court for the District of Hawaii

July 12, 1999, Decided ; July 12, 1999, Filed

CV. NO. 98-00369 DAE

Reporter

61 F. Supp. 2d 1102 *; 1999 U.S. Dist. LEXIS 10922 **; 1999-2 Trade Cas. (CCH) P72,670

SEA-LAND SERVICE, INC., Plaintiff, vs. ATLANTIC PACIFIC INTERNATIONAL, INC.; A & A CONSOLIDATORS, INC.; FLEMING COMPANIES, INC.; JOHN DOES 1-25, Defendants. and FLEMING COMPANIES, INC., Defendant/Third-Party Plaintiff, vs. JACK BORJA and HEIDI L. BORJA, Third-Party Defendants, and ATLANTIC PACIFIC INTERNATIONAL, INC., Defendant/Third-Party Plaintiff, vs. MATSON NAVIGATION SERVICES, INC., a Hawaii corporation; COSTCO WHOLESALE CORPORATION, a Washington corporation; WAL-MART STORES, INC. dba SAM'S CLUB, a Delaware corporation; TAG/ICIB SERVICES, INC., a Delaware corporation, Third-Party Defendants, and SEA-LAND SERVICE, INC., Plaintiff/Fourth-Party Plaintiff, vs. JACK BORJA and HEIDI L. BORJA, Fourth-Party Defendants.

Disposition: [**1] Sea-Land Service, Inc.'s Motion to Dismiss and/or for Summary Judgment on Atlantic Pacific International, Inc. and A & A Consolidators, Inc.'s First Amended Counterclaim GRANTED in part and DENIED in part.

Core Terms

containers, enterprise, cargo, carriers, alleges, shipping, transportation, shippers, customer, vessels, tariff, rates, predicate act, continuity, summary judgment, market power, racketeering activity, racketeering, tied product, commerce, charges, counterclaim, products, court concludes, market share, seller, maritime lien, Sherman Act, freight, summary judgment motion

LexisNexis® Headnotes

[Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials](#)

[Civil Procedure > ... > Discovery > Methods of Discovery > 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 [down arrow] Supporting Materials, Discovery Materials

Pursuant to [Fed. R. Civ. P. 56](#), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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\(c\)](#). All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Implausible Claims

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

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

HN2 [down arrow] Burdens of Proof, Implausible Claims

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. The substantive law defines which facts are material. A genuine issue of material fact requires more than some metaphysical doubt as to the material facts. Only disputes over outcome determinative facts under the applicable substantive law will preclude the entry of summary judgment. If the factual context makes a respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

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

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

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 > Genuine Disputes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

HN3 [down arrow] Supporting Materials, Affidavits

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. Once the movant's burden is met by presenting evidence which, if uncontested, would entitle the movant to a directed verdict at trial, the burden shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. In meeting this burden, parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient.

Civil Procedure > Judgments > Summary Judgment > General Overview

HN4 Judgments, Summary Judgment

The summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.

Administrative Law > Sovereign Immunity

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

HN5 Administrative Law, Sovereign Immunity

There is no private cause of action for violations of the Federal Trade Commission Act, [15 U.S.C.S. § 45](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > 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 > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > Sherman Act > General Overview

HN6 Tying Arrangements, Clayton Act

[Section 1](#) of the Sherman Act declares illegal every contract, combination, or conspiracy, in restraint of trade or commerce. [15 U.S.C.S. § 1](#). Tying arrangements have long been considered per se unlawful under [§ 1](#). To establish a tying arrangement that is illegal per se, the plaintiff must show: (1) the tying of two products, (2) that defendant had sufficient economic power in the tying product market to affect the tied product market, and (3) an effect on a substantial volume of commerce in the tied product market. A tying arrangement exists when a seller refuses to sell one product, the tying product, unless the purchaser agrees to purchase another product, the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN7 Price Fixing & Restraints of Trade, Tying Arrangements

To prevail on a tying claim, a plaintiff must first show that the scheme involves two separate products.

61 F. Supp. 2d 1102, *1102 (1999 U.S. Dist. LEXIS 10922, **1

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN8 Price Fixing & Restraints of Trade, Tying Arrangements

Before concluding that a link between two products constitutes a tying arrangement, a plaintiff must show that the buyer is required to purchase or lease the unwanted product.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN9 Regulated Practices, Market Definition

Tying arrangements are per se illegal where the seller has market power. Market power is the ability to force a purchaser to do something that he would not do in a competitive market. Market definition is the first step in the assessment of market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Business & Corporate Compliance > ... > Patent Law > Ownership > Federal Government Inventions

HN10 Regulated Practices, Market Definition

The Supreme Court has identified three sources of market power. First, when the government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power. The second is when the seller's share of the market is high. The third is when the seller offers a unique product that competitors are not able to offer.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN11 Regulated Practices, Market Definition

Lower courts have used the 30 percent market share as a minimum threshold for showing market power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN12 Price Fixing & Restraints of Trade, Tying Arrangements

A defendant's economic interest is sufficient where the seller of the tying product is also the seller of the tied product. Only when the tied product is sold by a separate company must the seller of the tying product have an economic interest in the sale of the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN13 Price Fixing & Restraints of Trade, Tying Arrangements

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In a per se tying violation, a not insubstantial amount of commerce in the tied product market must be affected by the tie. The not insubstantial requirement can be satisfied by the foreclosure of a single purchaser, so long as the purchaser represents a not insubstantial dollar-volume of sales.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN14 [+] **Robinson-Patman Act, Coverage**

The federal statute that generally prohibits price discrimination, that is, [§ 2](#) of the Clayton Act, as amended by [§ 1](#) of the Robinson-Patman Act, [15 U.S.C.S. § 13](#), applies only to the sale of commodities, and not to services such as transportation. In fact, federal legislation that governs water carriers in the non-contiguous domestic trade does not expressly prohibit rate discrimination; to the contrary, it allows carriers to engage in price discrimination under certain circumstances. For example, water carriers can discriminate among shippers based on the volume of cargo offered over time. [49 U.S.C.S. § 13702\(b\)\(4\)](#).

Administrative Law > Separation of Powers > Primary Jurisdiction

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Surface Transportation Board

HN15 [+] **Separation of Powers, Primary Jurisdiction**

The Interstate Commerce Commission Termination Act, [49 U.S.C.S. §§ 13701\(c\), 13702\(b\)\(6\)](#), provides expressly that a shipper may bring claims regarding the reasonableness of rates before the Surface Transportation Board (STB). Under the primary jurisdiction doctrine, the issue of reasonableness requires preliminary resort to the STB. Rate reasonableness is one area where uniformity and agency knowledge are essential to a proper result. Thus, district courts should refrain from deciding issues related to the reasonableness or claimed discriminatory effect of a filed rate when the STB has primary jurisdiction to do so.

Antitrust & Trade Law > Sherman Act > Claims

61 F. Supp. 2d 1102, *1102 (1999 U.S. Dist. LEXIS 10922, **1

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 > Elements

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 > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

[HN16](#) [L] Sherman Act, Claims

Claims for violation of [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), must allege two key elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power. To establish a Sherman Act [§ 2](#) violation for attempted monopolization, a private plaintiff seeking damages must demonstrate four elements: (1) specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct directed at accomplishing that purpose, (3) a dangerous probability of achieving monopoly power, and (4) causal antitrust injury.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Memoranda of Law

[HN17](#) [L] Summary Judgment, Motions for Summary Judgment

Where a brief does not meet the requirements of [Fed. R. Civ. P. 56\(e\)](#), it cannot be considered as evidence upon a summary judgment this motion. [Fed. R. Civ. P. 56\(e\)](#).

Admiralty & Maritime Law > Shipping > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

[HN18](#) [L] Admiralty & Maritime Law, Shipping

The elements of a RICO claim are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The failure to establish any of these elements is fatal to a RICO claim.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

61 F. Supp. 2d 1102, *1102 (1999 U.S. Dist. LEXIS 10922, **1

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN19 [blue icon] Private Actions, Racketeer Influenced & Corrupt Organizations

RICO defines the term pattern of racketeering activity as requiring at least two acts of racketeering activity, the last of which occurred within 10 years after the commission of a prior act of racketeering activity. [18 U.S.C.S. § 1961\(5\)](#). Aside from the minimal requirement of showing two predicate acts existed, RICO nowhere addresses the meaning of the term pattern as used throughout the statute.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > General Overview

HN20 [blue icon] Private Actions, Racketeer Influenced & Corrupt Organizations

To prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. Thus, the determination of whether a RICO plaintiff is able to establish a pattern of racketeering activity necessarily entails an initial determination of whether the defendants committed two or more predicate acts within the meaning of the RICO statute and, if so, whether the predicate acts were related in a manner such that they created a threat of continued unlawful activity.

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Crimes Against Persons > Robbery > General Overview

Criminal Law & Procedure > ... > Robbery > Unarmed Robbery > Elements

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

HN21 [blue icon] Hobbs Act, Elements

The Hobbs Act makes it illegal to obstruct, delay or affect commerce by robbery or extortion; by an attempt or a conspiracy to rob or extort; or by committing or threatening physical violence to a person or property in furtherance of a plan to violate the statute. [18 U.S.C.S. § 1951\(a\)](#). The Hobbs Act defines robbery as the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property. [§ 1951\(b\)\(1\)](#). The use of actual or threatened force or violence is an essential element of robbery pursuant to the Hobbs Act.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

61 F. Supp. 2d 1102, *1102 (1999 U.S. Dist. LEXIS 10922, **1

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

HN22 [L] Pleadings, Counterclaims

Extortion is defined by the Hobbs Act as the obtaining of personal property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of right. [18 U.S.C.S. § 1951\(b\)\(2\)](#). A plaintiff cannot state a claim of extortion pursuant to the Hobbs Act unless it shows that it parted with property with its consent.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > Elements

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN23 [L] Private Actions, Racketeer Influenced & Corrupt Organizations

[18 U.S.C.S. § 659](#) prohibits theft from interstate shipments by carrier. Only felonious violations of [§ 659](#) constitute racketeering activity under RICO. [18 U.S.C.S. § 1961\(1\)\(A\)](#). Theft under [§ 659](#) is a felony only if the amount or value of the stolen goods exceeds \$ 1,000.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN24 [L] Private Actions, Racketeer Influenced & Corrupt Organizations

To establish a RICO pattern it must be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity. There are two alternative ways to satisfy the continuity prong: Continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN25 [L] Private Actions, Racketeer Influenced & Corrupt Organizations

A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. This formulation raises the question of how long a substantial period of time is. The Supreme Court has declined to draw a bright line of substantiality. The Supreme Court did state, however, that a few weeks or months is not enough. The Ninth Circuit is in accord as it has found no case in which a court has held the requirement to be satisfied by a pattern of activity lasting less than a year. A pattern of activity lasting only a few months does not reflect the long term criminal conduct to which RICO was intended to apply.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

[**HN26**](#) [down] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Continuity may be demonstrated if the predicate acts constitute a threat of continuing racketeering activity: past conduct that by its nature projects into the future with a threat of repetition. In such cases, liability depends on whether the threat of continuity is demonstrated.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

[**HN27**](#) [down] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In assessing whether a threat of continuity exists, courts look first to the nature of the predicate acts alleged or to the nature of the enterprise at whose behest the predicate acts were performed. Thus, an inherently unlawful act performed at the behest of an enterprise whose business is racketeering activity would automatically give rise to the requisite threat of continuity. Where the nature or conduct of the enterprise does not by itself suggest that the racketeering acts will continue, a plaintiff must point to other external factors.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[**HN28**](#) [down] **Racketeer Influenced & Corrupt Organizations Act, Elements**

[18 U.S.C.S. § 1962\(a\)](#) prohibits not the engagement in racketeering acts to conduct an enterprise affecting interstate commerce, but rather the use or investment of the proceeds of racketeering acts to acquire, establish or operate such an enterprise. Therefore, a [§ 1962\(a\)](#) claim must include allegations of injury from the use and investment of racketeering proceeds, not merely injury from the predicate acts of racketeering themselves.

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

[**HN29**](#) [down] **Private Actions, Racketeer Influenced & Corrupt Organizations**

[18 U.S.C.S. § 1962\(b\)](#) prohibits engaging in a racketeering activity to acquire or maintain an interest in or control of an enterprise. Thus, it requires a specific nexus between the control of the enterprise and the racketeering activity.

61 F. Supp. 2d 1102, *1102 (1999 U.S. Dist. LEXIS 10922, **1

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN30 [] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1962(c) renders unlawful the direct or indirect conducting of or participation in a RICO enterprise's affairs through a pattern of racketeering activity by any person employed by or associated with any enterprise engaged in interstate commerce. This section of RICO contains strict pleading requirements: For the purposes of § 1962(c), RICO plaintiffs must allege a defendant -- the person or persons -- who is distinct from the enterprise whose business the defendant is conducting.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Torts > Vicarious Liability > Employers > General Overview

HN31 [] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Ninth Circuit law is clear that a RICO person may not be held directly liable under § 1962(c), when it and the RICO enterprise are identical. Furthermore, the Ninth Circuit has recognized that: it would be inconsistent with the language and purpose of section 1962(c) to allow plaintiffs to circumvent this rule by naming an employee of the enterprise as the person that conducts the affairs of the enterprise, who is also the employer, and then resorting to the doctrine of respondeat superior to make his employer liable. Respondeat superior and agency liability is inappropriate when the person is the RICO enterprise.

Admiralty & Maritime Law > Maritime Contracts > General Overview

Contracts Law > Types of Contracts > General Overview

Admiralty & Maritime Law > Practice & Procedure > Jurisdiction

HN32 [] **Admiralty & Maritime Law, Maritime Contracts**

In order for a contract to fall within the federal admiralty jurisdiction, it must be wholly maritime in nature, or its non-maritime elements must be either insignificant or separable without prejudice to either party. To qualify as maritime, the elements of a contract must pertain directly to and be necessary for commerce or navigation upon navigable waters. Contracts involving cargo are maritime only to the extent that cargo is on a ship or being loaded on or off a ship. Consistent with this rule, courts have repeatedly held that shoreside cargo handling, including trucking, drayage, and container handling, is not of a maritime nature.

Counsel: For SEA-LAND SERVICE, INC., plaintiff: Gregory W. Kugle, Damon Key Bocken Leong & Kupchak, Honolulu, HI.

For SEA-LAND SERVICE, INC., plaintiff: Deborah E. Barack, Carlsmith Ball Wichman Case & Ichiki, Honolulu, HI.

For ATLANTIC PACIFIC INTERNATIONAL INC., A & A CONSOLIDATORS, INC., defendants: Timothy J. Hogan, Lynch Ichida Thompson & Kim, Honolulu, HI.

For FLEMING COMPANIES, INC., defendant: Craig K. Shikuma, Kobayashi Sugita & Goda, Honolulu, HI.

For ATLANTIC PACIFIC INTERNATIONAL INC., counter-claimant: Timothy J. Hogan, Lynch Ichida Thompson & Kim, Honolulu, Hi.

For FLEMING COMPANIES, INC., counter-claimant: Craig K. Shikuma, Kobayashi Sugita & Goda, Honolulu, HI.

For SEA-LAND SERVICE, INC., counter-defendant: Gregory W. Kugle, Damon Key Bocken Leong & Kupchak, Honolulu, HI.

For SEA-LAND SERVICE, INC., counter-defendant: Gary G. Grimmer, Deborah E. Barack, Carlsmith Ball Wichman Case & Ichiki, Honolulu, HI.

For FLEMING COMPANIES, INC., **[**2]** cross-claimant: Craig K. Shikuma, Kobayashi Sugita & Goda, Honolulu, HI.

For FLEMING COMPANIES, INC., third-party plaintiff: Craig K. Shikuma, Kobayashi Sugita & Goda, Honolulu, HI.

For ATLANTIC PACIFIC INTERNATIONAL INC., A & A CONSOLIDATORS, INC., third-party plaintiffs: Timothy J. Hogan, Lynch Ichida Thompson & Kim, Honolulu, Hi.

For ATLANTIC PACIFIC INTERNATIONAL INC., A & A CONSOLIDATORS, INC., cross-defendants: Timothy J. Hogan, Lynch Ichida Thompson & Kim, Honolulu, Hi.

For JACK BORJA, HEIDI L. BORJA, third-party defendants: David C. Farmer, Paul B. Shimomoto, Ashford & Wriston, Honolulu, Hi.

For SEA-LAND SERVICE, INC., fourth party plaintiff: Gregory W. Kugle, Damon Key Bocken Leong & Kupchak, Honolulu, HI.

For SEA-LAND SERVICE, INC., fourth party plaintiff: Deborah E. Barack, Carlsmith Ball Wichman Case & Ichiki, Honolulu, HI.

For JACK BORJA, HEIDI L. BORJA, fourth party defendants: Paul B. Shimomoto, Ashford & Wriston, Honolulu, Hi.

For TAG/ICIB SERVICES, INC., third-party defendant: Kenneth A. Remson, Jones Day Reavis & Pogue, Los Angeles, CA.

For TAG/ICIB SERVICES, INC., third-party defendant: Jeffrey S. Portnoy, Cades Schutte **[**3]** Fleming & Wright, Honolulu, HI.

Judges: DAVID ALAN EZRA, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: DAVID ALAN EZRA

Opinion

[*1105] ORDER GRANTING IN PART AND DENYING IN PART SEA-LAND SERVICE, INC.'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT ON ATLANTIC PACIFIC INTERNATIONAL, INC. AND A & A CONSOLIDATORS, INC.'S FIRST AMENDED COUNTERCLAIM

The court heard Sea-Land's motion on May 18, 1999. Gary G. Grimmer, Esq., **[*1106]** and Deborah E. Barack, Esq., appeared at the hearing on behalf of Sea-Land Service, Inc.; Timothy J. Hogan, Esq., appeared at the hearing on behalf of Defendants Atlantic Pacific International, Inc. and A & A Consolidators, Inc. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS in part and DENIES in part Sea-Land Service, Inc.'s Motion to Dismiss and/or for Summary Judgment on Atlantic Pacific International, Inc. and A & A Consolidators, Inc.'s First Amended Counterclaim.

BACKGROUND

On May 7, 1998, Plaintiff Sea-Land Service, Inc. ("Sea-Land") filed a Complaint against Defendants Atlantic Pacific International, Inc. ("API"), A & A Consolidators, Inc. ("A & A"), and Fleming Companies, Inc. ("Fleming") (collectively "Defendants"), seeking to **[**4]** recover unpaid ocean freight charges. In response, API and A & A (hereinafter "API") asserted a counterclaim against Sea-Land, alleging (1) federal antitrust violations; (2) violation of the federal racketeering statute ("RICO"); (3) the existence of maritime liens on Sea-Land's vessels; (4) conversion of API's property; and (5) breach of contract.

API, a freight consolidator, arranged with Sea-Land, a common carrier, to ship cargo from the West Coast to Hawaii on behalf of Fleming, a wholesale food marketer and distributor. Sea-Land provides transportation services based on rates contained in tariffs. These tariffs are published and filed with the Surface Transportation Board ("STB"). While Sea-Land does not assess a separate charge for the use of its cargo containers during transportation, the cost of the containers is reflected in the shipping rates. Once the cargo reaches its destination, Sea-Land charges an additional detention fee for continued use of the containers after the period of time ("free time") allowed by the tariff. Essentially, customers have a specified period of time in which to unload their cargo and return the containers to Sea-Land before Sea-Land will impose **[**5]** the detention fee.

Rule 884 of Freight Tariff No. 486 allows shippers to transport goods on Sea-Land's vessels in shipper-owned or leased containers, provided that such containers meet Sea-Land's construction and size specifications. At least two of Sea-Land's customers regularly use shipper-owned containers. Sea-Land charges the same shipping rates regardless of whether a customer employs shipper-owned containers or uses Sea-Land's containers.

TAG/ICIB Services, Inc. ("TAG") is an independent contractor which inspects cargo on behalf of carriers to ensure tariff compliance. TAG obtains information from the carriers that customers furnish regarding their cargo. TAG may open and examine the contents of shipments to verify the accuracy of that information. If TAG determines that the cargo has been misdeclared by the customer, TAG will rebill the customer the difference, if any, between the freight charges for the actual type, origin and quantity of the commodity shipped, and the freight charges for the type, origin and quantity declared by the customer. TAG may also bill the customer a misdeclaration charge provided by the tariff. If the customer owes any charges, TAG will impound **[**6]** the shipment until the charges are paid. When cargo containers are detained by the customer beyond the free time authorized by Sea-Land's tariff, TAG will bill and collect the detention charges according to the tariff.

On January 20, 1999, Sea-Land filed the instant Motion to Dismiss and/or for Summary Judgment on API's First Amended Counterclaim. Because both Sea-Land and API ask the court to consider materials outside the pleadings, the court addresses this motion as one for summary judgment, pursuant to [Federal Rule of Civil Procedure 12\(b\)](#).

STANDARD OF REVIEW

HN1  Pursuant to [Federal Rule of Civil Procedure 56](#), summary judgment is proper "if **[*1107]** the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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\(c\)](#). All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. [Brinson v. Linda Rose Joint Venture](#), 53 F.3d 1044, 1050 (9th Cir. 1995). **[**7]** **HN2**  A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. [S.E.C. v. Seaboard Corp.](#), 677 F.2d 1301, 1305-06 (9th Cir. 1982). The substantive law defines which facts are material. [Anderson v. Liberty Lobby](#), 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A genuine issue of material fact requires more than some "metaphysical doubt" as to the material facts. [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Only disputes over outcome determinative facts under the applicable substantive law will preclude the entry of summary judgment. *Id.* If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

HN3 [↑] The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 [**8] (9th Cir.), cert. denied, 519 U.S. 868, 136 L. Ed. 2d 120, 117 S. Ct. 181 (1996). Once the movant's burden is met by presenting evidence which, if uncontested, would entitle the movant to a directed verdict at trial, the burden shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 250. In meeting this burden, parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *Keenan v. Allan*, 91 F.3d 1275, 1278 (9th Cir. 1996).

The Supreme Court cases cited above establish that **HN4** [↑] the "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327 (quoting *Fed. R. Civ. P.* 1).

DISCUSSION

Although, as noted above, API's First Amended Counterclaim (hereinafter [**9] "counterclaim") asserts five causes of action, Sea-Land's summary judgment motion addresses only three: antitrust, RICO, and maritime liens. The court examines each in turn.¹

I. Antitrust Claims

API purports to state claims against Sea-Land under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), the Clayton Act (alleged as 15 U.S.C. § 15), and Section 5 of the Federal Trade Commission Act ("FTCA") (15 U.S.C. § 45). This last claim fails from the start, as **HN5** [↑] there is no private cause of action for violations of the FTCA. *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973); *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184, 1187 (8th Cir. 1996); *Fulton v. Hecht*, 580 F.2d 1243, 1248 n. 2 (5th Cir. 1978).

Specifically, API alleges that Sea-Land [**10] and Matson Navigation Services, Inc. ("Matson"), another common carrier, conspired [*1108] and created an unlawful cartel which controlled the ocean transportation of goods between Hawaii and the Mainland.² This cartel allegedly:

- (1) Tied the provision of its transportation services to the "purchase of the use of carrier-owned containers" in which the cargo is carried on Sea-Land's vessels;
 - (2) Refused to deal with shippers who wished to provide their own containers;
 - (3) Conspired with TAG to fix the price of shipping in the Hawaii-Mainland market;
 - (4) Provided Costco and Sam's Club with preferential and discriminatory shipping rates, not available to API; and
- (5) Violated § 2 of the Sherman Act.

Because these allegations require individual analysis, the court discusses each separately.

1. Tying Claim

HN6 [↑] Section 1 of the Sherman [**11] Act declares illegal "every contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Tying arrangements have long been considered per se unlawful under Section 1. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). To establish a tying arrangement that is illegal per se, the plaintiff must show (1) the tying of two products; (2) that

¹ The court notes that, for lack of good cause shown, API's request for a Rule 56(f) continuance was denied during the May 18, 1999 hearing.

² Although Matson was originally named as a third-party defendant in API's third-party complaint, all claims against it were dismissed without prejudice.

defendant had sufficient economic power in the tying product market to affect the tied product market, and (3) an effect on a substantial volume of commerce in the tied product market. [Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1411 \(9th Cir. 1991\)](#). A tying arrangement exists when a seller refuses to sell one product (the tying product) unless the purchaser agrees to purchase another product (the tied product). [Northern Pacific, 356 U.S. at 5; Bhan, 929 F.2d at 1411.](#)

In this case, API alleges that Sea-Land tied the purchase of its shipping services (the tying product) to the purchase of the use of Sea-Land's containers (the tied product). API contends that it only wanted to purchase Sea-Land's [**12] shipping services. Because, however, Sea-Land's shipping rates include the cost of the containers, API maintains that it was also forced to purchase the use of Sea-Land's containers. Although the record clearly demonstrates that Rule 884 of Tariff 486 did not require API or any other shipper to use Sea-Land's containers, Sea-Land charged the same rate regardless of whether the customer used Sea-Land's or its own containers.

a. Separate Tied Product

[HN7](#) To prevail on a tying claim, a plaintiff must first show that the scheme involves two separate products. [Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 462, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 18-25, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). Sea-Land argues that the use of containers is a functional part of the ocean transportation of goods, rather than a separate product. In developing an approach to determine if two products are separate for tying purposes, the United States Supreme Court rejected a test based upon the functional relationship between the products. [Jefferson Parish, 466 U.S. at 21](#) ("We have often [**13] found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices."). In *Jefferson Parish*, the Supreme Court concluded that products are separate if "two distinguishable product markets [are] involved." *Id.* Subsequently, the Court refined this approach in *Eastman Kodak Company v. Image Technical Services, Inc.*: "To be considered two distinct products, there must be sufficient consumer [**109] demand so that it is efficient for a firm to provide [one product] separately from [the other]." [Kodak, 504 U.S. at 462](#).

Thus, under *Jefferson Parish* and *Kodak*, API must show that there is "sufficient consumer demand" in the Hawaii-Mainland ocean transportation market to make it efficient for carriers to offer a lease of containers as a service separate from the carriage. API has adduced evidence that shows at least two of Sea-Land's Hawaii-Mainland customers regularly use their own containers, and that other shippers may do so sporadically. Evidence also demonstrates that containers are interchangeable with other forms of transportation, including motor and rail transport, and that they [**14] can be used solely as a means to store goods. In addition, API clearly demanded separate services, as demonstrated by its attempts to negotiate with Sea-Land for reduced rates that would reflect the cost of shipping without the cost of using Sea-Land's containers. Simply because Sea-Land refused to sever the cost of the services does not mean that demand for separate services did not exist.

Nonetheless, as "evidence" of lack of demand, Sea-Land points to the fact that even shippers who use their own containers pay the same rate as customers who elect to use containers provided by Sea-Land. Rather than establish an absence of consumer demand, this fact merely bolsters API's claim that shippers who choose to use their own containers are still forced to pay for services that they do not want or need.

The court concludes that a genuine issue of material fact exists as to whether there is "sufficient consumer demand" for separate transportation and container services. Enough doubt is cast on Sea-Land's claim of a unified market that it should be resolved by the trier of fact. Before denying Sea-Land's Motion for Summary Judgment, however, the court must examine the other elements of a [**15] tying claim.

b. Sale of the Tied Product/Coercion

[HN8](#) Before concluding that a link between two products constitutes a tying arrangement, a plaintiff must show that the buyer is required to purchase or lease the unwanted product. [Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861, 881 \(D. Del. 1987\)](#). Sea-Land argues that because it does not assess a separate charge for the use of its containers, API was not forced to purchase anything. Sea-Land characterizes the use of its containers as a free

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service provided to its customers. Other courts, however, have rejected similar contentions, holding that to do otherwise would permit escape from antitrust laws prohibiting illegal tie-ins, by the simple device of offering both products as a unit at a single price, while claiming that one of the two is a "free giveaway." See [Hill v. A-T-O, Inc., 535 F.2d 1349 \(2nd Cir. 1976\)](#). This court agrees. Thus, Sea-Land's inclusion of the cost of containers in its shipping rates belies its claim that there was no sale of container services.

Moreover, Sea-Land's pricing scheme may also establish the requirement of "coercion." "When a buyer is free to take either product [**16] by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." [Northern Pacific Ry., 356 U.S. at 5-6](#). In this case, however, Sea-Land does not offer the products separately. Because Sea-Land charges one price, which includes both products, there is evidence customers may be coerced through their purchase of the first product to also purchase the second unwanted product.

c. Market Power

[HN9](#) Tying arrangements are per se illegal where the seller has market power. [Jefferson Parish, 466 U.S. at 14](#). "Market power is the ability 'to force a purchaser to do something that he would not do in a competitive market.'" [Kodak, 504 U.S. at 464](#) (quoting [Jefferson Parish, 466 U.S. at 14](#)). [**110] Market definition is the first step in the assessment of market power. [Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468](#) (3rd Cir.), cert. denied, 506 U.S. 868, 121 L. Ed. 2d 139, 113 S. Ct. 196 (1992) (relevant market was all automobiles, not just Chrysler automobiles). Both Sea-Land and API apparently agree that the relevant market in [**17] this case is Hawaii-Mainland ocean carriage of goods in containers.

[HN10](#) The Supreme Court has identified three sources of market power. First, when the government has granted the seller "a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power." [Jefferson Parish, 466 U.S. at 16](#) (citing [United States v. Loew's, Inc., 371 U.S. 38, 45-47, 9 L. Ed. 2d 11, 83 S. Ct. 97 \(1962\)](#)). The second is when "the seller's share of the market is high." *Id.* (citing [Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 611-13, 97 L. Ed. 1277, 73 S. Ct. 872 \(1953\)](#)). The third is when "the seller offers a unique product that competitors are not able to offer." *Id.*

Sea-Land contends that its share of this market is 33%, while Matson controls the other 66%. Sea-Land argues that its 33% market share is insufficient, as a matter of law, to constitute "market power." In [Jefferson Parish](#), the Supreme Court held that a 30% market share did not give rise to the inference of market power necessary for application of the per se rule against tying. [466 U.S. at 27](#). [HN11](#) [**18] Lower courts have subsequently used the 30% market share as a minimum threshold for showing market power. See [Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660 \(6th Cir. 1993\)](#) (11% market share cannot confer market power); [A.I. Root Co. v. Computer/Dynamics, 806 F.2d 673 \(6th Cir. 1986\)](#) (2-4% insufficient); [Will v. Comprehensive Accounting Corp., 776 F.2d 665 \(7th Cir. 1985\)](#) ("pygmy among large, national firms" had no market power), cert. denied, 475 U.S. 1129, 90 L. Ed. 2d 201, 106 S. Ct. 1659 (1986); [M. Leff Radio Parts, Inc. v. Mattel Inc., 706 F. Supp. 387 \(W.D. Pa. 1988\)](#) (30% market share of home video games sufficient to demonstrate market power).

In this case, API disputes Sea-Land's calculation of its market share. Evidence proffered by API shows that Sea-Land operates seven vessels in the Hawaii-Guam market and that, as of January 1999, Matson had reduced its Hawaii-Mainland fleet to six ships. The record is unclear as to whether the number of Sea-Land ships in the Hawaii-Guam market is the same as those in the Hawaii-Mainland market. The court need not pursue this mystery further, [**19] however, as the evidence relied upon by API is inadmissible pursuant to [Federal Rule of Civil Procedure 56\(e\)](#). The information regarding Matson was apparently taken from Matson's website. Although incorporated into API's counsel's affidavit, counsel does not purport to have any personal knowledge of the underlying facts. Moreover, this evidence would be inadmissible as hearsay.

Nevertheless, the court finds that Sea-Land's now undisputed 33% market share, coupled with the unique factors that 1) the market consists of only two participants, and 2) the Jones Act may prevent entry of new competitors into the market, renders the existence of Sea-Land's market power a question of material fact for the jury.

d. Economic Interest

Sea-Land argues that no tying arrangement exists because it does not have an economic interest in the tied product market, that is, the container market. Relying on [Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 491 F. Supp. 1199, 1209 \(D. Haw. 1980\)](#), aff'd, [732 F.2d 1403 \(9th Cir. 1984\)](#), Sea-Land maintains that API must show that Sea-Land "participates for profit" in the tied product market. Sea-Land's [**20] reliance on *Robert's* is misplaced. The *Robert's* decision made it clear that [HN12](#) the defendant's economic interest is sufficient where, as here, the seller of the tying product is also the seller of the tied product. Only when the tied [*1111] product is sold by a separate company must the seller of the tying product have an economic interest in the sale of the tied product. *Robert's*, 732 F.2d at 1407-08. Thus, API need not demonstrate that Sea-Land has an economic interest in the container market.

e. Effect on Commerce

The final requirement [HN13](#) in a per se tying violation is that a "not insubstantial" amount of commerce in the tied product market must be affected by the tie. "The 'not insubstantial' requirement can be satisfied by the foreclosure of a single purchaser, so long as the purchaser represents a 'not insubstantial' dollar-volume of sales." [Datagate, Inc. v. Hewlett Packard Co., 60 F.3d 1421 \(9th Cir. 1995\)](#), cert. denied, 517 U.S. 1115, 134 L. Ed. 2d 492, 116 S. Ct. 1344 (1996). In this case, API has established that approximately \$ 3.4 million dollars worth of containers were not purchased as a result of Sea-Land's alleged [**21] tying arrangement. Clearly, this arrangement has more than an insubstantial effect on commerce.

Because the court concludes that genuine issues of material fact exist with respect to 1) whether there is "sufficient consumer demand" in the market for separate transportation and container services, and 2) whether Sea-Land has "market power," Sea-Land's Motion for Summary Judgment on the tying claim is DENIED.

2. Refusal to Deal

API's claim that Sea-Land refused to deal with shippers who wish to ship cargo in their own containers does not survive summary judgment. Although API states that "the evidence shows that Sea-Land refused to allow shipper-owned containers under any circumstances," API has not proffered any of this evidence. In fact, the evidence is clearly to the contrary. Rule 884 of Tariff 486 allows shippers to use their own or leased containers. Moreover, Daniel Downes testified in his deposition that both Agmark and Frito-Lay regularly use shipper-owned containers and that other shippers may use them sporadically. While Rule 884 allows the use of shipper-owned containers, it reserves to Sea-Land the right to furnish containers if certain size and construction specifications [**22] are not met. The court finds that this reservation of rights does not create a genuine issue of material fact, as it does not demonstrate a refusal to deal, but merely precludes the use of non-conforming containers. Quite simply, API has failed to meet its burden on this issue. Accordingly, Sea-Land's Motion for Summary Judgment as to the refusal to deal claim is GRANTED.

3. Price-fixing Conspiracy

API alleges that Sea-Land conspired with TAG to fix the price of shipping in the Hawaii-Mainland market. Although API makes numerous allegations and insinuations regarding the "dark side" of TAG, it has offered no evidence to support its claim of price-fixing. In particular, API has not provided support for its statement that TAG acts as a "joint agent" of Sea-Land and Matson and that its knowledge of pricing is "by law, shared by both carriers."

Sea-Land, on the other hand, has offered affidavits demonstrating that TAG is an independent contractor in the performance of its duties, except as to billing and collection of tariff charges, in which respect it acts as an agent of the carrier. While Sea-Land and Matson both employ TAG, they do so separately, not jointly. Sea-Land's affidavits [**23] also establish that TAG has no involvement in the development of freight rates and does not gain any benefit from the level of freight rates established in Sea-Land's tariff. Moreover, Sea-Land submitted deposition testimony that expressly contradicts API's contention that TAG obtained financial information from Sea-Land regarding Fleming.

API does not dispute that TAG repeatedly caught it misdeclaring the type, quantity and/or origin of goods shipped in containers on board Sea-Land's vessels. [*1112] TAG billed API and/or Fleming for the difference between the actual cargo and that declared by API. TAG detained the shipments involved until the rebilled charges were paid. API is attempting to make a price-fixing conspiracy out of those charges.

Similar complaints by shippers unhappy with TAG were soundly rejected in *Caribbean Shippers Association v. Surface Transportation Board*, 330 U.S. App. D.C. 292, 145 F.3d 1362 (D.C. Cir. 1998). There, Caribbean Shippers' Association ("CSA"), an association of non-vessel operating common carriers, claimed that the water carriers that jointly controlled 90% of the transportation market in question used TAG to purposefully delay CSA [**24] members' shipments, in order to force customers to deal directly with water carriers. However, the court refused to infer concerted action by the water carriers from the fact that TAG was inspecting cargo on behalf of each of those carriers. 145 F.3d at 1363.

In fact, the *Caribbean Shippers*' Court noted that it appeared:

[Petitioner's real concern is that so long as TAG performs the inspection service for all three carriers it is more difficult for petitioner to play one against the other. If a shipper is unhappy about the manner in which TAG categorizes its merchandise, for example, it is hard for that shipper to gain more favorable treatment elsewhere because each of the major carriers in the market uses TAG. But competition in inspection efficiency, or more accurately inefficiency, is hardly the sort of competition the statute is designed to protect.]

Id. at 1364-65.

API argues that *Caribbean Shippers*' is distinguishable because there was no evidence presented in that case that TAG was sharing pricing information or involved in actual coercion and collusion with the carrier. API is unable to distinguish *Caribbean Shippers*' on that basis as it has [**25] not presented any such evidence in this case, either. Thus, because the court again concludes that API has failed to meet its burden, Sea-Land's Motion for Summary Judgment on the price-fixing claim is GRANTED.

4. Preferential/Discriminatory Shipping Rates

API alleges that Sea-Land's tariff includes special freight rates for Costco and Sam's Club that are more favorable than Sea-Land's general tariff, and that Sea-Land has refused to extend comparable tariff treatment to API. Even assuming, *arguendo*, that Sea-Land's tariff favors those shippers, API has not specified any statutory provision that Sea-Land has allegedly violated.

HN14 [+] The federal statute that generally prohibits price discrimination, that is, § 2 of the Clayton Act, as amended by § 1 of the Robinson-Patman Act, 15 U.S.C. § 13, applies only to the sale of commodities, and not to services such as transportation. See, e.g., *Alliance Shippers, Inc. v. Southern Pac. Transp. Co.*, 673 F. Supp. 1005, 1008 (C.D. Cal. 1986), aff'd., 858 F.2d 567 (9th Cir. 1988) ("The Robinson-Patman prohibition against price discrimination between similarly situated purchasers of [**26] like commodities does not apply to transportation since transportation is not a commodity.").

In fact, federal legislation that governs water carriers such as Sea-Land in the non-contiguous domestic trade does not expressly prohibit rate discrimination; to the contrary, it allows carriers to engage in price discrimination under certain circumstances. For example, water carriers can discriminate among shippers based on the volume of cargo offered over time. 49 U.S.C. § 13702(b)(4).

Moreover, to the extent that API argues that Sea-Land's rates are unreasonable, such arguments are subject to the primary jurisdiction of the Surface Transportation Board ("STB"), formerly the Interstate Commerce Commission.

HN15 [+] The ICC Termination Act, 49 U.S.C. §§ 13701(c) and 13702(b)(6), provides expressly that a [*1113] shipper "may" bring claims regarding the reasonableness of rates before the STB. Under the "primary jurisdiction" doctrine, the issue of reasonableness requires preliminary resort to the STB. *Hargrave v. Freight Distrib. Serv., Inc.*, 53 F.3d 1019, 1021 (9th Cir. 1995) (citing *Great N. Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291, 66 L. Ed. 943, 42 S. Ct. 477 (1922)). [**27]

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Rate reasonableness is one area where uniformity and agency knowledge are essential to a proper result. Hargrave, 53 F.3d at 1021; RTC Transp., Inc. v. Conagra Poultry Co., 971 F.2d 368 (9th Cir. 1992); Milne Truck Lines, Inc. v. Makita U.S.A., Inc., 970 F.2d 564 (9th Cir. 1992). Thus, district courts should refrain from deciding issues related to the reasonableness or claimed discriminatory effect of a filed rate when the STB has primary jurisdiction to do so. See DeBruce Grain, Inc. v. Union Pac. R.R. Co., 149 F.3d 787 (8th Cir. 1998); Baltimore & Ohio Chicago Terminal R.R. Co. v. Wisconsin Cent. Ltd., 154 F.3d 404 (7th Cir. 1998), cert. denied, U.S. , 119 S. Ct. 1254, 143 L. Ed. 2d 351 (1999).

Because API has failed to show a statutory violation with respect to its allegations of price discrimination, Sea-Land's Motion for Summary Judgment on this claim is GRANTED.

5. Section 2 of the Sherman Act

API invokes § 2 of the Sherman Act as one of the bases for its counterclaim:

Defendants unreasonably restrain trade and interstate commerce in violation of Section 1 [**28] and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

This conclusory allegation is clearly insufficient to state a claim under § 2. The Ninth Circuit has described the requirements of § 2, as follows:

Section 2 claims tend to encompass a narrower range of anticompetitive behavior specifically defined as monopolization and attempts to monopolize. 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 . . . trade shall be guilty" of an antitrust violation. 15 U.S.C. § 2. HN16[↑] Claims for violation of Section 2 must allege two key elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966) . . . To establish a Sherman Act Section 2 violation for attempted monopolization, a private plaintiff seeking damages must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed [**29] at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power"; and (4) causal antitrust injury. Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1432-33 (9th Cir. 1995) (citing McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)).

Amarel v. Connell, 102 F.3d 1494, 1521 (9th Cir. 1996) (as amended Jan. 15, 1997).

API does not allege that Sea-Land has "monopoly power." Monopoly power is the "power to control prices or exclude competition" in the relevant market. High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993). Because Sea-Land has only a 1/3 share in the Hawaii-Mainland market, it cannot have "monopoly power," as a matter of law. Forro Precision, Inc. v. Int'l Bus. Mach. Corp., 673 F.2d 1045, 1058 (9th Cir. 1982) (35% market share insufficient); Levitch v. Columbia Broadcasting System, Inc., 495 F. Supp. 649, 655 (S.D.N.Y. 1980), aff'd, 697 F.2d 495 (2nd Cir. 1983) (33% market share insufficient); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2nd Cir. 1945) [**30] (Learned Hand, J.) ("it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three is not").

While API tries to lump Sea-Land's and Matson's market shares together, it cannot do so because API has [*1114] failed to show concerted action by Sea-Land and Matson. API relies solely on two documents to demonstrate concerted action: 1) a Space Sharing Agreement between the two carriers, and 2) the State of Hawaii's Comments in Response to the U.S. Department of Transportation's Request for Public Comment on Competition in the Noncontiguous Domestic Offshore Trades (the "State Comment"). Neither raises a genuine issue of material fact here.

Matson and Sea-Land's Space Sharing Agreement merely provides for emergency shipping of cargo on each other's vessels "in the event of a vessel casualty or severe operational problems unrelated to vessel casualty." This

Agreement does not implicate antitrust concerns as it does not affect the freight rate billed to the customer by the original carrier.³

[**31] The State Comment is a brief filed by certain State agencies, unsuccessfully advocating a return to a close regulation of the carriers' rates or at least a repeal of the "zone of reasonableness" provision in the ICC Termination Act, [49 U.S.C. § 13701\(d\)](#), which established a presumption of validity of the carriers' rates so long as the upward annual increase of the rates did not exceed 7.5%. In that brief, the State agencies opine and argue that there is concerted action rather than competition between Sea-Land and Matson. Importantly, the State agencies' opinions regarding the alleged concerted action were not the result of any judicial or quasi-judicial administrative fact finding. Although incorporated in API's counsel's affidavit, counsel does not purport to have personal knowledge of its contents. Thus, [HN17](#)[↑] because the brief does not meet the requirements of [Federal Rule of Civil Procedure 56\(e\)](#), it cannot be considered as evidence upon this motion. [Fed. R. Civ. P. 56\(e\); Kim v. United States, 121 F.3d 1269, 1276-77 \(9th Cir. 1997\); Keenan v. Allan, 91 F.3d 1275, 1278 \(9th Cir. 1996\); Anheuser-Busch, Inc. v. Natural Beverage Distrib., 69 F.3d 337, 345 n. 4 \(9th Cir. 1995\).](#) [**32]

Moreover, API's allegations of concerted action 2 are conclusively contradicted by the undisputed testimony in the record. API's own officer testified at length that Sea-Land and Matson tried very hard to get API's business by undercutting and/or matching each other's tariff rates. In fact, he admitted that the two carriers were constantly competing against each other.

Furthermore, even if API had alleged "monopoly power," mere possession of monopoly power is not unlawful. [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273-98 \(2nd Cir. 1979\)](#) (Sherman Act [§ 2](#) "does not prohibit monopoly-similiciter"). API must allege overt acts in furtherance of a monopolization scheme to establish a [§ 2](#) claim. API does not. Thus, API's [§ 2](#) claim fails. See [Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 735-36 \(9th Cir. 1987\)](#) (holding that plaintiff's conclusory allegations of specific intent and anticompetitive conduct were insufficient). Therefore, the court GRANTS summary judgment in favor of Sea-Land on the [§ 2](#) claim.

II. RICO Claims

API alleges that TAG has been stealing cargo from its interstate shipments during inspections and that [**33] Sea-Land should be held vicariously liable for these thefts under RICO. [HN18](#)[↑] The elements of a RICO claim are (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. [Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 \(1985\)](#). The failure to establish any of these elements is fatal [[*1115](#)] to a RICO claim. See [Rae v. Union Bank, 725 F.2d 478, 480-81 \(9th Cir. 1984\)](#) (affirming [Rule 12\(b\)](#) dismissal of RICO claim where plaintiff failed to meet the "enterprise" requirement).

The court first examines whether API has adequately alleged a pattern of racketeering activity. [HN19](#)[↑] RICO defines the term "pattern of racketeering activity" as requiring "at least two acts of racketeering activity ... the last of which occurred within ten years ... after the commission of a prior act of racketeering activity." [18 U.S.C. § 1961\(5\)](#). Aside from the minimal requirement of showing two predicate acts existed, RICO nowhere addresses the meaning of the term "pattern" as used throughout the statute. In [H.J. Inc. v. Northwestern Bell Telephone Company](#), the Supreme Court sought to develop a meaningful concept [**34] of that term. [492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 \(1989\)](#). Drawing on dicta from a previous opinion in which the issue was considered, [Sedima, 473 U.S. at 496 n. 14](#), the Supreme Court developed from RICO's legislative history a two-prong framework for analysis: [HN20](#)[↑] To prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." [Northwestern Bell, 492 U.S. at 239](#). Thus, the determination of whether a RICO plaintiff is able to establish a pattern of racketeering activity necessarily entails an initial determination of whether the defendants committed two or more predicate acts

³ In fact, the Agreement is pro-competitive because it enables either carrier to compete with the other notwithstanding unexpected operational problems. For example, if a Sea-Land vessel were disabled, a prospective shipper would still have the option of shipping under Sea-Land's tariff and its Bill of Lading, although the cargo would actually be carried on board Matson's vessel. Without the Agreement, the shipper could only ship under Matson's terms.

within the meaning of the RICO statute and, if so, whether the predicate acts were related in a manner such that they created a threat of continued unlawful activity, *Northwestern Bell*, 492 U.S. at 239-43.

1. *Predicate Acts*

Congress has enumerated the predicate acts which may form a basis for a RICO claim in [18 U.S.C. § 1961\(1\)](#). Of these, API relies on (a) the Hobbs Act, [18 U.S.C. § 1951](#) [**35] (relating to interference with commerce, robbery, or extortion), and (b) [18 U.S.C. § 659](#) (relating to felonious theft from interstate shipment).

a. *Hobbs Act*

HN21[] The Hobbs Act makes it illegal to obstruct, delay or affect commerce by robbery or extortion; by an attempt or a conspiracy to rob or extort; or by committing or threatening physical violence to a person or property in furtherance of a plan to violate the statute. See [18 U.S.C. § 1951\(a\)](#). API fails to state a cause of action for either robbery or extortion.

The Hobbs Act defines robbery as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." [18 U.S.C. § 1951\(b\)\(1\)](#). The use of actual or threatened force or violence is an essential element of robbery pursuant to the Hobbs Act. [United States v. Smith](#), 156 F.3d 1046, 1056 ([10th Cir. 1998](#)), cert. denied, U.S. , 119 S. Ct. 844 (1999). Thus, the court in [United States](#) [**36] v. *Smith*, vacated a conviction for robbery under the Hobbs Act where there was no evidence either that the defendant brandished the guns he stole from the sporting goods store, or that he threatened the store's employees in any way. *Id.*

API fails to allege facts to support a claim of robbery as defined by [§ 1951](#). In fact, API's allegations contradict such a claim. API does not allege that TAG took property from the person or in the presence of another. Nor does API allege that TAG took property by means of actual or threatened force, violence or fear. Rather, API alleges that TAG took property "under the guise of conducting a neutral body inspection of the cargo." Thus, the court concludes that the clandestine activity described by API does not constitute robbery within the meaning of the Hobbs Act.

HN22[] [*1116] Extortion is defined by the Hobbs Act as "the obtaining of personal property from another, *with his consent*, induced by wrongful use of actual or threatened force, violence or fear, or under color of right." [18 U.S.C. § 1951\(b\)\(2\)](#) (emphasis added). A plaintiff cannot state a claim of extortion pursuant to the Hobbs Act unless it shows that it parted [**37] with property *with its consent*. [Camelio v. American Federation](#), 137 F.3d 666, 671 ([1st Cir. 1998](#)). API's counterclaim expressly states that TAG removed its property "without consent and unlawfully." Thus, while API's counterclaim alleges reprehensible acts, it does not allege a cause of action for extortion under the Hobbs Act.

b. [Section 659](#)

HN23[] [Section 659](#) prohibits theft from interstate shipments by carrier. [18 U.S.C. § 659](#). Only felonious violations of [§ 659](#) constitute "racketeering activity" under RICO. See [18 U.S.C. § 1961\(1\)\(A\)](#). Theft under [§ 659](#) is a felony only if the amount or value of the stolen goods exceeds \$ 1,000. Thus, while API alleges 20 specific violations of [§ 659](#), only four involve the theft of goods valued at over \$ 1,000.

2. *Continuity*

Because the court concludes that API has alleged four predicate acts, that is, four felonious violations of [§ 659](#), it must next determine whether these violations constitute a pattern within the meaning of RICO. According to *Northwestern Bell*, "**HN24**[] to establish a RICO pattern it must ... be shown that the predicates themselves amount to, or that [**38] they otherwise constitute a threat of, continuing racketeering activity." [492 U.S. at 240](#). The *Northwestern Bell* Court also explained that there are two alternative ways to satisfy the continuity prong:

"Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id. at 241*.

a. Closed-Ended Continuity

[HN25] A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *Northwestern Bell*, 492 U.S. at 241. This formulation raises the question of how long a substantial period of time is. The Supreme Court has declined to draw a bright line of "substantiality." *Id. at 243*. The Supreme Court did state, however, that "a few weeks or months" is not enough. *Id. at 242*. The Ninth Circuit is in accord:

We have found no case in which a court has held the requirement to be satisfied by a pattern of activity lasting less than a year. A pattern of activity lasting [**39] only a few months does not reflect the "long term criminal conduct" to which RICO was intended to apply.

Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 366-67 & n. 7 (9th Cir. 1992) (collecting cases). Because the alleged predicate acts occurred over only a ten-week period of time, between February 17, 1998 and April 25, 1998, they do not, as a matter of law, constitute acts "extending over a substantial period of time." Thus, the court concludes that API has not established closed-ended continuity.

b. Open-Ended Continuity

[HN26] Continuity may also be demonstrated if the predicate acts "constitute a threat of continuing racketeering activity": "past conduct that by its nature projects into the future with a threat of repetition." *Northwestern Bell*, 492 U.S. at 240-41. This enables a RICO plaintiff to establish a pattern in instances in which the action is brought before the racketeering activity has extended over a period long enough to constitute closed-ended continuity. "In such cases, liability depends on whether the threat of continuity is demonstrated." *Id. at 242*.

[HN27] In assessing whether a threat of continuity exists, [**40] courts have looked first to the [*1117] nature of the predicate acts alleged or to the nature of the enterprise at whose behest the predicate acts were performed. See, e.g., *GICC Capital Corp. v. Tech. Finance Group, Inc.*, 67 F.3d 463, 466 (2nd Cir. 1995). Thus, an inherently unlawful act performed at the behest of an enterprise whose business is racketeering activity would automatically give rise to the requisite threat of continuity. *Id.* Where the nature or conduct of the enterprise does not by itself suggest that the racketeering acts will continue, a plaintiff must point to other external factors. *Id.*

In this case, although API alleges that "the acts of these Defendants are a continuing course of criminal conduct and racketeering," it does not identify any external factors to support this conclusion. Although API maintains that TAG has engaged in unlawful activities, TAG also engages in legitimate business activities. Thus, because neither the nature of the conduct nor the enterprise itself suggests a continuing threat, API must allege some external basis for believing that the racketeering acts will continue. API has not done so.

Moreover, the four acts that [**41] constitute the alleged pattern took place during a ten-week period. More than eight months elapsed between the last alleged predicate act and the filing of the RICO counterclaim. This is a strong indication that the alleged racketeering activity has come to an end. If the racketeering activity has ended, API cannot show open-ended continuity. *Religious Tech. Ctr.*, 971 F.2d at 366-67.

Because the court concludes that API has not established the requisite continuity of the predicate acts, it cannot maintain a claim under RICO. Even if API had alleged sufficient continuity, its RICO contains additional deficiencies. Not only must a RICO plaintiff plead a pattern of racketeering activity, but it must also plead a violation of one of the prohibited RICO activities, as defined by *18 U.S.C. § 1962*, and an injury to business or property by reason of such violation. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1188 (3rd Cir. 1993). Again, API has not done so.

3. RICO Activities

a. [Section 1962\(a\)](#)

HN28 [+] [Section 1962\(a\)](#) prohibits not the engagement in racketeering acts to conduct an enterprise affecting interstate commerce, [**42] but rather the use or investment of the proceeds of racketeering acts to acquire, establish or operate such an enterprise.⁴ [**43] [United States v. Robertson, 73 F.3d 249, 251 \(9th Cir. 1996\)](#). Therefore, a [§ 1962\(a\)](#) claim must include allegations of injury from the use and investment of racketeering proceeds, not merely injury from the predicate acts of racketeering themselves. [Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 437 \(9th Cir. 1992\)](#), cert. denied, 508 U.S. 908, 124 L. Ed. 2d 247, 113 S. Ct. 2336 (1993). API alleges only that "moneys derived from TAG's unlawful conduct has [sic] been received by Sea-Land and Matson." API's RICO Case Statement asserts further that "both Sea-Land and Matson as well as TAG receive benefits from the pattern of racketeering," and they "both receive a tangible benefit." These allegations do not describe what, if any, benefits were received, much less "the use or investment of the proceeds of racketeering acts to acquire, establish, or operate" a racketeering enterprise.⁵ Thus, the [*1118] court concludes that API has failed to state a [§ 1962\(a\)](#) claim.

b. [Section 1962\(b\)](#)

HN29 [+] [Section 1962\(b\)](#) "prohibits engaging in a racketeering activity to acquire or maintain an interest in or control of an enterprise." [Schreiber Distrib. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 \(9th Cir. 1986\)](#). Thus, it requires a specific nexus between the control of the enterprise and the racketeering activity. No such nexus has been alleged.⁶

Moreover, API's [§ 1962\(b\)](#) claim cannot be based on the alleged predicate [**44] acts of interstate theft in violation of [18 U.S.C. § 659](#) because API never alleges that Sea-Land controlled TAG with respect to violations of [18 U.S.C. § 659](#). Instead, API simply seeks to hold Sea-Land vicariously liable for TAG's alleged conduct as Sea-Land's alleged agent. That is not sufficient to raise a RICO claim based on [§ 1962\(b\)](#). Thus, the court concludes that API's [§ 1962\(b\)](#) claim fails.

c. [Section 1962\(c\)](#)

HN30 [+] [Section 1962\(c\)](#) renders unlawful the direct or indirect conducting of or participation in a RICO 'enterprise's affairs through a pattern of racketeering activity' by any person employed by or associated with any enterprise engaged in interstate commerce. [United Energy Owners Comm., Inc. v. U.S. Energy Management Sys., Inc., 837 F.2d 356, 359 n. 5 \(9th Cir. 1988\)](#). This section of RICO contains strict pleading requirements:

For the purposes of [section 1962\(c\)](#), RICO plaintiffs must allege a defendant -- the "person" or "persons" -- who is distinct from the "enterprise" whose business the defendant is conducting. Under RICO, an "enterprise" is a being different from, not the same as or part of, the [**45] person whose behavior the act was designed to

⁴ [Section 1962\(a\)](#) provides, in relevant part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of [[18 U.S.C. § 2](#)], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

⁵ API has also failed to "describe the use or the investment of [racketeering] income" as required in the second part of item 11 of the RICO case statement mandated by Local Rule 9.1. Per LR 9.2, noncompliance with LR 9.1 is an independent ground for dismissal of a RICO claim.

⁶ Notably, API failed to "describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise" as required by item 12 of the RICO case statement.

61 F. Supp. 2d 1102, *1118 (1999 U.S. Dist. LEXIS 10922, **45

prohibit. Therefore, for purposes of a single action, a corporate defendant cannot be both the RICO person and the RICO enterprise under [section 1962\(c\)](#).

[Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1533-34 \(9th Cir. 1992\)](#) (citations omitted). Thus, in order to state a claim under [§ 1962\(c\)](#), a plaintiff must allege an "enterprise" that is distinct and separate from the "person." [Rae v. Union Bank, 725 F.2d 478, 481 \(9th Cir. 1984\)](#).

In this case, API has alleged that TAG is both the RICO enterprise and the RICO person. This allegation is evident in API's RICO Case Statement. Item 13 of the court's RICO case statement requires a response to the following inquiry:

If the complaint alleges a violation of [18 U.S.C. § 1962\(c\)](#), state who is employed by or associated with the alleged enterprise, and state whether the same entity is both the liable "person" and the "enterprise" under [§ 1962\(c\)](#).

API's response provides:

API does not know the names or identities of the individuals employed or associated by TAG but believes that these entities are liable as [**46] person and enterprises under 1962(c).

API further states that TAG conducted or participated in the racketeering activity with "certain of its employees (and others acting in concert with them)." Similarly, API alleges that "further agents of TAG and individuals employed by TAG or under TAG's control have committed predicate acts as further set forth in the section below regarding the RICO claims and are together a racketeering enterprise as defined by RICO." The inclusion of additional unidentified entities does not save API's [§ 1962\(c\)](#) claim. [HN31](#)[]. Ninth Circuit law is clear that a RICO person may not be held directly liable under [§ 1962\(c\)](#), when it and the RICO enterprise are identical.

[*1119] Furthermore, the Ninth Circuit has recognized that:

It would be inconsistent with the language and purpose of [section 1962\(c\)](#) to allow plaintiffs to circumvent this rule by naming an employee of the enterprise as the person that conducts the affairs of the enterprise [who is also the employer] and then resorting to the doctrine of respondeat superior [to make his employer liable].

[Brady v. Dairy Fresh Prods. Co., 974 F.2d 1149, 1154 \(9th Cir. 1992\)](#). "Respondeat [**47] superior and agency liability is inappropriate when the person is the RICO enterprise." *Id.* Without a proper allegation of a RICO enterprise, none of API's RICO claims can survive. [Chang v. Chen, 80 F.3d 1293, 1301 \(9th Cir. 1996\)](#).

d. [Section 1962\(d\)](#)

API's failure to allege the requisite substantive elements of a RICO claim under [§§ 1962\(a\), \(b\) or \(c\)](#), precludes its attempt to state a RICO conspiracy cause of action under [§ 1962\(d\)](#). [Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 n. 8 \(9th Cir. 1992\)](#). API does not allege that Matson and Sea-Land are RICO persons; instead, it only alleges that they "are vicariously liable as co-conspirators and/or for nondelегable duties for all of the amounts of damages" caused by TAG. Because TAG is not liable under [§§ 1962\(a\), \(b\) or \(c\)](#), Matson and Sea-Land cannot be held vicariously liable or as alleged "co-conspirators" under [§ 1962\(d\)](#).

e. [Amendment of RICO Claim](#)

Apparently cognizant of the deficiencies in its RICO claim, API requests that "should the court consider in any way limiting API's ability to readdress these criminal violations in a RICO case that it [API] be allowed sufficient [**48] opportunity to file an amended RICO claim." The Scheduling Order in effect for this case provided a November 3, 1998 deadline for any motions to amend the pleadings. Pursuant to the Ninth Circuit's decision in [Johnson v. Mammoth Recreations, Inc., 975 F.2d 604 \(9th Cir. 1992\)](#), a scheduling order shall not be modified except upon a showing of good cause. *Id. at 607-08* (holding that standards of [Fed. R. Civ. P. 16](#) apply). To determine if good cause exists, the court focuses primarily on the diligence of the party seeking amendment. [Id. at 609](#).

In this case, Sea-Land identified the failings of API's RICO claims in its January 20, 1999 summary judgment motion. Rather than respond to these deficiencies in its March 3, 1999 opposition to Sea-Land's motion, API merely reiterated its conclusory allegations. Not only does the court conclude that API has not been diligent in seeking to amend its RICO claim, the court recognizes that Sea-Land would be prejudiced were the court to allow such an amendment at this late stage. Therefore, the court denies API's request to amend its RICO claims.

Because the court concludes that API cannot maintain **[**49]** a claim under RICO, Sea-Land's Motion for Summary Judgment as to the RICO count is GRANTED.

III. Maritime Lien Claims

API alleges that Sea-Land "repudiated its agreement to pay API for certain necessities provided to certain of its ships. This breach of contract has given rise to a maritime liens [sic] pursuant to [46 U.S.C. § 31342](#). API contends that it stuffed (that is, placed) its or its customers' cargo in Sea-Land's containers in preparation for transportation on board Sea-Land's vessels. API also asserts that it performed some drayage of loaded containers. However, it is undisputed that:

1. API is not a stevedore. API never loaded containers on, or provided any stevedoring services to, any of Sea-Land's vessels.
 2. API did not stuff any cargo into containers for loading onto any of Sea-Land's vessels in the vicinity of any of Sea-Land's vessels, or anywhere within marine terminals where Sea-Land's vessels were berthed.
- [*1120]** 3. API did not dray any containers within marine terminals to the piers where Sea-Land's vessels were berthed or otherwise assist or participate in the process of loading the containers on board those vessels.

[50]** Assuming for purposes of this motion that stuffing and drayage of containers constitute "necessaries" within the meaning of the statute, the court must still determine whether API's services are maritime in nature. See *Inbesa America, Inc. v. M/V Anglia*, 134 F.3d 1035, 1036-37 n.2 (11th Cir. 1998). The *Anglia* Court summarized the governing legal principles as follows:

HN32 In order for a contract to fall within the federal admiralty jurisdiction, it must be wholly maritime in nature, or its non-maritime elements must be either insignificant or separable without prejudice to either party. To qualify as maritime, moreover, the elements of a contract must pertain directly to and be necessary for commerce or navigation upon navigable waters.

134 F.3d at 1036. Accord *Simon v. Intercontinental Transp. (ICT) B.V.*, 882 F.2d 1435, 1442 (9th Cir. 1989). The court then cited the more specific rule that "contracts involving cargo are maritime only to the extent that cargo is on a ship or being loaded on or off a ship." *Anglia*, 134 F.3d at 1037.

Consistent with this rule, courts have repeatedly held that shoreside **[**51]** cargo handling, including trucking ("drayage") and container handling, is not of a "maritime" nature. *Luvi Trucking, Inc. v. Sea-Land Service, Inc.*, 650 F.2d 371, 373-74 (1st Cir. 1981). The First Circuit, in *Luvi*, noted that the trucker never came in contact with the ship and that the drayage was entirely separable from the ocean part of the voyage.

Likewise, the Eleventh Circuit, in *Anglia*, discussed Inbesa's contention that its stuffing of cargo into containers to be carried on board the *Anglia*, as well as stripping cargo from containers carried on the vessel, should give it a maritime lien. Rejecting this contention, the Eleventh Circuit concluded:

Although such services by Inbesa were no doubt important for [the shipowner's] business, they were not "necessary" for the *Anglia*'s operation. Indeed, all of Inbesa's cargo-handling services took place on land without regard to whether the *Anglia* was in port; Inbesa could have loaded, stuffed, and secured cargo from trucks into containers before the *Anglia* arrived, and then stripped cargo from containers into warehouses or onto trucks after the *Anglia* departed We see no reason to blur the line **[**52]** between stevedoring and

shoreside cargo-handling that has long been a useful guide for the district courts in determining the scope of their admiralty jurisdiction.

Anglia, 134 F.3d at 1037-38.

Although one district court has recognized a maritime lien for container stuffing and stripping, in [Ceres Marine Terminals, Inc. v. M/V Harmen Oldendorff, 913 F. Supp. 919, 928 \(D. Md. 1995\)](#), that court based its decision on the fact that the contract upon which the lien was based, was between the vessel charterer and a stevedore, and therefore was more than tangentially related to maritime affairs. In this case, API is not a stevedore and thus the court employs the analysis adopted by the court in *Anglia*.

Applying the maritime/non-maritime approach, the undisputed facts show that the facilities where API stuffed containers are about a thirty-minute drive from the marine terminals. Thus, the court concludes, as did the Eleventh Circuit in *Anglia*, that because API's labor was not "maritime" in nature, it does not give rise to a maritime lien. Accordingly, the court GRANTS summary judgment in favor of Sea-Land on the maritime lien claims.

[**53] CONCLUSION

For the reasons stated above, the court GRANTS in part and DENIES in part Sea-Land Service, Inc.'s Motion to Dismiss and/or for Summary Judgment on [*1121] Atlantic Pacific International, Inc. and A & A Consolidators, Inc.'s First Amended Counterclaim. Sea-Land is entitled to summary judgment on the maritime lien claims, the RICO claims, and all the antitrust claims except the tying claim. This order does not affect API's claims for breach of contract and conversion.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 12 1999.

DAVID ALAN EZRA

CHIEF UNITED STATES DISTRICT JUDGE

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In re Brand Name Prescription Drugs Antitrust Litig.

United States Court of Appeals for the Seventh Circuit

June 9, 1999, Argued ; July 13, 1999, Decided

No. 99-1167

Reporter

186 F.3d 781 *; 1999 U.S. App. LEXIS 15621 **; 1999-2 Trade Cas. (CCH) P72,576

In Re Brand Name Prescription Drugs Antitrust Litigation.

Subsequent History: [**1] Rehearing Denied August 10, 1999, Reported at: [1999 U.S. App. LEXIS 18748](#).

Certiorari Denied February 22, 2000, Reported at: [2000 U.S. LEXIS 1430](#).

Prior History: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94 C 897. Charles P. Kocoras, Judge.

Disposition: Affirmed in Part, Vacated in Part, and Remanded.

Core Terms

manufacturers, wholesalers, pharmacies, conspiracy, discounts, prescription drug, market power, collusion, prices, brand, price discrimination, brand name, retailers, drugs, damages, district judge, nursing home, high prices, chargeback, customers, increased price, anti trust law, discriminatory, plaintiffs', hypothesis, selling, service fee, competitors, antitrust, arbitrage

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

[HN1](#) [↓] Antitrust & Trade Law, Sherman Act

Price discrimination implies market power, that is, the power to charge a price above cost (including in cost a profit equal to the cost of equity capital) without losing so much business so fast to competitors that the price is unsustainable.

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

There is no general rule against the possession of market power or the use of price discrimination to exploit it.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Cooperatives > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN3 Regulated Practices, Price Fixing & Restraints of Trade

Competitors are permitted by the antitrust laws (and certainly by the per se rule) to engage in cooperative behavior, under trade association auspices or otherwise, provided they don't reduce competition among themselves or help their suppliers or customers to reduce competition.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Evidence > Types of Evidence > Circumstantial Evidence

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN4 Antitrust & Trade Law, Sherman Act

There are two ways in which plaintiffs might be able to prove manufacturers' collusion: by presenting direct evidence (admissions or eyewitness accounts) that the manufacturers had agreed to collude; or by presenting circumstantial evidence, economic in character, that their behavior could better be explained on the hypothesis of collusion than on the hypothesis that each was embarked on an individual rather than a concerted course of action - that each, in other words, was merely exploiting the market power it had, rather than seeking to create or amplify such power through an agreement with competitors not to compete.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5 Regulated Practices, Price Fixing & Restraints of Trade

Since the unilateral exercise of a firm's individual market power does not violate the antitrust laws, preventing the frustration of that exercise through arbitrage is not a violation either.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

HN6 Regulated Practices, Price Fixing & Restraints of Trade

A consumer may rationally pay more for a trademarked product than for its physically identical substitute merely for the greater assurance of quality that a trademark conveys.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

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 Industries > Transportation > Railroads

HN7 Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine exempts from antitrust law collusive efforts to obtain governmental protection against the winds of competition.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN8 Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennigton doctrine does not authorize anticompetitive action in advance of government's adopting the industry's anticompetitive proposal. The doctrine applies when such action is the consequence of legislation or other governmental action, not when it is the means for obtaining such action.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN9 Antitrust & Trade Law, Sherman Act

The indirect-purchaser doctrine limits the right to bring antitrust overcharge suits to buyers who buy directly from the overcharging sellers rather than indirectly through middlemen.

Counsel: For HJB, INCORPORATED, ENDLESS PHARMACY, INCORPORATED, BARRY'S CUT RATE STORES, INCORPORATED, BRADY'S PHARMACY, INCORPORATED, BRADY'S ENTERPRISES,

INCORPORATED, Illinois corporations doing business as Johnson Pharmacy, Plaintiffs - Appellants: George L. Saunders, Jr., SAUNDERS & MONROE, Chicago, IL USA.

For WHOLESALERS, Defendant - Appellee: J. Thomas Rosch, LATHAM & WATKINS, San Francisco, CA USA.

For MANUFACTURERS, Defendant - Appellee: William F. Cavanaugh, JR., PATTERSON, BELKNAP, WEBB & TYLER, New York, NY USA.

Judges: Before Posner, Chief Judge, and Bauer and Easterbrook, Circuit Judges.

Opinion by: POSNER

Opinion

[*783] Posner, Chief Judge. Retail pharmacies brought suit under [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), against manufacturers and wholesalers of brand-name prescription drugs, charging that the defendants had conspired to deny discounts to the pharmacies. An additional claim emerged during the course of the litigation--that the defendants had conspired to peg price increases to changes in the Consumer Price Index. After an earlier decision by this court resolved some of the issues, see [123 F.3d 599 \(7th Cir. 1997\)](#), the plaintiffs settled with a number of the defendants and went to trial before a jury against the rest. At the conclusion of the plaintiffs' case in chief on liability, which took eight weeks to present, the district judge granted judgment as a matter of law for the defendants. The appeal challenges both the judge's "bottom line" and a number of his subsidiary [**2] rulings.

The evidence shows that the manufacturers of brand name (as distinct from generic) prescription drugs engage in price discrimination in the economic sense, selling the identical product to different customers at different prices even though the manufacturers' cost of selling to them is the same. The favored customers are primarily hospitals, health maintenance organizations, and nursing homes; the disfavored are pharmacies. [HN1](#) [↑] Price discrimination implies market power, that is, the power to charge a price above cost (including in "cost" a profit equal to the cost of equity capital) without losing so much business so fast to competitors that the price is unsustainable. The reason price discrimination implies market power is that assuming the lower of the discriminatory prices covers cost, the higher must exceed cost. [HN2](#) [↑] There is no general rule against the possession of market power or the use of price discrimination to exploit it, but the plaintiffs argue that the source of the drug manufacturers' market power manifested in their discriminatory pricing is collusion, and if this is right they have a case under [section 1](#).

Manufacturers of brand name prescription drugs generally [**3] do not sell directly to the retailers of their drugs, that is, to hospitals, HMO's, nursing homes, and pharmacies, but instead sell to wholesalers for resale to the retailers. A wholesaler is compensated for the warehousing and other functions that he performs in the distribution of his drugs through the difference between the price that he pays his supplier and the price at which he resells to retailers. The danger to a price-discriminating drug manufacturer is that a wholesaler might buy at the discounted price more than he needed to supply his hospital, HMO, and nursing home customers and sell the surplus to pharmacies at a price below the nondiscounted price that the manufacturer wanted them to pay. The industry calls this "diversion" (economists call it "arbitrage") and of course dislikes it. Suppose the manufacturer's profit-maximizing price to an HMO for some drug were [*784] \$ 40, his price to a pharmacy for the same drug \$ 65, and the wholesaler tacked on \$ 10 to compensate him for his services in distribution. Suppose that the HMO wanted 10 units of the drug and the pharmacy 2 units. If the wholesaler sold 10 units to the HMO at \$ 50 and 2 units to the pharmacy at \$ 75, as the manufacturer [**4] intended, the latter's total revenue would be \$ 530 and the wholesaler's \$ 120 (12 x \$ 10). If instead the wholesaler told the manufacturer that he needed 12 units for the HMO and none for the pharmacy, and the manufacturer therefore sold him 12 units at \$ 40, two of which the wholesaler resold to the pharmacy at some price between \$ 50 and \$ 75 (say, \$ 60), then although the wholesaler's revenue would increase to \$ 140 (\$ 120 plus the added profit from selling 2 units to the pharmacy for \$ 20 above cost rather than \$ 10) and the pharmacy would save \$ 30, the manufacturer would be worse off; his revenue would decline to \$ 480.

Manufacturers could prevent this evasion of their discriminatory pricing scheme by selling directly to the retailers, thus bypassing the wholesalers. The plaintiffs argue that fear that this would happen led the wholesalers to adopt a chargeback system--the focus of this litigation-- under which the manufacturer sets a uniform price to the retailers, contracts directly with the favored retailers for discount prices to them, and reimburses the wholesaler for the difference between that and the full, uniform price. In the previous example, the price to the wholesaler [**5] would be a flat \$ 65 regardless of whom he was reselling to. But upon proof by him that he had resold to an HMO at, say, \$ 60 (\$ 50, the price agreed upon between the manufacturer and the HMO, plus the wholesaler's service fee, negotiated with the retailer, for performing the wholesale function, and assumed in this example consistent with the previous one to be \$ 10), the manufacturer would reimburse him \$ 15. And so he would net the \$ 10 service fee to compensate him for performing the wholesaling function. The chargeback system eliminates diversion (arbitrage) by requiring the wholesaler, in order to avoid a loss when he resells at a discounted price, to report to the manufacturer his sales to that customer, so that the manufacturer can determine whether the customer is indeed one entitled to a discount. With the chargeback system in place, the manufacturers were content to sell through the wholesalers rather than directly to the retailers. The latter prefer, other things being equal, to deal with a single supplier who stocks the drugs of the different manufacturers (namely a wholesaler) than with each manufacturer separately. And if the manufacturers took over the wholesaling function, [**6] they would have to charge a higher price to the retailers to recover the cost of performing that function.

The plaintiffs presented evidence that the wholesalers adopted the chargeback system collectively rather than individually. Even so, the system would be a per se violation of the Sherman Act--and only per se violations are charged in this case--only if it were either a device for eliminating competition among wholesalers, which is not charged, or an instrument of a conspiracy among the manufacturers to eliminate or reduce competition among themselves. If, instead, each manufacturer was engaged in lawful, noncollusive price discrimination, it would no more be illegal per se for the wholesalers to devise collectively a system by which each manufacturer could engage in discriminatory pricing while selling through wholesalers than it would be illegal per se for them to agree on a standard form for inventorying drugs or a common method of inspecting drugs to make sure they are safe. [HN3↑](#) Competitors are permitted by the antitrust laws (and certainly by the per se rule) to engage in cooperative behavior, under trade association auspices or otherwise, provided they don't reduce competition [**7] among themselves, e.g., [National Collegiate Athletic Ass'n v. Board of Regents](#), 468 U.S. 85, 100-04, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984); [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.](#), 441 U.S. 1, [I*7851](#) 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979); [Polk Bros., Inc. v. Forest City Enterprises, Inc.](#), 776 F.2d 185, 188-89 (7th Cir. 1985), or help their suppliers or customers to reduce competition. [Business Electronics Corp. v. Sharp Electronics Corp.](#), 485 U.S. 717, 727-30, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988); [United States v. General Motors Corp.](#), 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966); [Eastern States Retail Lumber Dealers' Ass'n v. United States](#), 234 U.S. 600, 58 L. Ed. 1490, 34 S. Ct. 951 (1914); [JTC Petroleum Co. v. Piasa Motor Fuels, Inc.](#), 179 F.3d 1073, 1999 U.S. App. LEXIS 13802, 1999 WL 415499 (7th Cir. 1999); [Morrison v. Murray Biscuit Co.](#), 797 F.2d 1430, 1438 (7th Cir. 1986); [Rossi v. Standard Roofing, Inc.](#), 156 F.3d 452, 462 (3d Cir. 1998). If the wholesalers in this case were merely helping individual manufacturers maximize their profits by methods permitted [**8] by antitrust law, which include noncollusive price discrimination, there was no violation of antitrust law at either the manufacturer or the wholesaler level.

The plaintiffs had therefore to prove that the defendant manufacturers agreed to deny discounts to them. When last this case was before us, the district judge had denied summary judgment for the manufacturers and so we were required to assume for purposes of the appeal that the manufacturers had indeed colluded. On remand the assumption fell away and the plaintiffs had to prove that the manufacturers had colluded. [HN4↑](#) There were two ways in which they might have been able to do this: by presenting direct evidence (admissions or eyewitness accounts) that the manufacturers had agreed to collude; or by presenting circumstantial evidence, economic in character, that their behavior could better be explained on the hypothesis of collusion than on the hypothesis that each was embarked on an individual rather than a concerted course of action--that each, in other words, was merely exploiting the market power it had, rather than seeking to create or amplify such power through an agreement with competitors not to compete. [Monsanto Co. v. Spray-Rite Service Corp.](#), 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); [**9] [JTC Petroleum Co. v. Piasa Motor Fuels, Inc.](#), supra, at *4; [Serfecz v. Jewel Food Stores](#), 67 F.3d 591, 599 (7th Cir. 1995); [Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.](#), 971

[F.2d 37, 48-49 \(7th Cir. 1992\); Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1171-73 \(7th Cir. 1990\); Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., 176 F.3d 1055, 1999 WL 280497, at * 4-5 \(8th Cir. 1999\); Petrucci's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1233 \(3d Cir. 1993\).](#)

The direct evidence that the plaintiffs emphasize is testimony about a meeting of wholesalers at which representatives of some drug manufacturers, though none who remain in the case after several settled, were present. The subject was the formation of buying groups by pharmacies that hoped they could obtain discounts by forming leagues which would bargain collectively with manufacturers and wholesalers. The participants in the meeting expressed hostility toward such endeavors and indicated a disinclination to grant these groups any discounts. None of the manufacturer defendants was present, as we have said, [\[**10\]](#) and there is no evidence that the manufacturers who were represented at the meeting were acting as agents of the defendants. While the testimony might be evidence that the wholesalers agreed not to discount their own service fees to the buying groups, such an agreement is not among the unlawful acts charged. The complaint is not that the wholesalers were trying to eliminate competition among themselves, by fixing prices or credit terms or other competitive dimensions of the wholesale market, as in [Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 64 L. Ed. 2d 580, 100 S. Ct. 1925 \(1980\)](#) (per curiam), but that they were agents of a manufacturers' conspiracy. The joint adoption of a business method or standard, that is, the chargeback system, independent of any design to reduce competition at either the manufacturer or the [\[*786\]](#) wholesaler level, would not raise questions under the per se rule.

The only other direct evidence of a manufacturers' conspiracy that merits consideration is a scattering of internal company documents indicating anxiety that competitors might decide to grant such discounts. All firms worry about price cutting by their competitors; these worries are [\[**11\]](#) not evidence of price fixing. [Monsanto Co. v. Spray-Rite Service Corp., supra, 465 U.S. at 763.](#) Here they were, if anything, evidence of the contrary, since there is no indication that anyone employed by a manufacturer thought that such price cutting to pharmacies as occurred was in violation of an agreement among the manufacturers. Most of the anxiety about price, moreover, was expressed not by the manufacturers but by the wholesalers. Remember that there are two kinds of price involved in the distribution of brand name prescription drugs--the prices negotiated between the manufacturers and the retailers, and the wholesalers' service fees. The wholesalers feared the shaving of their service fees by aggressively bargaining buyer groups. That fear has nothing to do with the issues in this case.

The plaintiffs' principal economic evidence was that brand name prescription drugs are indeed priced discriminatorily, to the detriment of the pharmacies; that discrimination requires (and thus demonstrates the existence of) market power; and that the chargeback system facilitates discrimination. The defendants spent days cross-examining the plaintiffs' principal economic witness, [\[**12\]](#) Professor Robert Lucas, and ultimately persuaded the district judge to exclude most of his testimony under the rule of [Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 \(1993\)](#). But what was objectionable about his evidence actually had nothing to do with Daubert; it was that the evidence mainly concerned a matter not in issue--that the manufacturers of brand name prescription drugs engage in price discrimination, showing that they have market power. Everyone knows this. The question is whether that market power owes anything to collusion. (Even if it did, we remind that to obtain damages the plaintiffs would have to separate the price effects of collusion from the price effects of the plaintiffs' lawful market power. [Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 152 F.3d 588, 593-94 \(7th Cir. 1998\).](#)) On that, Lucas had virtually nothing to say. It is irrelevant, therefore, that, as the plaintiffs point out, the district judge erred in excluding Lucas's testimony on the grounds that he did--that Lucas had not studied the prescription drug industry in depth and had formulated his tentative opinion [\[**13\]](#) after working on the case for only 40 hours. His opinion that there is price discrimination in the prescription drug industry is one that an economist of Lucas's distinction should have been able to reach in even less time. Indeed the existence of price discrimination should have been removed as an issue at trial by a stipulation of the parties.

The judge also excluded the evidence of another of the plaintiffs' economic experts, Professor Jeffrey Perloff, on an erroneous ground. Perloff's evidence was that the chargeback system is designed to prevent arbitrage. True--and it should have been stipulated as true--but irrelevant for the reasons explained earlier. The judge thought Perloff had given insufficient weight to the fact that federal law limits the resale of prescription drugs by some of the favored

retailers; but we had discussed that law in our previous opinion and explained that it could not be relied upon to prevent arbitrage. [123 F.3d at 603](#). The important point is that [HN5↑](#)] since the unilateral exercise of a firm's individual market power does not violate the antitrust laws, preventing the frustration of that exercise through arbitrage is not a violation either.

[**14] Paradoxical as this may seem, market power is found in many highly competitive [[*787](#)] markets, for example the markets for scholarly books and journals. (The phenomenon is sometimes referred to as "monopolistic competition.") Publishers of scholarly books commonly publish the same book in hardcover and paperback versions at prices that differ by far more than the difference in costs, and publishers of scholarly journals commonly charge a much higher price to libraries than to individuals even though the cost of making and selling the journal is identical to both classes of purchaser. These price differences are possible because the book, or journal, lacks perfect substitutes (copyright law prevents the sale of identical substitutes without the copyright holder's consent). Brand name prescription drugs ordinarily are patented, and, though the patent may have expired, the physicians who prescribe the drug may continue to prescribe the branded version rather than the generic substitute, whether out of inertia, or because they think the branded version may be produced under better quality control (the rationale for trademarks), or because the patient may feel greater confidence in a familiar [[**15](#)] brand. The same thing is true if the original brand, whether or not still protected by a patent, now has a therapeutically close substitute sold under a brand name that is less familiar to physicians or patients than the original brand.

It would not be surprising, therefore, if every manufacturer of brand name prescription drugs had some market power. If so, every manufacturer would charge different prices depend on the elasticity of demand of different classes of purchaser with respect to price (that is, the responsiveness of quantity demanded to a change in price). The least elastic demanders are the pharmacies, because they must stock a full range of drugs in order to be able to fill prescriptions. They can therefore be expected to be charged the highest prices. In contrast, a hospital, nursing home, or HMO or other managed-care enterprise has a more elastic demand because it can influence (for example through a "formulary," a list of approved or recommended drugs) the physician's choice of which brand (or no brand--a generic) to prescribe. A slight increase in the price of one brand to such a purchaser might cause the manufacturer's sales of that brand to plummet. That manufacturers [[**16](#)] of brand name prescription drugs grant discounts to the enterprises we have listed but refuse to grant discounts to pharmacies is thus consistent with unilateral profit-maximizing behavior by the manufacturers.

The alternative hypothesis is that the manufacturers refuse to grant discounts to pharmacies because they have agreed among themselves not to. As there is neither an a priori reason nor direct evidence to suppose this hypothesis more likely than the first, and as the plaintiffs bore the burden of persuasion, it was necessary for them to present economic evidence that would show that the hypothesis of collusive action was more plausible than that of individual action. [Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#); City of [Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 571-72 \(11th Cir. 1998\)](#).

They did not, however, as the defendant manufacturers rather absurdly argue, have to exclude all possibility that the manufacturers' price discrimination was unilateral rather than collusive. That would imply that the plaintiff in an antitrust case must prove a violation of the antitrust [[**17](#)] laws not by a preponderance of the evidence, not even by proof beyond a reasonable doubt (as indeed is required in criminal antitrust cases), but to a 100 percent certainty, since any lesser degree of certitude would leave a possibility that the defendant was innocent.

The plaintiffs are equally wide of the mark, however, when they argue that proof of price discrimination shifts to the defendants the burden of proving that the discrimination was unilateral rather than collusive. Because price discrimination is as consistent with individual as with collusive behavior, mere proof that discrimination exists does not support, even weakly, [[*788](#)] an inference of collusion. The plaintiffs have the burden of rebutting, by the normal civil standard of a preponderance of the evidence, the hypothesis of individual maximizing action. They failed to come up with any evidence. Lucas did testify that he thought the demand by pharmacies no less elastic than that by hospitals, HMO's, and nursing homes, and if so--if the manufacturers of brand name prescription drugs have no significant market power individually, since they appear to have no significant market power with respect to those other customers--this [[**18](#)] would suggest that higher prices to pharmacies are the product of collusion. But this part of Lucas's testimony was properly excluded, or alternatively entitled to no weight, because it rested on a

demonstrated lack of knowledge about the competitive significance of formularies--the lists of approved or recommended drugs that hospitals, nursing homes, and HMO's and other managed-care enterprises issue. He said that a pharmacy could issue a formulary. It could, but no one would pay any attention to it, because a pharmacy, unlike a hospital, nursing home, or other provider of medical care, has no clout with doctors, the ones who actually order prescription drugs. There is no evidence that pharmacies issue formularies.

The record does contain a study by a consulting firm which found that many branded drugs have close therapeutic substitutes; this of course is true, but most books also have close substitutes, yet individual books are sufficiently distinctive to enable the publisher to price his books on a discriminatory basis even though he is not colluding with any other publisher. [HN6](#)[] A consumer may rationally pay more for a trademarked product than for its physically identical substitute [**19] merely for the greater assurance of quality that a trademark conveys. 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 2:5, p. 2-8 (4th ed. 1996); [Power Test Petroleum Distributors, Inc. v. Calcu Gas, Inc., 754 F.2d 91, 98 \(2d Cir. 1985\)](#); [Anti-Monopoly, Inc. v. General Mills Fun Group, 611 F.2d 296, 303 \(9th Cir. 1979\)](#). And all that really matters is that physicians, for whatever reason, in writing prescriptions tend to write a brand name rather than the generic (chemical) name. It is this practice that forces pharmacies to carry a full line of brands and thus prevents them from credibly threatening a manufacturer with refusing to stock his brand unless he offers a discount.

Since the market power conferred by a patent or trademark would vary across brands, evidence of uniform discounts (for example, that all HMO's received a 20 percent discount from the full price on all brands) might be indicative of a conspiracy. The plaintiffs contended in rebuttal at the oral argument of the appeal that this was the case here, but their brief does not make the argument or point to evidence in the record that might support it, so it is forfeited.

[**20] All this leaves of the plaintiffs' case is their claim that in the early 1990s the defendant manufacturers agreed among themselves to peg future price increases to the Consumer Price Index. There is enough evidence of such an agreement to create a triable fact. For example, an internal memorandum of defendant Burroughs Wellcome, dated September 1993 and entitled "Price Escalation Proposal," states that "the industry has generally agreed to informally keep its prices in line with CPI or CPI plus 1 to 2 %." The document is subject to interpretation (as is the other evidence, unnecessary to describe, that also supports the claim), but the interpretation of ambiguous documentary evidence of collusion is for the jury. [Monsanto Co. v. Spray-Rite Service Corp., supra, 465 U.S. at 765-66](#) and n. 11; [In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 614 \(7th Cir. 1997\)](#); [Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., supra](#), at * 5. The district judge threw out the CPI claim not because it was unfounded but because he thought it barred by [HN7](#)[] the Noerr-Pennington doctrine, which exempts from [antitrust law](#) collusive efforts [**21] to obtain governmental [*789] protection against the winds of competition. E.g., [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 v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#); [Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, Inc., 814 F.2d 358, 371 \(7th Cir. 1987\)](#); [Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 471 \(7th Cir. 1982\)](#). During the period of the alleged CPI conspiracy, the prescription drug industry was under political pressure to limit price increases. Had the industry wanted to obtain a law that would limit annual increases to the rate of inflation as measured by the CPI, plus modest additions, they could without antitrust liability have negotiated the proposal among themselves even though this would have involved their agreeing on how much to seek from government in the way of permitted price increases.

But they didn't want a law; they wanted (they say) to ward off a price-control law by being good boys and keeping their price increases moderate. The distinction is not [**22] critical; opposing legislation is a way of participating in the legislative process just as proposing legislation is. It would not make sense to interpret Noerr-Pennington in such a way as to encourage industries to channel all their legislative activity into proposing laws (here perhaps a law against passing a price-control law!). But [HN8](#)[] the doctrine does not authorize anticompetitive action in advance of government's adopting the industry's anticompetitive proposal. The doctrine applies when such action is the consequence of legislation or other governmental action, not when it is the means for obtaining such action (or in this case inaction). [FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 425, 107 L. Ed. 2d 851, 110 S. Ct.](#)

768 (1990); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988); Sandy River Nursing Care v. Aetna Casualty, 985 F.2d 1138, 1142-43 (1st Cir. 1993). Otherwise every cartel could immunize itself from antitrust liability by the simple expedient of seeking governmental sanction for the cartel after it was up and going.

The district judge thus erred in throwing **[**23]** out the CPI claim on Noerr-Pennington grounds, and he also erred in treating the doctrine as a rule of evidence that forbids the introduction of evidence (specifically, testimony by a corporate executive named David Landslide) relating to efforts to obtain governmental protection to show that the industry has indeed jumped the gun and begun to cartelize before getting governmental sanction for cartelization. United Mine Workers v. Pennington, supra, 381 U.S. at 670 and n. 3; MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1160 (7th Cir. 1983). Such evidence can be excluded under Fed. R. Evid. R. 403 if confusing or unduly prejudicial, Weit v. Continental Illinois National Bank & Trust Co., 641 F.2d 457, 466-67 (7th Cir. 1981), but there is no blanket rule of inadmissibility.

There is, however, a potential issue of waiver that beclouds the charge of a CPI conspiracy. In one of their briefs the last time this case was here, the plaintiffs told us that none of them intended to assert a claim for damages based on such a charge, that the evidence of the conspiracy would be used only to establish the existence of a "culture **[**24]** of collusion" in the industry. To establish damages the plaintiffs would have to prove that the price of brand name prescription drugs would have been higher (and by how much) had the defendants not agreed to peg price increases to the CPI. Since the defendants may have been seeking to moderate their price increases in order to ward off price controls, the price-fixing conspiracy (if there was one) may have resulted in lower rather than higher prices, in which event the defendants' customers were not harmed and cannot obtain damages. Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1256-57 (7th Cir. 1995).

[*790] What is more, in our previous opinion we held that HN9 the indirect-purchaser doctrine, which limits the right to bring antitrust overcharge suits to buyers who buy directly from the overcharging sellers rather than indirectly through middlemen, Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977), would bar the plaintiffs from recovering damages unless the wholesalers were members of the manufacturers' conspiracy. 123 F.3d at 604-07. The plaintiffs point to no evidence that any **[**25]** of the defendant wholesalers were members of a CPI conspiracy, so it's difficult to see how the plaintiffs could recover any damages even if they could prove that they paid higher prices as a result of such a conspiracy. They did present evidence (albeit insufficient, as we have seen) that the wholesalers were part of a manufacturers' conspiracy to charge discriminatory prices, but that is separate from the alleged CPI conspiracy and anyway the wholesalers are now out of the case.

In the present appeal, however, the plaintiffs argue that the conspiracy did result in higher prices, and the defendants do not let out a peep about the indirect purchaser doctrine. And while reminding us that the plaintiffs had previously foresworn a claim of damages based on that alleged conspiracy they do not argue that the claim is waived, barred by the doctrine of judicial estoppel or by the law of the case doctrine, or otherwise unavailable. They thus have waived waiver. E.g., United States v. Woods, 148 F.3d 843, 849 n. 1 (7th Cir. 1998); Riemer v. Illinois Dept. of Transportation, 148 F.3d 800, 804 n. 4 (7th Cir. 1998); United States v. Layeni, 319 U.S. App. D.C. 291, 90 F.3d 514, 522 (D.C. Cir. 1996). **[**26]** (This is an almost incomprehensible lapse, since several of the district judge's evidentiary rulings, which he'll now have to revisit, indicate that he assumed that there was no CPI price-fixing charge.) They put all their eggs in the Noerr-Pennington basket--mistakenly, because as we have seen there is no tenable defense based on the doctrine of those cases.

The judgment is therefore vacated so far as the CPI charges are concerned, and otherwise affirmed (which means that the wholesalers are dismissed from the case), and the case is remanded for further proceedings in conformity with this opinion. We suggest that before proceeding to trial on the CPI issue, the district judge require the plaintiffs to show that they have (in light of the doubts we've expressed) a viable theory of damages; if they do not, there would be no point in a trial on liability, as they do not appear to be seeking injunctive relief against the alleged CPI conspiracy. But these details remain to be sorted out on remand.

Affirmed in Part, Vacated in Part, and Remanded.

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United States v. Andreas

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

July 13, 1999, Filed ; July 15, 1999, Docketed

96 CR 762

Reporter

1999 U.S. Dist. LEXIS 11166 *; 1999 WL 515484

UNITED STATES OF AMERICA v. MICHAEL D. ANDREAS; MARK E. WHITACRE; TERRANCE S. WILSON; and KAZUTOSHI YAMADA, Defendants.

Disposition: [*1] Government's motions for upward enhancement of sentences of Michael D. Andreas and Terrance S. Wilson DENIED. Andreas' and Wilson's motions for downward departures of their sentence DENIED in their entirety. Government's motion to consider alleged citric acid conspiracy as relevant conduct to determine base offense level for Andreas and Wilson DENIED.

Core Terms

conspiracy, sentence, lysine, citric acid, departure, downward, co-conspirators, enhancement, base offense, encouragement, relevant conduct, aggressive, calculation, antitrust, guideline, offenses, price-fixing, disparity, contends, adjusted, commerce, culpable, motions, cooperation, convincing, producers, reduction, asserts, upward, acceptance of responsibility

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > Sentencing > Presentence Reports

[HN1](#) [down arrow] **Sentencing, Sentencing Guidelines**

Under [U.S. Sentencing Guidelines Manual § 6A1.3](#), a sentencing court may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information it may consider, or the source from which the information may come without regard for the rules of evidence.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > Sentencing > Presentence Reports

[HN2](#) [down arrow] **Sentencing, Sentencing Guidelines**

Under [U.S. Sentencing Guidelines Manual § 2R1.1](#), a court is allowed to upwardly adjust an offense level based on the amount of affected commerce.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

[HN3](#) Sentencing, Sentencing Guidelines

Pursuant to [U.S. Sentencing Guidelines Manual § 1B1.3\(a\)\(2\)](#), district courts must increase a defendant's base offense level to account for relevant conduct, which includes all acts and omissions committed by a defendant that are part of a common scheme or plan as the offense of conviction. It needs only to be proven by a preponderance of the evidence - not beyond a reasonable doubt.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

[HN4](#) Sentencing, Sentencing Guidelines

Under [U.S. Sentencing Guidelines Manual § 1B1.3\(a\)\(2\)](#), offenses are part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors to consider in determining whether the purported relevant conduct is part of the common scheme include: the degree of similarity between the offenses, the regularity of the offenses, the time interval between the offenses, and whether the charged and uncharged offenses share common victims, accomplices, common purpose, or similar modus operandi.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

[HN5](#) US Department of Justice Actions, Criminal Actions

Participants in an antitrust conspiracy can withdraw or abandon the conspiracy by committing affirmative acts inconsistent with the object of the conspiracy and communicating those acts in a manner reasonably calculated to reach co-conspirators.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

[HN6](#) Sentencing, Sentencing Guidelines

District courts can depart from a relevant guideline provision if there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In the United States Court of Appeals for the Seventh Circuit, courts apply a three-part test to determine whether to grant motions for downward departure for unmentioned or extraordinary circumstances. The test considers whether an aspect of the case potentially removes it from the prescribed sentencing range, whether the Commission has proscribed any consideration of the factor as a categorical matter, and whether there is an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

Criminal Law & Procedure > ... > Departures From Guidelines > Downward Departures > Coercion & Duress

Criminal Law & Procedure > Defenses > General Overview

Criminal Law & Procedure > Defenses > Entrapment

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN7 [Downward Departures, Coercion & Duress]

Aggressive encouragement of wrongdoing may be used as a basis for departure under the [U.S. Sentencing Guidelines Manual § 5K2.12](#) where defendants who are predisposed are pressured unduly by the government to go forward with a criminal offense.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

HN8 [Sentencing, Corrections, Modifications & Reductions]

Downward departures based on disparity in sentences between co-conspirators are available where the disparity is unjustified and results from an improper application of the relevant guideline provisions.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Mitigating Role

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN9 [Adjustments & Enhancements, Mitigating Role]

Where a defendant requests a decrease in his offense level, he has the burden of proving by a preponderance of the evidence that he is substantially less culpable than the average participant in order to warrant a reduction under [U.S. Sentencing Guidelines Manual § 3B1.2](#).

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Aggravating Role

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN10 [Adjustments & Enhancements, Aggravating Role]

In order for [U.S. Sentencing Guidelines Manual § 3B1.1\(a\)](#) to apply, a court must find that the defendant managed or organized a conspiracy that involved five participants or was otherwise extensive, and was substantially more culpable vis-a-vis his co-conspirators over whom he must have had some real and direct influence, aimed at furthering the criminal activity.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN11[Inchoate Crimes, Conspiracy

In order to determine whether a defendant was an organizer or leader in a conspiracy, the court must consider the defendant's exercise of decision making authority, the nature of the defendant's participation in the commission of the offense, the degree of the defendant's participation in planning or organizing the offense, if the defendant claimed a right to a larger share of the fruits of the crime, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Acceptance of Responsibility

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN12[Adjustments & Enhancements, Acceptance of Responsibility

The U.S. Sentencing Guidelines Manual provides for a two-point decrease in an offense level if a defendant clearly demonstrates acceptance of responsibility for his offense.

Counsel: For MICHAEL D ANDREAS, defendant (96-CR-762-1): James T. Phalen, John M. Bray, Schwab, Donnenfeld, Bray & Silbert, Washington, DC.

For MICHAEL D ANDREAS, defendant (96-CR-762-1): Kevin M Dinan, John David Shakow, King & Spalding, Washington, DC.

For MICHAEL D ANDREAS, defendant (96-CR-762-1): Joseph J. Duffy, Stetler & Duffy, Ltd., Chicago, IL.

U. S. Attorneys (96-CR-762-1): Philip A. Guentert, United States Attorney's Office, Chicago, IL.

U. S. Attorneys (96-CR-762-1): Jerry Michael Santangelo, Neal, Gerber & Eisenberg, Chicago, IL.

For MARK E WHITACRE, defendant (96-CR-762-2): Bill T Walker, Attorney at Law, Granite City, IL.

U. S. Attorneys (96-CR-762-2): Philip A. Guentert, United States Attorney's Office, Chicago, IL.

U. S. Attorneys (96-CR-762-2): Jerry Michael Santangelo, Neal, Gerber & Eisenberg, [*2] Chicago, IL.

For TERRANCE S WILSON, defendant (96-CR-762-3): Robert W Fleishman, Mark J. Hulkower, Reid H. Weingarten, Steptoe & Johnson, Washington, DC.

For TERRANCE S WILSON, defendant (96-CR-762-3): Kristina M.L. Anderson, Attorney at Law, Chicago, IL.

U. S. Attorneys (96-CR-762-3): Philip A. Guentert, United States Attorney's Office, Chicago, IL.

U. S. Attorneys (96-CR-762-3): Jerry Michael Santangelo, Neal, Gerber & Eisenberg, Chicago, IL.

U. S. Attorneys (96-CR-762-4): Philip A. Guentert, United States Attorney's Office, Chicago, IL.

U. S. Attorneys (96-CR-762-4): Jerry Michael Santangelo, Neal, Gerber & Eisenberg, Chicago, IL.

Judges: BLANCHE M. MANNING, UNITED STATES DISTRICT JUDGE.

Opinion by: BLANCHE M. MANNING

Opinion

MEMORANDUM AND ORDER

This matter is before the court on the parties' motions regarding the imposition of sentences for defendants Michael D. Andreas, Mark E. Whitacre,¹ and Terrance S. Wilson. [HN1](#)[[↑]] A sentencing court "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information she may consider, or the source from which it may come . . . without regard for the rules of evidence." U.S.S. [*3] G. [§ 6A1.3](#); [United States v. Gerstein, 104 F.3d 973, 978 \(7th Cir. 1997\)](#); see also [United States v. Taylor, 72 F.3d 533, 543 \(7th Cir. 1995\)](#).

I. Base offense levels proposed in the defendants' [*4] presentence investigation reports²

In a presentence investigation report (PSI) prepared by the United States Probation Office, applying the 1998 edition of the sentencing guidelines, Andreas has a proposed base offense level of 10 under the [U.S.S.G. § 2R1.1](#) for the one-count violation of the Sherman Antitrust Act, [15 U.S.C. § 1](#). [HN2](#)[[↑]] Under [§ 2R1.1](#), the court is allowed to upwardly adjust the offense level based on the amount of "affected commerce" - here, [*5] dry domestic lysine. In a prior pretrial ruling, the court adopted the definition of "affected commerce" established in [United States v. Hayter Oil Co., 51 F.3d 1265 \(6th Cir. 1995\)](#), meaning that defendants were per se liable for all domestic dry lysine sales during the conspiracy period which, according to the PSI, was approximately \$ 168 million which easily exceeds the \$ 100 million adjustment level in the table at [§ 2R1.1\(b\)\(2\)\(G\)](#). Thus, the adjusted sentence based solely on the antitrust offense alone, stands at a level 17.

The PSI also concluded that Andreas deserved a 4-level upward adjustment, pursuant to [U.S.S.G. § 3B1.1\(a\)](#), for his role as a manager, organizer, and leader of the lysine conspiracy. Specifically, the PSI noted that the evidence adduced at trial had shown that co-defendants Wilson and Whitacre had reported to Andreas who, himself, had actively negotiated and represented ADM at several important price and volume allocation meetings, particularly the 1993 Irvine, California meeting. After combining the [§ 2R1.1\(b\)\(2\)\(G\)](#) & [§ 3B1.1\(a\)](#) upward adjustments, the PSI concluded that Andreas' total offense level is 21, placing Andreas in Zone D of [*6] the sentencing table with a sentence ranging from 37 to 46 months, but with a statutory maximum, under [15 U.S.C. § 1](#), of three years (36 months).

Likewise, Whitacre's PSI recommends an adjusted base offense level of 14. Whitacre, unlike Andreas, cooperated with the government and, as a matter of law, was no longer a member of the conspiracy on and after October 1992, once Whitacre began his cooperation with the government's investigation of the conspiracy. Like Andreas, the PSI recommends no downward adjustment for acceptance of responsibility stating that "[Whitacre] has not demonstrated an affirmative acceptance of responsibility for his criminal activity." Whitacre Presentence Investigation Report at 7. Due to Whitacre's position as manager of ADM's BioProducts Division, the PSI reasoned that Whitacre deserved an upward adjustment, under [§ 3B1.1\(b\)](#) for supervising five or more co-conspirators (ADM salespersons) involved.

Wilson's PSI calculates his base offense level to be 10 upwardly adjusted by 7 levels for the amount of affected commerce. The PSI further reasons that Wilson arguably deserves an upward adjustment, pursuant to [§ 3B1.1\(b\)](#), for his role [*7] in the conspiracy, namely, establishing a phony trade association to conceal the conspiracy

¹ To date, the court has received no motions or objections from Whitacre or his counsel concerning sentencing other than his motion to waive his physical appearance and to be sentenced via videoconferencing. Whitacre's motion is denied in part since amazingly the state-of-the-art Edgefield Federal Correctional Institute in South Carolina, Whitacre's current penal institution, has no video link with the U.S. Courts. Hence, his sentencing must be performed via telephonic conference call. Whitacre rode on the coat tails of the successful joint motion of Andreas and Wilson with respect to the imposition of the alternative fine provision under [18 U.S.C. § 3571\(d\)](#). However, absent filing his own motions, such will not be the case for any remaining sentencing issues.

² The court pauses to commend the thorough and professional presentence investigation reports prepared by the U.S. Probation Office. This case presented highly complex sentencing issues involving [antitrust law](#) never confronted by any court, or its probation officers, in the Northern District of Illinois. The detailed synthesis of the facts and applicable sentencing guidelines provided invaluable assistance to the court and promoted the speedy resolution (when compared to the sheer girth of the case) of this prolonged sentencing phase.

meetings and training his co-conspirators how to manipulate sales volume to regulate the price agreement. Noting Wilson's confidence, demeanor and knowledge demonstrated in surreptitiously recorded videotapes of several conspiracy meetings, the PSI concludes that Wilson was clearly a top organizer and leader of the conspiracy.

II. Relevant Conduct: Citric Acid

During oral argument on his post-trial motions, Andreas argued that it would be fundamentally unfair and offensive to due process to punish him for conduct - participating in a sales volume allocation agreement - which has never been expressly adjudicated an illegal act. The court disagreed since Andreas' claim ignored a critical factual predicate - that the sales volume allocation was used in furtherance of price-fixing agreements that are clearly illegal.

Andreas again rings the due process bell and this time he is absolutely correct. Andreas' asserts that the government, under the cover of [U.S.S.G. § 1B1.3](#), is attempting to unfairly inflate his sentence by tacking on his purported conduct in the alleged citric acid conspiracy [*8] as "relevant conduct" to calculate the base offense level for the lysine conviction.³ Andreas contends that the government is unfairly casting the citric acid conspiracy as "relevant conduct" in order to circumvent another criminal trial and punish him for uncharged and unproven allegations with the aid of a lower burden of proof.

[HN3](#) [U.S.S.G. § 1B1.3\(a\)\(2\)](#) is popular with prosecutors since district courts must increase the defendant's base offense level to account for "relevant conduct" which includes "all acts and omissions committed . . . by the defendant," [U.S.S.G. § 1B1.3\(a\)\(1\)\(A\)](#), that are "part of . . . a common scheme or plan as the offense of conviction," which needs only to be proven by a preponderance of the evidence - *not* beyond a reasonable doubt. [U.S.S.G. § 1B1.3\(a\)\(2\)](#); [United States v. Crockett](#), 82 F.3d 722, 729 (7th Cir. 1996); [United States v. Duarte](#), 950 F.2d 1255, 1263 (7th Cir. 1991). [HN4](#) Offenses [*9] are part of the same course of conduct if they are 'sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.' [United States v. Patel](#), 131 F.3d 1195, 1203 (7th Cir. 1997). Factors to consider in determining whether the purported "relevant conduct" is part of the common scheme include: (1) the degree of similarity between the offenses; (2) the regularity of the offenses; (3) the time interval between the offenses; and (4) whether the charged and uncharged offenses share common victims, accomplices, common purpose, or similar modus operandi. [Taylor](#), 72 F.3d at 548; [United States v. Acosta](#), 85 F.3d 275, 281 (7th Cir. 1996). These factors are limited by the fact that [U.S.S.G. § 1B1.3\(a\)\(2\)](#) "must not be read to encompass any offense that is similar in kind to the offense of conviction but that does not bear the required relationship to that offense." [United States v. Bacallao](#), 149 F.3d 717, 720 (7th Cir. 1998); [United States v. Beler](#), 20 F.3d 1428, 1432 (7th Cir. 1994); see also [Duarte](#), 950 F.2d at 1263. [*10] The obvious unfairness of this practice has been lamented in numerous Seventh Circuit opinions, but has been held perfectly legal by the Supreme Court. See [United States v. Grayson](#), 438 U.S. 41, 57 L. Ed. 2d 582, 98 S. Ct. 2610 (1978).

Here, the government asserts that the degree of similarity weighs in their favor since the price-fixing involved in the lysine conspiracy and as alleged with respect to citric acid conspiracy, are antitrust violations involving complex economic and business principles. This argument is frequently raised in drug conspiracy cases where the government moves to enhance a pusher's sentence based on evidence of prior drug purchases made in close temporal proximity to the indicted offense. See, e.g., [United States v. Cedano-Rojas](#), 999 F.2d 1175 (7th Cir. 1993) (prior drug quantities included); [Acosta](#), 85 F.3d at 281-82 (same); *but see* [Patel](#), 131 F.3d at 1203-05; [Beler](#), 20 F.3d at 1432; [Duarte](#), 950 F.2d at 1263-64 (no relevant conduct enhancement).

At best, however, the evidence shows that Andreas and Wilson might have learned some tricks from past conduct [*11] which they apparently put to use in the lysine conspiracy. Hence, citric acid is an "offense that is similar in kind" but not necessarily part of the common lysine scheme or plan. [Crockett](#), 82 F.3d at 730 ("it is not, of course, enough that the conduct in question merely involved drugs"). The record provides precious little details

³ The court's analysis applies equally to defendant Wilson.

about the precise scope of the alleged citric acid conspiracy. We do know that, with the possible exception of Wilson and Andreas, the government has never linked any of the other lysine conspirators with citric acid. Nor is it likely to do so since, none of the foreign lysine producers are in the citric acid market. There was no communication or interaction between the lysine producers and the alleged citric acid conspirators. Moreover, the two conspiracies involved different markets with different victims, and the lysine conspiracy did not depend on the citric acid conspiracy for its success.

Nothing in the record even remotely suggests that the lysine conspiracy and the alleged citric acid conspiracy - the existence of which remains unproven, uncharged, and unadmitted by both Andreas and Wilson - are part of a single "crime spree." The [*12] government asserts that the court can merely conclude that fact based on the unrebutted testimony of ADM executive Barrie Cox. Recall, Cox testified that Andreas and Wilson were involved in an alleged conspiracy to fix the prices of citric acid. Just to be clear, despite the government's assertions to the contrary, the court never conclusively held that the lysine conspiracy was, as a matter of fact, patterned after the citric acid conspiracy. Twice, over vociferous defense objections, the court held that notwithstanding [Fed. R. Evid. 404\(b\)](#), the citric acid evidence was admissible for the very narrow purpose of placing the numerous lysine conversations into context and to establish the defendants' knowledge and intent to commit the lysine offense. The jury was instructed not to consider the evidence for any other substantive purpose and therefore, the defendants' conviction for the lysine offense has absolutely no factual bearing, as a matter of law, on the existence of the alleged citric acid conspiracy.

That said, the court agrees that the lysine conspiracy and the alleged citric acid conspiracy share only one proven similarity - they are agricultural products. However, [*13] as Andreas notes, the alleged citric acid conspiracy involved different victims, corporate conspirators, and geography. The only evidence establishing the participation of Wilson and Andreas or when the citric acid conspiracy transpired is Barrie Cox's testimony. Simply put, the court did not find Cox's uncorroborated testimony, by itself, convincing enough to conclude that Andreas and Wilson were involved in an unindicted, let alone, unproven criminal offense of the magnitude alleged.

It is simply ludicrous to conclude that citric acid is "relevant conduct" for Andreas when the government's star witness on the subject freely admits that he did not know if Andreas was ever even involved in the alleged relevant conduct. As for Wilson, the court is reminded by the Seventh Circuit's stern admonitions that [§ 1B1.3\(a\)\(2\)](#) "should not be applied to offenses [that are] of the same kind, but not encompassed in the same conduct or plan" as the convicted offenses." [Belar, 20 F.3d at 1432](#). Again, with the possible exception of Wilson and Andreas, none of the lysine conspirators were involved in the alleged citric acid conspiracy. The evidence elicited at trial against Wilson [*14] and Andreas was not admitted as substantive evidence of their involvement in the citric acid conspiracy. Apart from Cox's uncorroborated testimony the court has no other reliable evidence that shows, by a preponderance of the evidence, that either Wilson or Andreas was involved with the alleged citric acid conspiracy. Absent other corroboration, such as audio and videotapes showing that this alleged conspiracy existed, the court will not assume that one exists (or ever existed) based on the government's promise. Accordingly, the alleged citric acid conspiracy is excluded as relevant conduct for the purposes of calculating the base offense level of any of the defendants. Accordingly, the court will exclude all references and evidence of citric acid from the base offense levels of all the defendants.

To avoid injecting any confusion into the inevitable appeal in this action, the court admits that there is seeming inconsistency to say that Cox's testimony is admissible to prove the existence of the lysine conspiracy, but then disregard it for purposes of aggregating the defendants' sentences. However, as Judge Rovner very recently noted in [United States v. Ruiz, 178 F.3d 877, 1999 U.S. App. LEXIS 9353, 1999 WL 305062 \[*15\] \(7th Cir. 1999\)](#):

While the terminology is similar to that used in [Rule 404\(b\)](#) evaluations, the focus is different. Under [Rule 404\(b\)](#), the question is whether the conduct is close enough in time and similar enough in nature to be relevant to a *determination of intent, knowledge, etc.* In contrast, the issue under [sec. 1B1.3](#) is whether the conduct is close enough in time and character to constitute a single course of conduct or common scheme. . . . conduct which satisfies the [Rule 404\(b\)](#) test may nevertheless not constitute relevant conduct for sentencing purposes. (emphasis added).

At times evidence that is admissible despite 404(b) limitations nevertheless is irrelevant for purposes of [U.S.S.G. 1B1.3\(a\)\(2\)](#) because the conduct was not, in sum and substance, part of the same common scheme or plan for which the defendants were convicted. [Patel, 131 F.3d at 1203-04](#). For the longest time, the Department of Justice's Antitrust Division has convened at least one grand jury in California to investigate an alleged citric acid conspiracy. According to representations by the government and the testimony of ADM executive Barrie Cox, defendant Wilson is likely [*16] a primary focus of the citric acid investigation. But the court respectfully reminds the government that Cox's testimony regarding citric acid was, over repeated defense objections based on [Fed. R. Evid. 404\(b\)](#), admitted for the limited purpose of: (1) placing the co-conspirators' recorded conversations and testimony in context; and (2) proving the defendants possessed the requisite intent to form the price-fixing agreement. That is what the government did and the court is not going to allow the government to do an end run around another trial by aggregating the sentences of Andreas and Wilson for a separate uncharged and unproven offense where there is absolutely no reliable evidence that the citric acid offense was directly part of the lysine scheme. As the record stands, the alleged citric acid conspiracy is merely similar in character, but not part of the same criminal scheme and will not be deemed relevant conduct attributable to the defendants' base offense levels.

III. Scope of the Conspiracy

Since the fine calculation for [U.S.S.G. § 2R1.1](#) depends on the amount of "affected commerce" during the life of the conspiracy, the government has tendered numerous documentary [*17] and testimonial evidence which it believes establishes that the lysine conspiracy began on June 23, 1992 at the Mexico City meeting and ended on June 27, 1995 when the FBI raided the corporate headquarters of ADM and its co-conspirators. Andreas, relying on [United States v. United States Gypsum Co., 438 U.S. 422, 57 L. Ed. 2d 854, 98 S. Ct. 2864 \(1978\)](#) and [United States v. Swiss Valley Farms Co., 912 F. Supp. 401, 403 \(C.D. Ill. 1995\)](#), disputes the government's estimate, arguing that the evidence that lysine sold by ADM below the "agreement price" indicates that Andreas withdrew from the conspiracy.

After thoroughly reviewing the government's charts that capture the major highlights of the evidence elicited at trial regarding the dates, locations, and objectives of the conspiracy meetings, the court agrees that for the purposes of sentencing, the lysine conspiracy existed from June 23, 1992 until June 27, 1995 - the day of the FBI raid.

In *United States Gypsum*, the Supreme Court held that [HN5](#) participants in an antitrust conspiracy can withdraw or abandon the conspiracy by committing "[affirmative acts inconsistent with the object of the conspiracy [*18] and communicating those acts] in a manner reasonably calculated to reach co-conspirators" [438 U.S. at 464-65](#). Andreas, while still denying his participation in the lysine conspiracy, argues that the evidence of prices below the alleged "agreement price" is inconsistent with the goals of the conspiracy and thus, he should be deemed to have abandoned the conspiracy. That argument is flawed, however, since *United States Gypsum* clearly indicates that the inconsistent act must be communicated to the co-conspirators. Andreas offers a plethora of documentary evidence in the form of business records belonging to the foreign lysine producers expressing concerns that ADM was selling below the "agreement price." Remarkably absent, however, was any communiqué or correspondence from Andreas to the foreign lysine producers informing them that Andreas was leaving the conspiracy. Absent evidence of clearly demonstrated intent, there is no reliable method of knowing whether ADM's lower prices were not simply a fluke or due to ADM's desire to cheat its co-conspirators. Neither of which constitute withdrawal from the conspiracy.

Having failed to present any persuasive evidence [*19] that the defendants intended to withdraw from the lysine conspiracy or to dispute the government's time frame, the court concludes that the lysine conspiracy lasted from June 23, 1992 through June 27, 1995. Hence, the court will impose a fine under [U.S.S.G. § 2R1.1](#) based on ADM's domestic dry lysine sales for that period which, according to undisputed government calculations is \$ 193,297,847.61. Since the level of "affected commerce" attributable to Andreas and Wilson exceeds \$ 100,000,000.00, they both will receive adjusted base offense levels of 17. [U.S.S.G. § 2R1.1\(b\)\(2\)\(G\)](#).

The record shows that on November 4, 1992, defendant Whitacre withdrew from the conspiracy by informing the authorities of the lysine conspiracy and assisting them with the covert investigation that ensued. Hence, Whitacre is liable only for lysine sales occurring between June 23, 1992 and November 4, 1992 which, again according to undisputed government calculations, is \$ 18,738,188.65. Because that amount exceeds \$ 15,000,000, Whitacre receives an adjusted base offense level of 15. [U.S.S.G. § 2R1.1\(b\)\(2\)\(E\)](#). For the reasons set forth in the relevant conduct discussion, the court will not consider the alleged [*20] citric acid conspiracy to calculate the base offense level.

IV. Offense Level Adjustments

A. Andreas

Unsurprisingly, Andreas objects to portions of the PSI and alternatively seeks a reduction in his sentence based on, *inter alia*, his limited role in the conspiracy, and the government's alleged aggressive encouragement to cause him to participate in the lysine conspiracy (which Andreas still contends never existed).

1. Downward departure under *Koon v. United States*

The court first turns to Andreas' motion for a downward departure based on [Koon v. United States, 518 U.S. 81, 135 L. Ed. 2d 392, 116 S. Ct. 2035 \(1996\)](#) since its factual bases overlap significantly with Andreas' other arguments in favor of departure or in opposition to the government's motions for upward adjustment. The Guidelines create sentencing "heartlands" - the "set of typical cases embodying the conduct that the [relevant guideline provision] describes." [United States v. Santoyo, 146 F.3d 519, 525 \(7th Cir. 1998\)](#), citing U.S.S.G. Ch. 1, Pt. A(4)(b), intro. comment. The parties agree that the relevant guideline is the antitrust provision [*21] of [U.S.S.G. § 2R1.1](#).

The *Koon* Court held [HN6](#) that district courts can depart from the relevant guideline provision "if there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." [518 U.S. at 92](#), citing [18 U.S.C. § 3553\(b\)](#). Rather than leave district courts to their own devices, the Sentencing Commission narrowed the circumstances for departure by established categories of factors - forbidden, encouraged, discouraged, and unmentioned - to determine whether a departure is warranted. [Koon, 518 U.S. at 94-95; United States v. Meza, 127 F.3d 545, 548 \(7th Cir. 1996\)](#).

In the Seventh Circuit, courts apply a three-part test to determine whether to grant motions to downward departure for unmentioned or, as Andreas describes them, "extraordinary circumstances," including whether: (1) an aspect of the case potentially removes it from the prescribed sentencing range; (2) the Commission has proscribed any consideration of the factor as [*22] a categorical matter; and (3) "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." [Meza, 127 F.3d at 549; 18 U.S.C. § 3553 \(b\)](#).

Attempting to find salvation in the arguably vague (but not very) dicta of *Koon* and its progeny, Andreas asserts that his case is so unusual that it falls outside the heartland of typical antitrust violations governed by [U.S.S.G. § 2R1.1](#). Basically Andreas launches into his familiar diatribe which, after almost three years, the court now affectionately calls the "let's blame Whitacre defense." That is, his conviction falls outside [§ 2R1.1](#)'s heartland because: (1) the government unfairly targeted Andreas for prosecution; (2) that Whitacre "aggressively encouraged" him into conspiring with Messrs. Yamada, Ikeda, Crouy, Wilson, Mimoto, Yamamoto, Kim, Chaudret, and Whitacre himself, to get their companies to intentionally inflate the global price of lysine; (3) the government manipulated his sentence by intentionally prolonging the ADM [*23] investigation by not prosecuting him sooner, and giving co-conspirators immunity and lenient plea agreements creating sentencing disparities; and (4) continued market competition,

despite the conspiracy's existence, made the conspiracy less harmful than the typical antitrust violations [§ 2R1.1](#) contemplates.

Andreas' theory is supported, in part, by renewed attacks over how the FBI gave Whitacre unfettered discretion to tape conversations which were arguably selectively taped or destroyed in order to distort the evidence and "frame" Andreas and co-defendant Wilson for price-fixing. See generally [United States v. Andreas, 39 F. Supp. 2d 1048 \(N.D. Ill. 1998\)](#). Andreas still proclaims his innocence and denies ever joining a conspiracy which, he contends, is evident from ADM's competitive acts during the scope of the conspiracy period. Finally, Andreas contends that the disparity between his prospective sentence and those received by his foreign lysine co-conspirators is, as a matter of law, grounds for a downward departure.

In response, the government argues that Andreas' claim lacks any merit as is evident from surreptitious videotapes showing that Andreas was predisposed [*24] to participate in the conspiracy and freely engaged in the conspiracy without the encouragement of Whitacre or any other government agent. The government, citing numerous Seventh Circuit authority, demonstrates that Andreas' aggressive encouragement and disparate sentencing arguments are not permissible grounds to downwardly depart.

a. Unfair targeting and aggressive encouragement

Andreas invokes the theory of [HN7](#) "aggressive encouragement" recognized in [United States v. McClelland, 72 F.3d 717, 725 \(9th Cir. 1995\)](#), where aggressive encouragement of wrongdoing "may be used as a basis for departure under § 5K2.12" where, unlike here, "defendants who are predisposed but who are then pressured unduly by the government to go forward with the offense." [72 F.3d at 725](#). Aggressive encouragement is a not-so-distant cousin to the entrapment defense which Andreas never raised at trial and, based on the evidence adduced at trial, was not a viable theory of defense for which the court would have given a jury instruction.

Andreas' aggressive encouragement claim, however, is fueled largely by rank speculation that Whitacre somehow coaxed, cajoled, or encouraged [*25] Andreas's participation. As the government notes, the Seventh Circuit has never adopted the Ninth Circuit's aggressive encouragement theory nor, based on the Seventh Circuit's rejection of government misconduct claims as affirmative defenses, [United States v. Boyd, 55 F.3d 239, 241 \(7th Cir. 1995\)](#), does the court think aggressive encouragement claims will be warmly welcomed.

Even in the unlikely event that the Seventh Circuit was to adopt *McClelland*, Andreas has not met *McClelland's* burden of proving that Whitacre "unduly pressured" Andreas. The court said it before in its December 30, 1998 order and will say it again - the videotape conversation of the 1993 Irvine, California, coupled with all of the other admitted evidence, dispels any doubt that Andreas did not willingly participate in the conspiracy. Andreas had the opportunity to convince the jury that his Irvine meeting with Ikeda and Yamada was innocent, but the jury did not believe that explanation nor does the court now.

Whitacre never pressured Andreas. Nor can Andreas convince this court otherwise by proffering snippets of purported exculpatory conversations where Whitacre allegedly manipulated [*26] Andreas. With all due respect, the video and audiotapes clearly show that Andreas is not easily intimidated by business competitors, let alone an ADM underling of Whitacre's caliber. In other words, this court remains steadfastly convinced that when Andreas decides to do something, Andreas does so freely and willingly and not as the result of coercion or encouragement - aggressive or otherwise. Indeed, the court strongly doubts that Andreas would have been such a successful business person (prior to his poor judgment in this one instance) unless he was the strong-willed individual that he is. Accordingly, Andreas' aggressive encouragement claim is rejected as a basis for a downward departure.

b. Sentencing disparities and sentencing manipulation

Andreas' sentencing manipulation claim fails for two reasons. First, "there is no defense of sentencing manipulation [in the Seventh Circuit]." [United States v. Garcia, 79 F.3d 74, 76 \(7th Cir. 1996\)](#). Second, assuming *arguendo* that the government had insufficient evidence (which it did not), then the government would have had to extend the

covert phase of the lysine investigation even longer thereby prolonging [*27] the life of the conspiracy and increasing the ultimate penalties. Andreas cannot have it both ways.

Motions for downward departure due to disparate sentences between co-conspirators fair no better. A disparity in sentences between co-conspirators is not a per se basis for granting a downward departure as an "unmentioned category" under *Koon*. In [United States v. Meza, 127 F.3d 545, 549-50 \(7th Cir. 1996\)](#) the Seventh Circuit held that [HN8](#)¹ downward departures based on disparity in sentences between co-conspirators are available where the disparity is "unjustified" and results from an improper application of the relevant guideline provisions.

Andreas claims that an unjustified disparity exists merely because his coconspirators received plea agreements and immunity to avoid prosecution - despite their comparable culpability - but that he received no deals. Yet, *Meza* rejected the very same argument, noting that [U.S.S.G. § 6B1.2](#) expressly allows coconspirators to receive different sentences where, as here, certain members execute plea agreements under [Fed. R. Crim. P. 11\(e\)\(1\)](#) and aid the government in prosecuting the other conspirators. [Meza, 127 F.3d at 549](#); [*28] see also [United States v. McClinton, 135 F.3d 1178, 1192 \(7th Cir. 1998\)](#); [United States v. Miranda, 1998 U.S. Dist. LEXIS 4917](#), No. 94 CR 714-2, [1998 WL 173300](#) (N.D. Ill. Apr. 10, 1998) (Williams, J.). This case is no different. Almost all of the foreign lysine producers received immunity in exchange for their cooperation in prosecuting the defendants.⁴ This outcome might offend the layperson's sense of justice, but the result is perfectly legal, hardly extraordinary, and clearly not grounds for a downward departure.

c. Limited success of the conspiracy

Andreas essentially renews his motion that global price-fixing and sales volume allocation agreements are not per se illegal. For the reasons previously [*29] stated in the December 30, 1998 order, the court declines further comment. Alternatively, relying on [United States v. Stockheimer, 157 F.3d 1082, 1091 \(7th Cir. 1998\)](#), Andreas asserts, without any detailed explanation, that the preliminary numerical dollar value of the amount "affected commerce" for purposes of [§ 2R1.1](#) grossly exaggerates the seriousness of the crime. The court disagrees. To be clear, Andreas does not dispute the accuracy of the dollar amount to the extent that it was used to upwardly adjust his base offense level under [§ 2R1.1](#)'s by seven levels. See [§ 2R1.1\(b\)\(2\)\(G\)](#).

Andreas does not explain what particular aspects of this case take it out of the heartland for antitrust offenses nor does the court see any. As the government argued, this case is no different from the typical antitrust offense, i.e., several large corporations agreed to inflate prices to make some extra cash to feed their own greed. The fact that the participants might have cheated or stabbed one another in the back adds nothing to the analysis since the vast majority of criminal conspiracies - violent, nonviolent, blue-collar or white-collar - involve informants who cooperate [*30] and turn in their former compatriots for immunity. That is life in the criminal fast lane. Hence, this argument is likewise rejected. Having found no basis to consider this case outside the [§ 2R1.1](#)'s heartland, Andreas' motion for downward departure under *Koon* is denied.

2. Andreas' role in the offense

Andreas contends that, pursuant to [U.S.S.G. § 3B1.2](#), he is entitled to a four level reduction in his offense level because he is "substantially less culpable than the average participant." In contrast, the government moves for a four-point increase in Andreas' offense level under [U.S.S.G. § 3B1.1\(a\)](#), arguing that Andreas was "an organizer or leader of the [lysine conspiracy] that involved five or more participants or was otherwise extensive." Govt. Sentencing Memo. at 59.

a. Andreas' [§ 3B1.2](#) motion for a four-point downward departure

⁴ It will be interesting to observe whether the government will revoke some of those cooperation agreements in light of some of the foreign co-conspirators' unwillingness to produce documentation necessary to calculate the alternative fine provision under [18 U.S.C. § 3571\(d\)](#).

HN9 [↑] Where a defendant requests a decrease in his offense level, he has the burden of proving by a preponderance of the evidence that he is "substantially less culpable than the average participant in order to warrant a reduction under [U.S.S.G.] § 3B1.2." *United States v. McClinton*, 135 F.3d 1178, 1190 (7th Cir. 1998). [*31] Andreas contends that he was a "minimal participant" because Whitacre never told him that the foreign lysine producers wanted to engage in price-fixing and Andreas contends that ADM did not make deals. The court would, for once and for all, like to place Andreas' "we don't make deals" comment into its full context. The court concedes that Andreas told Wilson and Whitacre that ADM does not "make deals." Ironically, Andreas was later captured on videotape at the Irvine meeting with Ikeda and Yamada carving up the global lysine volume in order to stabilize the price agreement. It seems Andreas said one thing and did something completely different. Andreas' sufficiency of the evidence claims have been addressed more than once and any further argument can be made before the court of appeals.

Nothing in the record even remotely suggests that Andreas was less culpable than his co-conspirators, let alone, substantially. He negotiated the sales volume allocation with Ikeda and Yamada which, by all accounts, was absolutely necessary to further the price agreement and further the objectives of the conspiracy. Accordingly, Andreas' motion for a four-point reduction is denied.

2. Enhancement [*32] for Andreas' organizer/leadership role

HN10 [↑] In order for U.S.S.G. § 3B1.1(a) to apply, the court must find that the defendant: (1) managed or organized a conspiracy that involved five participants or was otherwise extensive; and (2) was substantially more culpable vis-a-vis his co-conspirators in which he must have had some real and direct influence, aimed at furthering the criminal activity. *McClinton*, 135 F.3d at 1190 (7th Cir. 1998); *United States v. Fones*, 51 F.3d 663, 668 (7th Cir. 1995); *United States v. Mustread*, 42 F.3d 1097, 1103 (7th Cir. 1994); *United States v. Brown*, 944 F.2d 1377, 1381-82 (7th Cir. 1991). The primary inquiry is relative responsibility - those who play an aggravating role in the offense are to receive sentences that reflect their greater contributions to the illegal scheme as determined by the defendant's relative culpability vis-a-vis other participants in the offense. *United States v. Tetzlaff*, 896 F.2d 1071, 1074-74 n.4 (7th Cir. 1990).

Besides claiming his innocence, Andreas objects to the four-level enhancement arguing that he never managed or otherwise supervised [*33] five co-conspirators. Andreas concedes that the court can count Andreas himself to satisfy the five person requirement, but notes that even then, arguably only three people were managed - Andreas and Wilson and Whitacre. Andreas contends that Whitacre cannot be counted, as a matter of law, since he was a government agent at the time of the conspiracy. The government, however, argues that Whitacre was not a government agent prior to November 4, 1992, thus he is eligible based on his acts prior to that time. Even if the government were given the benefit of the doubt and Andreas, Whitacre, and Wilson are counted, the government is still two people shy of a four-point enhancement. The void could be filled if, as the government proposes, ADM sales executives are counted too. That proposal does not work since a participant is "a person who is criminally responsible for the commission of the offense," U.S.S.G. § 3B1.1, and the record clearly reveals that none of the ADM sales executive knew, let alone, participated in the conspiracy. One of the government's star witnesses, ADM executive Barrie Cox, said so at trial and the government admitted it during its closing arguments.

Tacitly conceding [*34] that the numbers are not in its favor, the government seeks to circumvent the five person requirement by arguing that, due to its size and scope, the lysine conspiracy was "otherwise extensive" and can be deemed the functional equivalent of a "five person" enterprise led by Andreas for which an enhancement is viable. It is true, § 3B1.1 permits a four-point enhancement where the offense is "otherwise extensive" which the Seventh Circuit defines to include circumstances where the relevant "activity is the functional equivalent of an activity involving five or more participants." *United States v. Tai*, 41 F.3d 1170, 1173 (7th Cir. 1994).

While the *Tai* Court remanded the case for re-sentencing because the district court enhanced the defendants' based on the involvement of three participants and two (innocent) outsiders, the Seventh Circuit expanded § 3B1.1's scope to include "the unknowing services of many outsiders." *United States v. Mohammad*, 53 F.3d 1426, 1437 (7th Cir. 1995). Hence, the government correctly argues that the court may consider how Andreas and his co-

conspirators utilized the aid of unwitting corporate underlings to further the [*35] price-fixing scheme. The sheer girth of the lysine conspiracy permits the court to deem it the functional equivalent of a five-person criminal enterprise. The only problem is convincing the court that Andreas' conduct vis-a-vis his foreign competitors was greater to make him the "brains" of the outfit. See [McClinton, 135 F.3d at 1191](#).

The primary purpose of [§ 3B1.1](#) is to punish - choose a euphemism - the "chief," "kingpin," "brains," "mastermind." [HN11](#) [Footnote] In order to determine whether the defendant was an "organizer" or "leader," the court must consider: (1) the defendant's exercise of decision making authority; (2) the nature of the defendant's participation in the commission of the offense; (3) the degree of the defendant's participation in planning or organizing the offense; (4) if the defendant claimed a right to a larger share of the fruits of the crime (5) the nature and scope of the illegal activity; and (6) the degree of control and authority exercised over others. [United States v. Parmelee, 42 F.3d 387, 399-400 \(7th Cir. 1994\)](#).

Applying those factors to the record, nothing convinces the court that Andreas, was a kingpin or supervisor any greater [*36] than other corporate executives involved in the lysine conspiracy. When compared with Ikeda, Yamada, Crouy, Chaudret, and Yamamoto, Andreas and Wilson were equals. The only thing that makes them worse than their counterparts was their inability to cut a deal with the government to avoid prosecution. A deal, by the way, which was never on the table for Andreas or Wilson. In that limited respect, the court agrees that Andreas and Wilson never made any deals.

The government implies that Andreas was the worst of the bunch because he threatened to flood the market in order to coerce cooperation from the other producers. That is certainly one interpretation of the evidence. Another equally plausible explanation is that the heads of several international corporations met secretly in hotel rooms under the guise of a sham trade association to talk price-fixing and later came to an agreement. They all had authority over their own underlings and exerted their own autonomy. If as the government contends, Andreas was the "big boss," he could have avoided the Irvine Meeting to stabilize the volume allocation by directly calling someone at Ajinomoto, Sewon, Eurolysine, and so forth, and simply ordered [*37] them to sell a specific volume at the set "agreement price." That is not what happened. Andreas had to negotiate with Ikeda and Yamada and they all had to agree or the deal was off. That is hardly what the court would call a "big boss." Equally probative is the fact that the record clearly indicated that the foreign producers have engaged in illegal conduct long before Andreas or Wilson entered the lysine market. Hence, the court does not believe Andreas and Wilson could coerce Ajinomoto and the rest as powerfully as the government claims.

Here, the whole team wanted to play coach and quarterback which inevitably led to cheating amongst the conspirators. The alleged cheating which occurred was under the auspices of Ikeda, Yamada, and others who apparently did not care too much for what Andreas or Wilson had to say until the group collectively realized that the conspiracy would fail without mutual cooperation that could not exist unless all of the "kingpins" (yes, plural) agreed. Hence, the first three *Parmelee* factors are inconclusive as to Andreas.

While Andreas enjoyed a large share of the lysine profits by virtue of his status as a major ADM shareholder, there is no evidence [*38] that it was substantially greater than that enjoyed by the Koreans, Japanese, French, or Swiss. Accordingly, the fourth *Parmelee* factor is equally unpersuasive. Finally, as noted above, the lysine conspiracy was large. But its size was the result of several corporate leaders joining together to break the law. Andreas bears no greater culpability than his contemporaries and thus, does not deserve a four-point enhancement. As such, the government's motion for a four-point enhancement under [U.S.S.G. § 3B1.1](#) is denied.

B. Wilson

1. Role in the offense

The government, pursuant to [U.S.S.G. § 3B1.1\(b\)](#), moves for an upward enhancement of Wilson's sentence, claiming that Wilson used his price-fixing expertise to become the de facto "coach" of the lysine conspiracy thereby

deserving an enhancement due to his function as a manager/supervisor of the conspiracy. Like Andreas, the record does not establish any convincing evidence that Wilson supervised or managed any of his lysine co-conspirators.

While the numerous audio and videotapes show him taking a prominent role in the discussions to regulate the objectives of the conspiracy, his role did not appear to be any [*39] greater than that of the other foreign lysine competitors or otherwise influenced or controlled their participation in the lysine conspiracy. Rather, the court agrees with Wilson's description of his participation - he was a "coequal" with his co-conspirators - no more or less culpable than the rest of his co-conspirators. Accordingly, the government's motion for an upward enhancement of Wilson's sentence under [§ 3B1.1\(b\)](#) is denied.

2. Downward departure for exceptional family circumstances, age, and health

Wilson asks the court to reduce his sentence under [U.S.S.G. § 5H1.6](#), due to "exceptional family circumstances." Before addressing the merits of the motion, the court acknowledges Wilson's standing objection to the public disclosure of his family and medical history. Nonetheless, as previously addressed by the court, there is a strong presumption in favor of public access to court proceedings. See generally [United States v. Edwards, 672 F.2d 1289, 1294 \(7th Cir. 1982\)](#). "This presumption is rebuttable upon demonstration that suppression 'is essential to preserve higher values and is narrowly tailored to serve that interest.'" [Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 \(7th Cir. 1994\)](#), [*40] quoting [Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510, 78 L. Ed. 2d 629, 104 S. Ct. 819 \(1984\)](#). While the court can appreciate Wilson's desire not to subject his family to further public scrutiny, the fact remains that he opened the door to his family's private life the moment he invoked his family as a basis for a departure.

a. Extraordinary family circumstances

The district court may depart from an applicable guidelines range once it finds that a defendant's family ties and responsibilities or community ties are so unusual that they may be characterized as extraordinary. [United States v. Canoy, 38 F.3d 893 \(7th Cir. 1994\)](#). Wilson asserts that incarceration will cause an irreparable harm on his family, particularly his son, Robert Wilson. The court is incredibly sympathetic to the plight that this entire process has imposed on the Wilson family, especially Mrs. Mary Jo Wilson and her son Robert. Nevertheless, after careful consideration of all of the materials submitted on this issue, the court must deny the motion. The potential effect of Mr. Wilson's family is no greater than that of the typical criminal case [*41] to warrant a downward departure and doing so here would deprecate the gravity of the offense. It is unfortunate, but the simple truth is that incarceration will always adversely impact a defendant's family - economically, emotionally, and sometimes physically.

The court agrees that sentences which are not tempered by some degree of compassion for the defendants' family can cause a substantial hardship. At the same time, that hardship must be balanced with the court's fundamental obligation to never implicitly or explicitly disregard the severity of the crime. That is an especially serious concern with "white-collar" offenses in which there is a popular but absolutely erroneous perception that the violation is minor. As the Seventh Circuit so eloquently noted:

We take this opportunity to emphasize to the district judges of this circuit that no "middle class" sentencing discounts are authorized. *Business criminals* are not to be treated more leniently than members of the "criminal class" just by virtue of being regularly employed or otherwise productively engaged in lawful economic activity . . . it is natural for judges, drawn as they (as we) are from the middle or upper-middle [*42] class, to sympathize with criminals drawn from the same class. But in this instance we must fight our nature. Criminals who have the education and training that enables people to make a decent living without resorting to crime are more rather than less culpable than their desperately poor and deprived brethren in crime. (emphasis added).

[United States v. Stefonek, 179 F.3d 1030, 1999 U.S. App. LEXIS 11337, 1999 WL 356407](#) at *7 (7th Cir. 1999) (Posner, J.).

Judge Posner's accurate description of the need to avoid double standards for white-collar offenders did not arise in the context of downward departures for family circumstances. Nonetheless, in the past this court has reluctantly but steadfastly refused downward departures in cases far more exceptional than Wilson's. While the court sympathizes with the plight of the Wilson family, the simple truth is that in the long run they will fair far better than the typical criminal defendant that appears before this court. Accordingly, the motion for downward departure based on exceptional family circumstances is denied.

b. Poor Health

Alternatively, Wilson seeks a downward departure claiming that incarceration [*43] will complicate his preexisting heart condition making any incarceration a de facto death sentence. Wilson and the government presented expert testimony and affidavits so divergent as to suggest that the opinions were too biased to make a reliable decision regarding the sentence. As such, the court appointed an independent cardiologist, Dr. Allen S. Anderson, Medical Director of the Heart Failure and Transplant Program at the University of Chicago.

Dr. Anderson's expert report presented a fair and balanced review of Mr. Wilson's health while implicitly addressing the relative strengths and weaknesses of the parties' conflicting opinions. In sum, Dr. Anderson acknowledges that Mr. Wilson does suffer from very serious, but manageable, cardiac problems. Fairly read, Dr. Anderson's report concludes that Wilson is at low risk of suffering from a sudden and lethal heart attack and that, with proper medical monitoring, incarceration poses no greater health risk than managing a Fortune 500 company. Accordingly, Wilson's motion for a downward departure based on his health is denied. The court will make a non-binding recommendation to the Bureau of Prisons to assign Wilson to a BOP medical [*44] facility.

c. Acceptance of responsibility

Following the old adage "you never know unless you ask" Wilson astonishingly moves, pursuant to U.S.S.G. § 3E1.1, for a downward departure for accepting responsibility in the lysine conspiracy. HN12[

The Sentencing Guidelines provide for a two-point decrease in offense level "if the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). The commentary to § 3E1.1 provides that a downward adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." Application Note 2; see also United States v. Morgano, 39 F.3d 1358, 1377-78 (7th Cir. 1994). Citing United States v. McKittrick, 142 F.3d 1170, 1178 (9th Cir. 1998), Wilson contends that notwithstanding putting the government, not to mention this court, through the burden of an eleven-week trial, he is entitled to a two-point reduction because he was preserving his right to challenge the applicability of the Sherman Antitrust Act to his alleged conduct.

[*45] Wilson, however, does not claim that the Sherman Act is legally inapplicable to his price-fixing misconduct. Instead, he merely asserts that, as a matter of fact, none of his conduct was indicative of Wilson's intent to form the illegal agreement even though the jury did not believe him. This is exactly the type of question that "relate[s] to factual guilt" for which *McKittrick* does not recognize as grounds for a downward departure under § 3E1.1. Wilson rolled that dice at trial and lost.

The Seventh Circuit precedent on this issue is clear - no two-point downward departures for defendants who deny the charge, go to trial and eventually lose. Any other result is "contrary to the basic system of incentives and disincentives established by the acceptance of responsibility reduction, namely to reward those who plead guilty -- saving the judiciary and government from the time, expense and effort of a trial." United States v. Gomez, 24 F.3d 924, 926 (7th Cir. 1994). Even now, as he asks for a downward departure for acceptance of responsibility, Wilson still insists that he never committed the crime. Granting this motion would undermine the very purpose of § 3E1.1 [*46] and thus, is denied. The court noticed that defendant Andreas implied that he would likewise seek this departure, but failed to formally move for one. The government's response indicates that Andreas might have decided not to seek it. But just in case the motion was somehow lost in the plethora of sentencing memoranda and motions, that motion would also be denied as to Andreas for the exact same reason.

V. Sentences

1. Andreas and Wilson

Having denied all motions for enhancement and downward departure of sentences as to Andreas and Wilson, and excluded citric acid as relevant conduct for purposes of calculating the base offense level, the court finds that both Andreas and Wilson have a total adjusted offense level of 17, and (having no prior convictions) a criminal history category of I, which places them in Zone D of the Sentencing Table with a range of 24 to 30 months. **The court, in its discretion, sentences Michael D. Andreas and Terrance S. Wilson to 24 months of incarceration to be served at a facility to be determined by the BOP.** However, as previously noted, the court recommends that Wilson serve his sentence at a BOP medical facility.

Because the [*47] volume of affected commerce attributable to defendant Andreas' and Wilson's conduct easily exceeds the statutory maximum of [15 U.S.C. § 1](#), pursuant to [U.S.S.G. § 2R1.1\(c\)\(1\)](#), **Michael D. Andreas and Terrance S. Wilson shall be fined \$ 350,000.00.**

2. Whitacre

Before the imposing sentence, the court finds it incredibly important to note for the record that Whitacre's counsel diligently represented the best interests of his client and was often forced to make difficult strategic decisions as to how to best represent Whitacre. During the sentencing phase, neither Whitacre nor his counsel have filed a single motion or raised a single objection to the government's version of the offense contained in the PSI or the PSI's sentencing recommendations, especially the request for an enhancement of sentence as a manager of the conspiracy. Given Whitacre's prior criminal history and failure to object, it seems that the government's cooperating witness will actually receive more time than defendants Andreas and Wilson. Again, sentencing disparity is perfectly appropriate where, as here, the sentence is the result of a proper application of the relevant guideline [*48] provisions. The court declines to speculate what might have motivated Whitacre to not object to the PSI and will hold him to his waiver of argument in opposition to the enhancement.

The court previously allowed Whitacre to ride on the coattails of Andreas and Wilson and gave him the benefit of favorable rulings that arguably should apply to all three defendants. That practice stops immediately! At the sentencing hearing, Whitacre and his counsel informed the court that they both read and understood the PSI and sought no corrections or recalculations. If they knowingly and voluntarily consent to the government's proposal to enhance his sentence, then this court will not stand in his way.

After thoroughly reviewing the PSI and considering all of Mark Whitacre's actions before, during, and after the government's investigation of the lysine conspiracy, the court finds that he does not deserve any reduction in sentence for his acceptance of responsibility nor for assisting the government. Whitacre complained that he has received no form of aid from the government since being indicted before this court. Well, quite frankly, he should never have expected any after trying to play both sides [*49] of the fence. Recall, Whitacre lied to everyone about his embezzlement of ADM funds and attempts to extort money from the biotechnology espionage affair commonly referred to as the "Fujiwara Incident." And who could possibly forget about Whitacre's attempts to derail the entire lysine prosecution and save his own neck by claiming that he destroyed exculpatory evidence and/or hid it by sending it to his associate David Hoech.

Needless to say, this court is not persuaded that Whitacre deserves any reduction in sentence for his "aid." Whitacre is the major exception to the basic rule that cooperating witnesses deserve lesser sentences. Time and time again, the government must often rely on the aid of crooks and snitches to convict the guilty. But for the testimony of the other co-conspirators and the videotapes which captured Andreas and Wilson in the act, the court is thoroughly convinced that the jury would have acquitted the defendants. Whitacre helped nobody but himself and

prolonged this case to the detriment of the government and this court and now suffers a fate created by his own misguided greed, deceit, and outright theft!

In light of Whitacre's lack of objections to the PSI, [*50] the court adopts the PSI in its entirety. Whitacre has a category II criminal history for his prior fraud conviction before Judge Howard Baker of the Central District of Illinois. His base offense level is 10 under [U.S.S.G. § 2R1.1](#) upwardly adjusted by 4-points for the amount of "affected commerce" and a 3-point enhancement for his role in the offense, totaling 17 points. Under criminal history category II, the court has the discretion of imposing a sentence between 27 to 33 months. Accordingly, defendant **Mark E. Whitacre is sentenced to serve 30 months on the instant conviction. Moreover, it is the order of this court that 10 months of that sentence shall be served concurrently with Whitacre's current term of incarceration with the remaining 20 months to be served consecutively. The court declines to impose a fine against Whitacre since it appears he has no financial resources to pay the fine. In addition, defendant Whitacre is ordered to seek the assistance of psychiatric/psychological counseling.**

CONCLUSION

For the foregoing reasons, the government's motions for upward enhancement of the sentences of Michael D. Andreas and Terrance S. Wilson are **DENIED**. Andreas' [*51] and Wilson's motions for downward departures of their sentence are **DENIED** in their entirety. The government's motion to consider the alleged citric acid conspiracy as relevant conduct to determine the base offense level for Andreas and Wilson is **DENIED**. The government's calculation of the scope of the lysine conspiracy is accepted and the calculation of "affected commerce" under [U.S.S.G. § 2R1.1](#) will be based on domestic dry lysine sales between June 23, 1992 and June 27, 1995.

ENTER:

BLANCHE M. MANNING

UNITED STATES DISTRICT JUDGE

DATE: 7/13/99

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Neo Gen Screening, Inc. v. New England Newborn Screening Program

United States Court of Appeals for the First Circuit

July 14, 1999, Decided

No. 99-1100

Reporter

187 F.3d 24 *; 1999 U.S. App. LEXIS 17392 **; 1999-2 Trade Cas. (CCH) P72,591

NEO GEN SCREENING, INC., Plaintiff, Appellant, v. NEW ENGLAND NEWBORN SCREENING PROGRAM, d/b/a NEW ENGLAND REGIONAL NEWBORN SCREENING PROGRAM, UNIVERSITY OF MASSACHUSETTS, UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER, HOWARD KOH, RALPH TIMPERI, Defendants, Appellees.

Subsequent History: [\[**1\]](#) As Corrected August 3, 1999.

Certiorari Denied December 13, 1999, Reported at: [1999 U.S. LEXIS 8283](#).

Writ of certiorari denied *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 528 U.S. 1061, 120 S. Ct. 615, 145 L. Ed. 2d 510, 1999 U.S. LEXIS 8283 (1999)

Prior History: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. George A. O'Toole, Jr., U.S. District Judge.

[*Neo Gen Screening, Inc. v. New England Newborn Screening Program, 1998 U.S. Dist. LEXIS 23654 \(D. Mass., Dec. 3, 1998\)*](#)

Disposition: Affirmed.

Core Terms

Screening, newborn, regulations, testing, state official, monopoly, district court, immunity, injunctive relief, arm, executive branch, cases

LexisNexis® Headnotes

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Constitutional Law > State Sovereign Immunity > Waiver > General Overview

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

HN1 [down] State Sovereign Immunity, State Immunity

Under [U.S. Const. amend. XI](#), a state or an arm of the state is normally immune from suits by citizens in federal court, unless the state waives its immunity, or Congress overrides that immunity as it may do in limited situations.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Governments > Native Americans > Property Rights

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Federal Judicial Limitations

Constitutional Law > State Sovereign Immunity > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

HN2 [down] State Sovereign Immunity, State Immunity

The Ex Parte Young doctrine removes [U.S. Const. amend. XI](#)'s bar where the private suit is directed not against the state or a state agency eo nomine but instead against state officials acting in violation of federal law and where, in addition, retrospective damages or property transfers are not sought for official acts.

Antitrust & Trade Law > Sherman Act > Defenses

Constitutional Law > Supremacy Clause > General Overview

Governments > Native Americans > Property Rights

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

HN3 [down] Sherman Act, Defenses

It is quite true that Ex Parte Young avoids the [Eleventh Amendment](#) defense where prospective injunctive relief, not involving damages or property transfer, is sought against named state officials for a violation of federal law. Usually, such injunctions are sought to require compliance with the Constitution; but the Ex Parte Young doctrine is equally applicable to compel state officials to comply with a valid federal statute that must be obeyed under the [Supremacy Clause of the Constitution](#).

187 F.3d 24, *24L^A1999 U.S. App. LEXIS 17392, **1

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN4 Antitrust & Trade Law, Sherman Act

It is clearly established that the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), does not itself apply to state action.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Constitutional Law > State Sovereign Immunity > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN5 Higher Education & Professional Associations, Colleges & Universities

A regulation or purchase of services made by the state is classic state action immunized from the Sherman Act, [15 U.S.C.S. § 1 et seq.](#)

Counsel: Kenneth P. McKay with whom Law Offices of K. Patrick McKay was on brief for appellant.

Jane L. Willoughby, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, was on brief for appellees.

Judges: Before Boudin, Circuit Judge, Campbell, Senior Circuit Judge, and Lipez, Circuit Judge.

Opinion by: BOUDIN

Opinion

[*25] BOUDIN, *Circuit Judge*. The present appeal arises out of a federal antitrust case dismissed by the district court on the ground that it was barred by the [Eleventh Amendment](#). We assume to be true, for purposes of this appeal, the facts as alleged in the complaint. [Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 3 \(1st Cir. 1998\)](#). However, the district court also considered, as do we, uncontroverted facts furnished by affidavit pertaining to the status of the defendants under the [Eleventh Amendment](#).

The plaintiff-appellant in this case is Neo Gen Screening, Inc., a private, for-profit Pennsylvania corporation whose business is the medical screening of newborn children. In Massachusetts, as elsewhere, [*2] newborns must be tested for specified diseases, some of which can be remedied if promptly detected. [Mass. Gen. Laws ch. 111, §§ 4E, 110A](#); see also *id.* §§ 3, 5, 6. According to the complaint, Neo Gen provides hospitals in various states with screening services to detect disorders in newborns but is being prevented by the defendants from doing so in Massachusetts.

The principal defendants named in the complaint as currently amended are the University of Massachusetts, a not-for-profit corporation linked to the state through governance and financing, its New England Newborn Screening

Program ("the Screening Program"), ¹ and two individuals--Howard Koh and Ralph Timperi--who are or were respectively the Commissioner of the Massachusetts Department of Public Health and an Assistant Commissioner responsible for laboratory testing. Several other defendants were named in the original complaint but later dismissed by consent.

[**3] The original complaint was filed on March 5, 1998, and contained eleven counts; but it was thereafter amended and reduced to two counts, the second of which was later voluntarily withdrawn. The remaining count (count I) is subcaptioned: "PLAINTIFF CORPORATION VS. DEFENDANTS NENSP AND UMASS VIOLATION OF THE SHERMAN ANTI-TRUST LAWS."; and it expressly charges the Screening Program and University of Massachusetts, in concert with the Massachusetts Department of Public Health, with monopolizing, attempting to monopolize and/or conspiring to monopolize "newborn [*26] screening services" in Massachusetts and surrounding states.

Although there are some collateral allegations, the main thrust of count I is an attack on the University of Massachusetts for seeking and obtaining a monopoly in the provision of the newborn screening services in Massachusetts. The only relief sought by the complaint is injunctive relief, apart from attorneys' fees, and the injunctive relief sought includes a request to bar the Commissioner and Assistant Commissioner from issuing permanent regulations that maintain the screening program's monopoly over the provision of the testing services in question. The complaint [**4] provides a history, which can be summarized briefly, as to how the supposed monopoly came about.

The Screening Program, a collection of personnel and a laboratory, had at one time been a unit of the Department of Public Health. At some point in the 1980s, the Screening Program was taken over by Tufts University and later, beginning in 1997, by the medical school of the University of Massachusetts. The Screening Program currently operates, under a contract between the University of Massachusetts and the Department of Public Health, to provide screening for specified disorders of newborn infants. A blood sample is taken by the hospital where the child is delivered and submitted to the Screening Program for testing, and a charge is paid by the hospital to the Screening Program.

In the fall of 1997, Neo Gen set about trying to persuade Massachusetts hospitals to let Neo Gen screen their newborns. It solicited hospitals in Massachusetts and purported to offer more modern, comprehensive screening at half the fee charged by the Screening Program. According to the complaint, the University of Massachusetts and its Screening Program responded by seeking adoption of regulations by the Department [**5] of Public Health that would give the Screening Program a monopoly in the provision of screening services in Massachusetts.

The complaint charges that the Screening Program "influenced" the Department of Public Health to issue emergency regulations that required testing for nine diseases and required that the blood samples be submitted to the Department itself. See 105 C.M.R. 270.000 "et seq.". Also appended to the complaint is a contract entered into between the Department of Public Health and the University of Massachusetts requiring the latter to provide newborn screening laboratory work, clinical follow-up and research services. The proposed regulations were adopted on an emergency basis in November 1997, accompanied by statements that the Department of Public Health would thereafter study the possibility of allowing other entities to perform the screening.

The defendants moved to dismiss the amended complaint as barred by the Eleventh Amendment, asserting as well that the complaint failed to state a claim under the federal antitrust laws and was barred by various antitrust doctrines. In a decision issued on December 3, 1998, the district court held that the [**6] only claim remaining in the case was count I, that this count was directed against the University of Massachusetts and the Screening Program, and that both entities were arms of the state and were entitled to dismissal under the Eleventh Amendment. This appeal followed.

¹ Although named as a defendant, the Screening Program is simply a program at the University of Massachusetts conducted through its medical school, which is also not a separate corporation. However, given our disposition, we need not pursue our doubt whether the screening program is a suable entity.

HN1[] Under the [Eleventh Amendment](#), a state or an arm of the state is normally immune from suits by citizens in federal court, [Edelman v. Jordan](#), 415 U.S. 651, 662-63, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); see Chemerinsky, [Federal Jurisdiction](#) § 7.4, at 403 (3d ed. 1999), unless the state waives its immunity, [Idaho v. Coeur d' Alene Tribe of Idaho](#), 521 U.S. 261, 267, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997), or Congress overrides that immunity as it may do in limited situations, [Seminole Tribe v. Florida](#), 517 U.S. 44, 57-68, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996). Neo Gen has not argued either that there [*27] was any waiver of [Eleventh Amendment](#) immunity by defendants or any abrogation of that immunity by Congress.

Whether and when state universities are arms of the state for [Eleventh Amendment](#) purposes have long vexed the federal courts. The multi-part tests [**7] that we have used are not easy to apply,² and, confusingly, overlap but do not quite duplicate tests that determine whether a university is an independent entity for purposes of diversity jurisdiction. Cf. [University of Rhode Island v. A.W. Chesterton Co.](#), 2 F.3d 1200, 1202-05 (1st Cir. 1993). A number of decisions have held that individual state universities are arms of the state for [Eleventh Amendment](#) purposes, but the inquiry tends to turn on facts peculiar to each university, and there are cases denying protection. See Chemerinsky, *supra*, § 7.4, at 407 & nn.33-34 (collecting cases).

In [**8] its decision under review, the district court explicitly found that the University in conducting the Screening Program was "acting as an agency or arm of the Commonwealth of Massachusetts." It rested this legal conclusion on a detailed discussion of the University's mission, its governance, its financial relationship to the state and similar matters. Its conclusion that the University is an arm of the Commonwealth accords with the view of another district court involving the University of Massachusetts. [Daniel v. American Board of Emergency Medicine](#), 988 F. Supp. 127, 178-81 (W.D.N.Y. 1997).

On this appeal, Neo Gen has effectively failed to dispute the district court's holding that the University and its Screening Program are covered by the [Eleventh Amendment](#). Since that ruling is at least colorable and certainly not plain error, cf. [Beatty v. Michael Business Machines Corp.](#), 172 F.3d 117, 121 (1st Cir. 1999), we treat the dismissal of the case against these two defendants as conceded. However, Neo Gen argues that Koh and Timperi were also intended defendants in count I and that despite the [Eleventh Amendment](#) these state officials are subject to injunctive [**9] relief under the doctrine of [Ex Parte Young](#), 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908).

[Ex Parte Young](#) is one of several major qualifications on [Eleventh Amendment](#) immunity. Chemerinsky, *supra*, §§ 7.5-7.7, at 411-46. Ignoring some refinements, **HN2**[] the doctrine removes the [Eleventh Amendment](#) bar where the private suit is directed not against the state or a state agency *eo nomine* but instead against state officials acting in violation of federal law and where (in addition) retrospective damages or property transfers are not sought for official acts. [Coeur d' Alene Tribe](#), 521 U.S. at 269, 277-80; [Strahan v. Coxe](#), 127 F.3d 155, 166-67 (1st Cir. 1997), cert. denied, 142 L. Ed. 2d 63, 119 S. Ct. 81 (1998); Chemerinsky, *supra*, § 7.5, at 411-30. This exception is Neo Gen's main argument on this appeal.

The Commonwealth replies that the claims in count I were asserted only against the University of Massachusetts and the Screening Program and that no relief was sought under that count against the two named state officers. That is certainly what the district court thought, and its view is supported by [**10] the subcaption of the count (quoted above), which referred to those institutional defendants and no others. By contrast, count II, which was voluntarily withdrawn, specifically mentions Koh and Timperi as defendants in the corresponding subcaption.

Neo Gen counters that state officials were named as defendants in the complaint, that the Department of Public Health itself is mentioned in count I, that complaints are liberally construed, and that at worst it is entitled to leave to [*28] amend. The latter claim fails since leave to amend was not requested in the district court, but the construction of count I in its present form is open to reasonable dispute. We think that the injunctive relief against

² E.g., [Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority](#), 991 F.2d 935, 939-40 (1st Cir. 1993) (7-factor test); [In re San Juan DuPont Plaza Hotel Fire Litigation](#), 888 F.2d 940, 942 (1st Cir. 1989); [Ainsworth Aristocrat Int'l Pty, Ltd. v. Tourism Co. of Puerto Rico](#), 818 F.2d 1034, 1038 & n.24 (1st Cir. 1987) (collecting cases).

the two state officials is so clearly barred for a substantive reason that we prefer to affirm on that ground rather than because of a possible pleading error.

HN3[¹] It is quite true that *Ex Parte Young* avoids the *Eleventh Amendment* defense where prospective injunctive relief, not involving damages or property transfer, is sought against named state officials for a violation of federal law. See *Coeur d' Alene Tribe*, 521 U.S. at 276-77. Usually, such injunctions are sought to [**11] require compliance with the Constitution; but the *Ex Parte Young* doctrine is equally applicable to compel state officials to comply with a valid federal statute that must be obeyed under the *Supremacy Clause of the Constitution*. *Id. at 273-77*. Thus, if the state officials were violating the Sherman Act, in principle the *Eleventh Amendment* would not bar injunctive relief against them.

The difficulty for Neo Gen is that **HN4**[¹] it is clearly established that the Sherman Act does not itself apply to state action. In *Parker v. Brown*, 317 U.S. 341, 350-51, 87 L. Ed. 315, 63 S. Ct. 307 (1943), the Supreme Court determined that Congress had not meant to require states to comply with the Sherman Act. Accordingly, a state is free to regulate, or act on its own behalf, in ways that are anti-competitive and would not be permitted to a private individual. *Id.* This doctrine is so well settled that its rationale and underpinnings are scarcely worth discussing. See I Areeda & Hovenkamp, *Antitrust Law*, PP 221-222 (1997).

No doubt the emergency regulations, coupled with the ten-year renewable contract already described, create an effective monopoly for [**12] the University of Massachusetts in conducting the screening of Massachusetts newborns. By regulation, the blood must be made available to the Department, and the Department has chosen to contract with the University to do the testing. Although a hospital could also choose to engage Neo Gen, no hospital is likely to pay twice for the same service. But **HN5**[¹] a regulation or purchase of services made by the state is classic state action immunized from the Sherman Act. Cf. *Hoover v. Ronwin*, 466 U.S. 558, 567-73, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073, 1076 (1st Cir. 1993).

Neo Gen mistakenly attempts to distinguish *Parker v. Brown* and the long line of cases that have followed it by arguing that the Massachusetts legislature did not "clearly articulate" a purpose to supplant competition with monopoly. The cases on which Neo Gen relies, such as *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991), and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978), [**13] do impose a requirement of this kind (the details are not important here) where the acts sought to be shielded under *Parker v. Brown* are those of municipalities or other local public entities. But no such requirement exists where the acts are those of the state itself. *Hoover*, 466 U.S. at 568.

Whether executive branch action is that of the state is a different issue. The Supreme Court has held that acts of the state legislature or state supreme court are protected under *Parker*, but it reserved decision as to whether state-level executive branch departments or agencies are entitled to similar treatment. *Hoover*, 466 U.S. at 568 n.17 (reserving question). However, both circuits that have squarely faced the issue have extended *Parker's* ordinary protection to actions [*29] of the state executive branch.³ We agree, with possible caveats that do not affect the outcome in this case.

[**14] Broadly speaking, the *Parker* doctrine represents a judgment by the Supreme Court that, in regulating anti-competitive business conduct, Congress was not seeking to regulate the states themselves; and "the states" include their executive branches quite as much as their legislatures and their courts. The municipalities have been

³ *Charley's Taxi Radio Dispatch Corp. v. Sida of Hawaii, Inc.*, 810 F.2d 869, 875-76 (9th Cir. 1987) (state department of transportation); *Deak-Perera Hawaii, Inc. v. Department of Transportation*, 745 F.2d 1281, 1282-83 (9th Cir. 1984) (same), cert. denied, 470 U.S. 1053, 84 L. Ed. 2d 820, 105 S. Ct. 1756 (1985); *Saenz v. University Interscholastic League*, 487 F.2d 1026, 1027-28 (5th Cir. 1973) (division of University of Texas); compare *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1044-46 (2d Cir. 1986); see generally I Areeda & Hovenkamp, *supra*, P 224b2, at 411-415; *id.* P 212.2d (1992 Supp.).

given less protection under *Parker* on the stated ground that technically speaking, they are not "the state," *Lafayette, 435 U.S. at 412-13*, while the status of state boards or commissions is open to dispute, see Areeda, *supra*, P 224; *id.* P 212.2d at 141 & n.48 (1992 Supp.). And there is still less of an analogy to private carriers or utilities, operating under some measure of state supervision, whose protection under *Parker* is even more restricted. *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57-62, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*.

The question remains whether and to what extent a plaintiff should be able to pierce the *Parker* defense on the ground that the state official or agency was acting in excess of his (or its) authority under state law. On the one hand, [**15] the Supreme Court has made clear that the *Eleventh Amendment* is not to be avoided under *Ex Parte Young* merely in order to enforce state law. *Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984)*. On the other hand, extreme cases can be imagined: suppose a state executive official entered into an exclusive-dealing contract for the state that would violate the principles of *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*, if done by a private party, and suppose further that the state legislature had expressly banned such a contract.

We need not resolve such conundrums here. Neo Gen argues that the Massachusetts legislature did not expressly approve or authorize the kind of regulation or contract involved in this case; but we have rejected a "clear articulation" test as applied to the state's executive branch, at least where a full-fledged department is concerned. Given the Commonwealth statutes that authorize testing, there is nothing extraordinary or unforeseeable about the Department of Public Health's regulation requiring testing or its decision [**16] to do the testing itself or through a chosen instrument. Even if a patent lack of authority could ever be an exception to *Parker*, it is certainly not so in a case of this kind.

There are a scattering of other allegations in count I in addition to the charge that the University of Massachusetts sought and acquired a monopoly over newborn screening. These include claims that the "defendants" fixed the price of services at \$ 42 per infant (whereas Neo Gen offered testing at \$ 25), and that the defendants "influenced" the adoption of the regulations.⁴ These undeveloped allegations are not pursued in Neo Gen's brief and deserve no further comment. *King v. [*30] Town of Hanover, 116 F.3d 965, 970 (1st Cir. 1997)*.

[**17] It may be, as Neo Gen charges, that the defendants' actions reflect a cozy arrangement that gives newborns inferior screening at higher cost and that everyone--except possibly the Screening Program--would be better off if hospitals could contract competitively for screening services, just as they procure drugs, bandages, and other resources. The state, in turn, says that its contract provides for extra research and follow-up that Neo Gen fails to provide; such cross-subsidy arguments are traditional defenses for monopoly but not invariably without merit. At bottom, this is a policy matter to be resolved by the Commonwealth.

Affirmed.

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⁴ But cf. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* (coordination within a firm is not "price fixing" prohibited by the antitrust laws), and *Eastern R.R. Pres. Conf. v. Noerr Motor Freight, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* (petitions to the government, if not mere "shams," do not give rise to antitrust liability).



Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.

United States Court of Appeals for the Ninth Circuit

May 3, 1999, Argued and Submitted, Portland, Oregon ; July 14, 1999, Filed

No. 98-36024

Reporter

185 F.3d 957 *; 1999 U.S. App. LEXIS 15711 **; 1999-2 Trade Cas. (CCH) P72,575; 23 Employee Benefits Cas. (BNA) 1906; 99 Cal. Daily Op. Service 5609; 99 Daily Journal DAR 7181

OREGON LABORERS-EMPLOYERS HEALTH & WELFARE TRUST FUND; SCHOOL DISTRICT # 1, HEALTH & WELFARE TRUST FUND; PLUMBERS, STEAMFITTERS, & SHIPFITTERS RETIREE HEALTH & WELFARE PLAN, UNITED ASSOCIATION UNION LOCAL 290; LOCAL 11 OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, HEALTH & WELFARE PLAN; LOCAL 125 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 125, EBA-PGE-IBEW LOCAL 125 HEALTH & WELFARE TRUST, Plaintiffs-Appellants, v. PHILIP MORRIS INCORPORATED; RJ REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; BRITISH AMERICAN TOBACCO COMPANY LTD; BAT INDUSTRIES PLC; LORILLARD TOBACCO COMPANY; LIGGETT GROUP INCORPORATED; AMERICAN TOBACCO COMPANY; UNITED STATES TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH USA INCORPORATED; TOBACCO INSTITUTE INCORPORATED; SMOKELESS TOBACCO COUNCIL INCORPORATED; HILL & KNOWLTON INCORPORATED, Defendants-Appellees.

Subsequent History: Certiorari Denied January 10, 2000, Reported at: [2000 U.S. LEXIS 126](#).

Prior History: [\[**1\]](#) Appeal from the United States District Court for the District of Oregon. D.C. No. CV-97-01051-MA. Malcolm F. Marsh, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

damages, smokers, plaintiffs', antitrust, smoking, defendants', consumer, anti trust law, injuries, Funds, antitrust claim, proximate cause, cigarettes, ascertain, products, remote, safer, alleged wrongful conduct, personal injury, costs, present case, smoking-related, competitors, expenses, unjust enrichment, civil conspiracy, equitable relief, tobacco product, district court, health risk

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 de novo a district court's grant of judgment on the pleadings for failure to state a claim.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

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

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN2 Trials, Judgment as Matter of Law

A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Securities Law > RICO Actions > Remedies

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Securities Law > RICO Actions > Standing

HN3 Racketeer Influenced & Corrupt Organizations, Claims

[18 U.S.C.S. § 1964\(c\)](#) and [15 U.S.C.S. § 15\(a\)](#) provide a private right of action for damages only to those individuals injured in their business or property by reason of a violation of the law's substantive provisions. Both statutes also require that the alleged violation of the law be a "proximate cause" of the injury suffered. "Proximate cause" is used 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. Accordingly, among the many shapes this concept took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged.

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4 Private Actions, Remedies

A direct relationship between the injury and the alleged wrongdoing, although not the "sole requirement" of Racketeer Influenced and Corrupt Organizations (RICO) and antitrust proximate causation, is one of its central

elements. Thus, a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts is generally said to stand at too remote a distance to recover. To determine whether an injury is "too remote" to allow recovery under RICO and the antitrust laws, the court applies the following three-factor "remoteness" test: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

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

HN5 **Private Actions, Remedies**

To recover equitable relief under antitrust laws, a plaintiff has to show antitrust injury, either real or threatened. This requirement ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place. An "antitrust injury" is an injury of the type that the antitrust statute was intended to forestall. The antitrust laws were enacted for the protection of competition, not competitors. The requirement that the alleged injury 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. In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN6 **Racketeer Influenced & Corrupt Organizations, Remedies**

Injunctive relief is not available to a private party in a civil Racketeering Influenced and Corrupt Organizations action.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Torts > Business Torts > Unfair Business Practices > General Overview

HN7 **Trade Practices & Unfair Competition, State Regulation**

Under [Or. Rev. Stat. § 646.638\(1\)](#), the Unfair Trade Practices Act (UTPA) grants standing to any person who suffers any ascertainable loss of money resulting from a violation of the law. Damages predicated upon "personal injury" are not recoverable under the UTPA.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN8 **Business Torts, Fraud & Misrepresentation**

A plaintiff may not recover for economic loss resulting from negligent infliction of bodily harm to a third person. This rule extends to loss resulting from fraudulent misrepresentation.

Torts > Business Torts > General Overview

Torts > Procedural Matters > General Overview

Torts, Business Torts

To state a cause of action for unjust enrichment, a plaintiff must show that he conferred a "benefit" on the defendant and that it would be unjust for the defendant to retain that benefit.

Counsel: Steve D. Larson and Scott A. Shorr, Stoll Stoll Berne Lokting & Shlachter, Portland, Oregon, and Michael Spencer, Millberg, Weiss, Bershad, Hynes & Lerach, New York, New York, for the plaintiffs-appellants.

Herbert M. Wachtell, Wachtell, Lipton, Rosen & Katz, New York, New York, for the defendants-appellees.

Michael D. Reynolds, Assistant Attorney General, Salem, Oregon, for amicus curiae State of Oregon.

Carl R. Schenker, Jr., O'Melveny & Myers, Washington, D.C., for amicus curiae Product Liability Advisory Council.

Jan S. Amundson, National Association of Manufacturers, Washington, D.C., for amicus curiae National Association of Manufacturers.

Judges: Before: William C. Canby, Jr., Thomas G. Nelson, Circuit Judges, and Jeremy Fogel, District Judge.¹ Opinion by Judge T.G. Nelson.

Opinion by: THOMAS G. NELSON

Opinion

[*961] OPINION

T.G. NELSON, Circuit Judge:

The plaintiffs **[**2]** in this action are six Oregon-based employee health and welfare benefit trust plans created to provide comprehensive health care benefits to their participants, who are thousands of union and public-sector workers employed under various collective bargaining agreements. Plaintiffs filed suit against defendants - eight tobacco companies, three non-profit public relations/lobbying/research councils and one public relations firm - under federal RICO, Oregon RICO, federal and state antitrust laws, and other Oregon state laws. Plaintiffs seek to recover the costs they have incurred treating their participants' and beneficiaries' smoking-related illnesses. The district court granted judgment on the pleadings in favor of defendants, concluding that plaintiffs had failed to state a claim upon which relief could be granted. We have jurisdiction under [28 U.S.C. § 1291](#). We affirm.

I.

Plaintiffs are five health and welfare trust funds that provide health care benefits to their participants and beneficiaries. These funds are formed and operated as legal trusts with each trust's mission being to pay for health care benefits for participating workers, retirees and their **[**3]** families.

¹ Honorable Jeremy Fogel, United States District Court Judge for the Northern District of California, sitting by designation.

In their complaint, plaintiffs allege the following: In the early 1950's, scientific studies linking smoking to health risks surfaced. Defendants concluded that an awareness of the health risks associated with smoking could result in regulation of the tobacco industry and threaten the industry's profitability. To prevent this from happening, defendants began a public relations campaign to persuade the public that the industry would research the health risks from tobacco and make a candid disclosure of the results. Defendants, however, entered into a conspiracy to do just the opposite.

Plaintiffs' complaint cites many examples of this alleged public relations campaign that was being waged at the same time that defendants were allegedly engaged in a covert scheme to defraud the public (including plaintiffs) as to the health risks of smoking. Defendants allegedly sought to conceal the scientific evidence about smoking risks and to maintain the powerful "lie" that the link between smoking and disease was an "open controversy." Defendants' alleged misconduct covered not only the general smoking-disease link, but also the degree of the health risk, the addictiveness of smoking, **[**4]** the feasibility of safer cigarettes, the actual safety of low-tar and filtered cigarettes, and the suppression of comparative safety information about different product designs. Defendants also allegedly sought to impair the development and implementation of smoking cessation programs, and fought efforts to ban smoking in the workplace.

Plaintiffs also allege that defendants conspired to restrain intercompany competition in making and marketing safer cigarettes or alternative products. Defendants allegedly stopped advertising differences in product safety, fixed the quality level of products allowed in the market, suppressed product information, and policed their agreement not to let any manufacturer introduce and market tobacco products that were safer or less hazardous. Plaintiffs allege that this conduct presents a classic case of horizontal conspiracy to fix product quality and that, as a result, cigarettes **[*962]** are perhaps the only product that has not gotten any safer in the last forty-five years. Finally, plaintiffs allege that defendants targeted teen smokers to replace the adult smokers that died.

As to damages, plaintiffs allege that defendants' wrongdoing injured them in two **[**5]** causal chains. First, defendants' alleged manipulation of information and suppression of products prevented plaintiffs from obtaining accurate information and safer products in operating their health funds, which in turn prevented plaintiffs from taking action to reduce smoking rates among their participants. This reduction in smoking rates would have led to a reduction in smoking-related disease among the funds' participants which would have in turn led to lowering plaintiffs' expenditures. Second, plaintiffs allege that defendants' wrongful fraud and concealment of information, suppression of safer products, targeting of children and manipulation of nicotine resulted in more smoking, less quitting, and smoking of more hazardous cigarettes among the funds' participants, which in turn resulted in higher incidence of disease and higher expenditures for medical bills by plaintiffs.

Plaintiffs allege that, but for defendants' conduct, plaintiffs would have undertaken stronger anti-smoking measures. Plaintiffs further allege that they have borne the brunt of smoking-related health care costs and that plaintiffs simply seek to replenish trust assets by recovering from defendants the injuries **[**6]** that plaintiffs have suffered as a result of defendants' misconduct.

Plaintiffs have asserted the following claims for relief: federal RICO, Oregon RICO, federal and state antitrust, Oregon's Unfair Trade Practices Act ("UTPA"), fraudulent misrepresentation and concealment, unjust enrichment, negligent breach of a special assumed duty and civil conspiracy. Plaintiffs seek damages as well as equitable and injunctive relief.

Defendants moved the district court for judgment on the pleadings on each of plaintiffs' claims or, alternatively, for dismissal for failure to join necessary parties. The district court granted defendants' motion, finding plaintiffs failed to state a claim on which relief could be granted. See [Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 17 F. Supp. 2d 1170 \(D. Or. 1998\).](#)

The district court held (1) that plaintiffs did not meet the standing or proximate cause requirements necessary to maintain either a federal or state antitrust claim; (2) that plaintiffs' injuries were entirely dependent upon injuries sustained by their participants and were thus too far removed from the challenged harmful conduct to support **[**7]**

either a federal or state RICO claim;² (3) that plaintiffs did not meet the standing requirement of Oregon UTPA because they were not "consumers of defendants' products"; (4) that plaintiffs did not meet the proximate cause requirements to maintain a claim for fraud; (5) that the theories of unjust enrichment and indemnity were inapplicable; (6) that plaintiffs failed to allege the elements necessary to maintain a claim for breach of an assumed duty;³ and (7) that plaintiffs' claim for civil conspiracy was entirely dependent on the underlying claims for fraud and UTPA violations and must therefore also fail.

[[**8] II.

HN1[We review *de novo* a district court's grant of judgment on the pleadings for failure to state a claim. *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir. [*963] 1998). **HN2**["A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Id.*

III.

A. RICO and Antitrust Claims for Damages

The requirements for standing to maintain a civil action under RICO and the antitrust laws are similar.⁴ See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992). **HN3**[Both provide a private right of action for damages only to those individuals "injured in [their] business or property by reason of" a violation of the law's substantive provisions. *18 U.S.C. § 1964(c)* (RICO); *15 U.S.C. § 15(a)* (antitrust). Both also require that the alleged violation of the law be a "proximate cause" of the injury suffered. See *Holmes*, 503 U.S. at 268 (RICO); *Blue Shield v. McCready*, 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) [[**9] (antitrust)]. As the Court explained in *Holmes*:

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. Accordingly, among the many shapes this concept took at common law was a demand for some *direct relation* between the injury asserted and the injurious conduct alleged.

503 U.S. at 268 (citations and quotations omitted) (emphasis added).

[[**10] **HN4**[

A direct relationship between the injury and the alleged wrongdoing, although not the "sole requirement" of RICO and antitrust proximate causation, "has been one of its central elements." *503 U.S. at 269* (citing *Associated Gen. Contractors v. California State Council of Carpenters* ("AGC"), 459 U.S. 519, 540, 74 L. Ed. 2d 723, 103 S. Ct. 897

²The district court held that plaintiffs also lacked standing under Oregon RICO because they failed to allege that defendants have been convicted of mail or wire fraud as required under Oregon RICO. 17 F. Supp. 2d at 1179 (citing *Or. Rev. Stat. § 166.725(7)(a)(A)*). Plaintiffs have not appealed the district court's dismissal of their Oregon RICO claim. This claim is therefore waived.

³ Plaintiffs have not appealed the dismissal of their claim for breach of an assumed duty. This claim is therefore waived.

⁴ Plaintiffs assert claims under both federal and state antitrust laws. The Oregon antitrust statutes are almost identical to the federal antitrust statutes. Compare *15 U.S.C. §§ 1, 2* with *Or. Rev. Stat. §§ 646.725, 646.730*. In fact, Oregon courts look to federal antitrust decisions for "persuasive" guidance in interpreting the state antitrust laws. See *Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp.*, 130 Ore. App. 487, 882 P.2d 637, 640 (Or. Ct. App. 1994) (citing *Or. Rev. Stat. § 646.715(2)*). The district court and the parties have treated the state and federal antitrust claims as one and the same for purposes of standing analysis. We do the same.

(1983)). "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."

To determine whether an injury is "too remote" to allow recovery under RICO and the antitrust laws, the Court applies the following three-factor "remoteness" test: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. See id. at 269-70 (RICO); AGC, 459 U.S. at 545 [**11] (antitrust).

Plaintiffs in the present case assert that they have suffered both "direct" injury and "indirect" injury. They claim a "direct" injury based on what they call a "one-link" causation chain. As defendants point out, however, *all* of plaintiffs' claims rely on alleged injury to smokers - without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers. Thus, there is no "direct" link between the alleged misconduct of defendants and the alleged damage to plaintiffs. See *Laborers Local 17 Health & Benefit* [*964] Fund v. Philip Morris, Inc., 172 F.3d 223, 233 (2d Cir. 1999) (holding that because trust funds' damages "are entirely derivative of the harm suffered by plan participants as a result of using tobacco products," the damages were "indirect" and did not "proximately cause the injuries alleged" by the trusts); see also Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 928 (3d Cir. 1999) (holding that it did not matter whether plaintiffs' injuries were "direct" or "indirect" because "the plaintiffs' direct claim comes no closer than [**12] their indirect claim to meeting the proximate cause requirement for antitrust standing").

Two circuit courts have addressed the issue of a health trust fund's standing to bring antitrust and RICO actions. Both the Second and the Third Circuits have held that a trust fund's claims are "too remote" to allow recovery and that the actions are therefore barred. See *Laborers Local 17*, 172 F.3d 223 (addressing only RICO); Steamfitters, 171 F.3d 912 (addressing RICO and antitrust).

Because we determine that the "remoteness" test weighs in favor of barring plaintiffs' action, we agree with the Second and the Third Circuits and hold that plaintiffs' RICO and antitrust claims are "too remote" from defendants' alleged wrongdoing to allow recovery. These claims are therefore barred.

1. Existence of More Direct Victims of Alleged Wrongful Conduct

Plaintiffs argue that their "standing is confirmed" because only they, and not smokers, "can allege injury to business or property for the RICO and antitrust claims at issue here."

Plaintiffs are correct that individuals that suffer personal injury cannot claim medical expenses as "injury to business or property," [*13] and that the smokers are therefore barred from asserting RICO or antitrust claims. See Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990) (holding that personal injury is not "injury to business or property" and is therefore not compensable under RICO). This inability does not, however, necessarily lead to the conclusion that plaintiffs must therefore have standing.

First, "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." AGC, 459 U.S. at 534. Some injuries caused by an antitrust violation may thus be left unremedied for lack of a proper plaintiff. As we recognized in Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 580 n.7 (9th Cir. 1986): "The fact that injury has occurred and that other claims have failed does not permit this court to expand the coverage of [antitrust law]."

Second, there is an identifiable group of persons - smokers - whose self-interest will motivate them to seek recovery of the damages caused by defendants' alleged wrongful conduct. Although the smokers cannot "vindicate" [*14] the public interest in antitrust [or RICO] enforcement," see AGC, 459 U.S. at 542, they can "remedy the harm done by defendants' alleged misconduct. Moreover, these actions [by the smokers] will promote 'the general interest in deterring injurious conduct,' which *Holmes* noted as the objective of this policy factor." *Laborers Local 17*, 172 F.3d at 235 (quoting Holmes, 503 U.S. 258 at 269).

The existence of the smokers, who are more direct victims of the alleged wrongful conduct and who can be counted on to vindicate the injury caused by defendants' alleged wrongful conduct, weighs heavily in favor of barring plaintiffs' actions.

2. Difficulty in Ascertaining Damages Attributable to Defendants' Alleged Wrongful Conduct

Although the actual damages attributable to medical payments made by plaintiffs due to smoking-related injuries would be as easy to ascertain in the present case as in a direct action by the smokers, the other damages that plaintiffs allege would [*965] be very difficult to ascertain. As the Third Circuit stated:

The Funds' alleged damages are said to arise from the fact that the tobacco companies prevented [**15] the Funds from providing smoking-cessation or safer smoking information to their participants, some of whom would have allegedly quit smoking or begun smoking safer products, reducing their smoking-related illnesses, and thereby lowering the Funds' costs for reimbursing smokers' health care expenditures. In order to calculate the damages - i.e., the costs not lowered due to the antitrust conspiracy - the Funds must demonstrate how many smokers would have stopped smoking if provided with smoking-cessation information, how many would have begun smoking less dangerous products, how much healthier these smokers would have been if they had taken these actions, and the savings the Funds would have realized by paying out fewer claims for smoking-related illnesses.

It is apparent why the Funds argue that they can demonstrate all of this through aggregation and statistical modeling: it would be impossible for them to do so otherwise. Yet we do not believe that aggregation and statistical modeling are sufficient to get the Funds over the hurdle of the AGC factor focusing on whether the "damages claim is . . . highly speculative."

Steamfitters, 171 F.3d at 929. [**16]

The Second Circuit similarly found the damages claim of the trust funds to be highly speculative:

It will be virtually impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have had on the number of smokers among the plan beneficiaries; (2) the countereffect that the tobacco companies' direct fraud would have had on the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs. On a fundamental level, these difficulties of proving damages stem from the agency of the individual smokers in deciding whether, and how frequently, to smoke. In this light, the direct injury test can be seen as wisely limiting standing to sue to those situations where the chain of causation leading to damages is not complicated by the intervening agency of third parties (here, the smokers) from whom the plaintiffs' injuries derive.

These concerns become particularly pointed in a case, like the present one, where the injuries are alleged to derive not simply from defendants' [**17] affirmative misconduct but also from plaintiffs' fraudulently induced inaction. That is, it is often easier to ascertain the damages that flow from actual, affirmative conduct, than to speculate what damages arose from a party's failure to act. In the latter situation, as in the case at hand, it becomes difficult to distinguish among the multitude of factors that might have affected the damages. Here, for example, plaintiffs' alleged damages might have derived from inefficiencies in the Funds' own management, as well as from non-smoking related health problems suffered by the smokers, and it would be the sheerest sort of speculation to determine how these damages might have been lessened had the Funds adopted the measures defendants allegedly induced them not to adopt.

Laborers Local 17, 172 F.3d at 233-34.

The difficulty of ascertaining the damages attributable to defendants' alleged wrongful conduct and the complexity involved in calculating these damages weigh heavily, if not dispositively, in favor of barring plaintiffs' actions.

3. Potential for Duplicative Recovery or Complex Apportionment of Damages

This third and final factor also weighs in favor [**18] of barring plaintiffs' actions. It is [*966] quite likely that if there are not cases by smokers already pending in Oregon, there will likely be many filed as has been seen in other states. Although the smokers cannot recover under either RICO or the antitrust laws, they can seek recovery under other state law theories for personal injury and the associated medical costs - the same damages that plaintiffs seek to recover. Moreover, although there may be some protection from multiple recovery in state law, this safeguard would not cure the ultimate problem - that the courts would be forced "to adopt complicated rules apportioning damages among plaintiffs at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." See [Holmes, 503 U.S. at 269](#) (citing [AGC, 459 U.S. 519 at 543-44](#)); [Laborers Local 17, 172 F.3d at 230](#).

All three factors of the "remoteness" test weigh in favor of barring plaintiffs' claims. We therefore hold that plaintiffs lack standing to bring either a RICO or an antitrust claim for damages.⁵

[**19] B. *RICO and Antitrust Claims for Equitable Relief*

In addition to damages, plaintiffs seek equitable relief under RICO and the antitrust laws.

1. *Antitrust*

Standing analysis for equitable relief under the antitrust laws is not the same as standing analysis for damages. See [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110-11, 93 L. Ed. 2d 427, 107 S. Ct. 484](#) & nn. 5-6 (1986). As the Court explained in *Cargill*:

The fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one. Thus, because standing [for damages] raises no threat of multiple lawsuits or duplicative recoveries, some of the factors *other than antitrust injury* that are appropriate to a determination of standing [for damages] are not relevant [to a determination of standing for equitable relief].

Id. at 111 n.6 (citation and quotation omitted) (emphasis added).

Thus, plaintiffs may not have to meet all three factors in the "remoteness" test to maintain an action for antitrust injunctive relief. [HN5](#) Plaintiffs do, however, still have to show antitrust injury - either real or [**20] threatened. See *id. at 111-13*. This requirement "ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." [ARCO v. USA Petroleum Co., 495 U.S. 328, 342, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#).

An "antitrust injury" is an injury of "the type that the antitrust statute was intended to forestall." [AGC, 459 U.S. at 540](#). "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 \(1977\)](#) (quotation omitted). "The requirement that the alleged injury 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 Hosps., Inc., 772 F.2d 1467, 1470 \(9th Cir. 1985\)](#). "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." [Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 540 \(9th Cir. 1987\)](#). [**21]

In their complaint, plaintiffs define the antitrust market at issue as the market for cigarettes and tobacco products. [*967] Plaintiffs are neither consumers nor competitors in that market. They are not, therefore, "participants in the same market" as defendants, and they have thus not suffered "antitrust injury." See [Bhan, 772 F.2d at 1470](#); see also [Steamfitters, 171 F.3d at 926](#).

⁵ Plaintiffs' argument that their standing to bring RICO and antitrust actions is "confirmed" by state and common law rules governing proximate cause, as well as trust law, ignores the test set out by the Supreme Court for analyzing standing in RICO and antitrust cases. This argument also ignores the fact that there is an alternative route for the trusts to recover the damages alleged in the present action - via subrogation in a non-RICO, non-antitrust action. See [Laborers Local 17, 172 F.3d at 235](#).

Plaintiffs' reliance on *McCready* to argue that "there is no 'consumer' or market participant requirement," is misplaced. The plaintiff in *McCready* filed an antitrust action against Blue Shield, claiming that Blue Shield's "practice of refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists, was in furtherance of an unlawful conspiracy to restrain competition in the psychotherapy market." [457 U.S. at 467](#). The Court held that the plaintiff, as a subscriber who had employed the services of a psychologist and thus a *consumer* of psychotherapy services, had standing to maintain the antitrust action. See [457 U.S. at 480-81, 484-85](#). The Court did [\[**22\]](#) not hold that there is no "consumer" or "market participant" requirement.

The present case is distinguishable from *McCready* in several aspects. First, the plaintiff in *McCready* was a *consumer* in the relevant market of "psychotherapeutic services." See [457 U.S. at 483](#). In contrast, it is undisputed that plaintiffs in the present case are neither "consumers" nor "competitors" in the relevant market of cigarettes and tobacco products.

Second, the Court has explained that the broad language it used in *McCready*⁶ was simply a paraphrase of the antitrust laws and "added nothing to the even broader language that the statute itself contains." See [AGC, 459 U.S. at 529](#) & n.19. In so explaining, the Court noted that the actual plaintiff in *McCready* was *directly* harmed by the defendants' unlawful conduct. See *id.*

[\[**23\]](#) In contrast, plaintiffs' own argument in the present case reveals that they were *not directly* harmed by defendants' allegedly unlawful conduct, but rather that any harm they suffered is *derivative* of the harm suffered by smokers.⁷ As the Third Circuit stated:

It is true that, drawing on the language from *McCready*, we have sometimes expressed the injury requirement in terms of the harm being "inextricably intertwined" with the defendant's wrongdoing. The simple invocation of this phrase, however, will not allow a plaintiff to avoid the fundamental requirement for antitrust standing that he or she have suffered an injury of the type - almost exclusively suffered by consumers or competitors - that the antitrust laws were intended to prevent.

[Steamfitters, 171 F.3d at 926 n.8](#) (citations omitted).

[\[**24\]](#) Plaintiffs have failed to allege an injury of the type that the antitrust laws were intended to prevent. Plaintiffs are neither consumers nor competitors in the relevant market of cigarettes and tobacco products. To the extent they have suffered injury, their claims are entirely derivative of the injuries suffered by smokers. Their injuries are not of a nature to establish standing for equitable relief under the antitrust laws.

2. RICO

[HN6](#)  [↑] "Injunctive relief is not available to a private party in a civil RICO action." [\[*968\]](#) [Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1084 \(9th Cir. 1986\)](#).

C. State Law Claims

1. Unfair Trade Practices Act

[HN7](#)  [↑] The UTPA grants standing to "any person who suffers any ascertainable loss of money" resulting from a violation of the law. [Or. Rev. Stat. § 646.638\(1\)](#). Damages predicated upon "personal injury" are not recoverable under the UTPA. See [Gross-Haentjens v. Leckenby, 38 Ore. App. 313, 589 P.2d 1209, 1211 \(Or. Ct. App. 1979\)](#)

⁶ In *McCready*, the Court stated: "As we have recognized, 'the statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.'" [457 U.S. at 472](#).

⁷ Plaintiffs argue that their injuries are "inextricably intertwined with that of market participants (smokers deprived of a choice of a safer product) in that the Trust paid the bills resulting from the restraint."

(holding the UTPA does not cover personal injuries). Plaintiffs' damages - expenses to treat smokers' personal injuries - are clearly predicated upon "personal injury" and are therefore **[**25]** unrecoverable under the UTPA.

Moreover, "the UTPA is to be construed consistently with its consumer protective purposes." *Cullen v. Investment Strategies, Inc.*, 139 Ore. App. 119, 911 P.2d 936, 941 (Or. Ct. App. 1996); see also *Raudabaugh v. Action Pest Control*, 59 Ore. App. 166, 650 P.2d 1006, 1008-09 (Or. Ct. App. 1982) (noting that the purpose of UTPA is to "provide a viable remedy for consumers" and if "there is an ascertainable loss to a consumer, that consumer has a cause of action" under UTPA). This emphasis on direct protection of consumers suggests that the UTPA, like the other statutes that we have discussed, is not intended to provide a cause of action to a non-consumer that is wholly derivative of injury to consumers.

2. Fraud

The Oregon Supreme Court recognizes the prevailing rule "that **HN8**[↑] a plaintiff may not recover for economic loss resulting from negligent infliction of bodily harm to a third person," *Ore-Ida Foods, Inc. v. Indian Head Cattle Co.*, 290 Ore. 909, 627 P.2d 469, 473 (Or. 1981), and has extended this rule to loss resulting from fraudulent misrepresentation. See *Oksenholt v. Lederle Lab.*, 294 Ore. 213, 656 P.2d 293, 299 (Or. 1982) **[**26]** (holding that claim for indemnity is a claim for recovery for economic loss that results from physical harm to a third person and is barred in both a negligence and fraudulent misrepresentation action under *Ore-Ida*).

In the present case, plaintiffs seek only to recover medical costs paid on behalf of their beneficiaries. This is a classic claim for indemnity, with plaintiffs attempting to recover for the economic loss they have suffered as a result of the physical harm suffered by third parties - the smokers. Under *Ore-Ida* and *Oksenholt*, this claim for damages is barred.

Moreover, for the same reasons that proximate cause did not exist for plaintiffs' RICO and antitrust claims, proximate cause is lacking for their fraud claim. See *Oksenholt*, 656 P.2d at 299 ("Damages properly recoverable in an action for intentional misrepresentation are those which are a direct and necessary result of defendant's acts or omissions.").

3. Unjust Enrichment

Under Oregon law, **HN9**[↑] to state a cause of action for unjust enrichment, plaintiffs must show that they conferred a "benefit" on defendants and that it would be unjust for defendants to retain that benefit. **[**27]** See *L.S. Henriksen Constr., Inc. v. Shea*, 155 Ore. App. 156, 961 P.2d 295, 296-97 (Or. Ct. App. 1998).

Plaintiffs allege that they conferred a "benefit" on defendants by paying the medical bills of the smokers. Plaintiffs do not, however, allege that defendants had any legal obligation to pay the medical expenses of the smokers. Without a legal obligation on the part of defendants to pay, the payment by plaintiffs did not "benefit" defendants.

Moreover, because plaintiffs had an independent obligation to pay the smokers' medical expenses, they cannot maintain an action for unjust enrichment against defendants just because defendants were incidentally benefitted. See *Restatement of Restitution* § 106 (1936) ("A person who, **[*969]** incidentally to the performance of his own duty . . . has conferred a benefit upon another, is not thereby entitled to contribution.").

4. Civil Conspiracy

Plaintiffs' claim for civil conspiracy is entirely dependent on their underlying claims for fraud and violations of UTPA. Because these underlying claims fail, plaintiffs' civil conspiracy claim must also fail.

IV.

As the district court stated:

However compelling [plaintiffs'] **[**28]** charges may be, there are very sound judicial policy reasons for limiting legal actions to those parties most directly injured by the harmful conduct. These policies are not new and have lengthy historical roots in our jurisprudence. To allow plaintiffs to maintain actions that are entirely dependent

upon the harm suffered by others threatens chaos for the judicial system, especially where others may (and have) filed their own actions and are capable of recovering a full range of damages, including the medical costs sought here.

17 F. Supp. 2d at 1183.

The district court's grant of judgment on the pleadings in favor of defendants is AFFIRMED.

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Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co.

Supreme Court of Hawai'i

July 15, 1999, Decided ; July 15, 1999, Filed

NO. 19044

Reporter

91 Haw. 224 *; 982 P.2d 853 **; 1999 Haw. LEXIS 261 ***; 1999-2 Trade Cas. (CCH) P72,582

ROBERT'S HAWAII SCHOOL BUS, INC.; and STUDENT TRANSPORTATION, INC., Plaintiffs-Appellants, v. LAUPAHOEHOE TRANSPORTATION COMPANY, INC.; CENTRAL TRANSPORTATION COMPANY, INC.; DOUBLE K TRANSPORTATION SERVICES, INC.; T & N TRANSPORTATION SERVICES, INC.; and NOBU SHINOHARA, as Personal Representative of the Estate of CHIAKI MATSUO, Defendants-Appellees, and JOHN DOES 1-25 and DOE BUSINESS ENTITIES 26-50, Defendants

Prior History: [***1] APPEAL FROM THE FIRST CIRCUIT COURT. CIV. NO. 93-1428-04.

Disposition: Affirmed the trial court's judgment, findings, and conclusions.

Core Terms

Double, bid, routes, Island, bidder, school bus, practices, lease, buses, unfair, trial court, Antitrust, alter ego, monopolize, tortious interference, appellants', prospective business advantage, Transportation, courts, insufficient evidence, corporate veil, baseyard, charter, stock, attempt to monopolize, anti trust law, Specification, conspiracy, ownership, shell

LexisNexis® Headnotes

Administrative Law > Agency Rulemaking > State Proceedings

HN1[Agency Rulemaking, State Proceedings

Under [Haw. Rev. Stat. § 103-11](#) (1993), Department of Accounting and General Services rules shall have the force of law.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Fraud & Misrepresentation

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > 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 Alter Ego, Fraud & Misrepresentation

Generally speaking, the question whether a corporation is a mere agency, instrumentality, or alter ego of another corporation or individual is one of fact. However, when all material facts are undisputed, application of the alter ego doctrine is a question of law. Thus, summary judgment may be granted in a case where no genuine issue of fact is raised or shown. However, it is recognized that the determination of whether there are sufficient grounds for piercing the corporate veil ordinarily should not be disposed of by summary judgment, in view of the complex economic questions often involved, especially if fraud is alleged.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Torts > Business Torts > Unfair Business Practices > General Overview

HN3 Standards of Review, Clearly Erroneous Review

The question whether one's actions amount to unfair methods of competition is one of fact.

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

HN4 Standards of Review, De Novo Review

Hawaii appellate courts review conclusions of law de novo, under the right/wrong standard. Under the right/wrong standard, the court examines the facts and answers the question without being required to give any weight to the trial court's answer to it. A conclusion of law will not be overturned if supported by the trial court's findings of fact and by the application of the correct rule of law. However, a trial court's label is not determinative of the standard of review to be applied on appeal.

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

HN5 Standards of Review, De Novo Review

The interpretation of a statute is a question of law reviewable de novo.

Governments > Legislation > Interpretation

HN6 Legislation, Interpretation

The starting point in statutory construction is to determine the legislative intent from the language of the statute itself. The court's foremost obligation when interpreting a statute is to ascertain and give effect to the intention of the legislature, which is obtained primarily from the language contained in the statute itself. The court reads statutory language in the context of the entire statute and construes it in a manner consistent with its purpose.

Governments > Legislation > Interpretation

HN7 Legislation, Interpretation

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. In construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. The court may also consider the reason and spirit of the law, and the cause which induced the legislature to enact it to discover its true meaning. Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Damages > Punitive Damages

HN8 Standards of Review, Abuse of Discretion

An award or denial of punitive damages is within the sound discretion of the trier of fact and will not be reversed absent a clear abuse of discretion. A court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.

Administrative Law > Agency Rulemaking > State Proceedings

HN9 Agency Rulemaking, State Proceedings

Agency regulations affect internal management and do not affect private rights of or procedures available to the public.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

HN10 Shareholder Duties & Liabilities, Piercing the Corporate Veil

Establishing a corporation to limit personal liability is proper and is, alone, an insufficient basis for the application of the doctrines of alter ego or piercing the corporate veil.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

HN11 Shareholder Duties & Liabilities, Piercing the Corporate Veil

The common purpose of statutes providing limited shareholder liability is to offer a valuable incentive to business investment. Although the greatest judicial deference normally is accorded to the separate corporate entity, this entity is still a fiction. Thus, when particular circumstances merit--for example, when the incentive value of limited liability is outweighed by the competing value of basic fairness to parties dealing with the corporation--courts may look past a corporation's formal existence to hold shareholders or other controlling individuals liable for "corporate"

obligations. When a corporation is the mere instrumentality or business conduit of another corporation or person, the corporate form may be disregarded.

[Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview](#)

[Torts > Vicarious Liability > Corporations > Subsidiary Corporations](#)

[Torts > Vicarious Liability > Corporations > General Overview](#)

HN12 **Shareholder Duties & Liabilities, Piercing the Corporate Veil**

The alter ego doctrine has been adopted by the courts in cases where the corporate entity has been used as a subterfuge and to observe it would work an injustice. The rationale behind the theory is that, if the shareholders or the corporations themselves disregard the proper formalities of a corporation, then the law will do likewise as necessary to protect individual and corporate creditors. The rule is designed to give incentives to those using the corporate form to obey the state's laws fully by maintaining the formalities and the legal separateness of the corporation. Thus, those who fail to maintain the corporate formalities cannot expect the state to grant them the limited liability that flows from the corporate form. While the instrumentality doctrine has its origin in the context of parent-subsidiary relationships, it has been suggested that a similar analysis is applicable to an individual shareholder's relationship with a corporation.

[Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview](#)

[Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview](#)

HN13 **Piercing the Corporate Veil, Alter Ego**

A claim based on the alter ego theory is not in itself a claim for substantive relief, but rather to disregard the corporation as a distinct defendant is procedural. A finding of fact of alter ego, standing alone, creates no cause of action. It merely furnishes a means for a complainant to reach a second corporation or individual upon a cause of action that otherwise would have existed only against the first corporation. An attempt to pierce the corporate veil is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract. The alter ego doctrine is thus remedial, not defensive, in nature. One who seeks to disregard the corporate veil must show that the corporate form has been abused to the injury of a third person.

[Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview](#)

HN14 **Shareholder Duties & Liabilities, Piercing the Corporate Veil**

Courts apply the alter ego doctrine with great caution and reluctance. In fact, many courts require exceptional circumstances before disregarding the corporate form.

[Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Fraud & Misrepresentation](#)

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

HN15 [] Alter Ego, Fraud & Misrepresentation

Generally speaking, a corporation will be deemed the alter ego of another where recognition of the corporate fiction would bring about injustice and inequity or when there is evidence that the corporate fiction has been used to perpetrate a fraud or defeat a rightful claim. Before a corporation's acts and obligations can be legally recognized as those of a particular person, and vice versa, it must be made to appear that (1) the corporation is not only influenced and governed by that person, but that there is such a unity of interest that the individuality, or separateness, of such person and corporation has ceased, and (2) that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > Misappropriation of Funds

Business & Corporate Law > Corporations > Corporate Finance > General Overview

Business & Corporate Law > ... > Corporate Finance > Initial Capitalization & Stock Subscriptions > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

HN16 [] Piercing the Corporate Veil, Alter Ego

Factors that many courts have weighed in determining whether a corporate entity is the alter ego of another include: (1) commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; (2) the treatment by an individual of the assets of the corporation as his own; (3) the failure to obtain authority to issue stock or to subscribe to or issue the same; (4) the holding out by an individual that he is personally liable for the debts of the corporation; (5) the identical equitable ownership in the two entities; (6) the identification of the equitable owners thereof with the domination and control of the two entities; (7) identity of directors and officers of the two entities in the responsible supervision and management; and (8) sole ownership of all of the stock in a corporation by one individual or the members of a family.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

HN17 [] Shareholder Duties & Liabilities, Piercing the Corporate Veil

Factors that many courts have weighed in determining whether a corporate entity is the alter ego of another include: (9) the use of the same office or business location; (10) the employment of the same employees and/or attorney; (11) the failure to adequately capitalize a corporation; (12) the total absence of corporate assets, and undercapitalization; (13) the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; (14) the concealment and misrepresentation of the identity of

the responsible ownership, management and financial interest, or concealment of personal business activities; (15) the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; and (16) the use of the corporate entity to procure labor, services or merchandise for another person or entity.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > Personal Liability

HN18 Shareholder Duties & Liabilities, Piercing the Corporate Veil

Factors that many courts have weighed in determining whether a corporate entity is the alter ego of another include: (17) the diversion of funds to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; (18) the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and (19) the formation and use of a corporation to transfer to it the existing liability of another person or entity.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Pensions & Benefits Law > Governmental Employees > General Overview

HN19 Shareholder Duties & Liabilities, Piercing the Corporate Veil

Factors that other courts have weighed in determining whether a corporate entity is the alter ego of another include: (1) incorporation for the purpose of circumventing public policy or statutes; (2) whether the parent finances the subsidiary; (3) whether the subsidiary has no business or assets except those conveyed to it by the parent; (4) whether the parent uses the subsidiary's property as its own; (5) whether the directors of the subsidiary do not act independently in the interest of the corporation but take their orders from and serve the parent; and (6) whether the fiction of corporate entity has been adopted or used to evade the provisions of a statute.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

HN20 Shareholder Duties & Liabilities, Piercing the Corporate Veil

Exclusive ownership and control are not solely determinative on the issue of whether the court should disregard the corporate entity. Indeed, the question is one of control, not merely paper ownership. The mere existence or nonexistence of formal stock ownership is not conclusive.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN21 Conspiracy, Elements

Collusion is defined as an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose; a secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

HN22[] Piercing the Corporate Veil, Alter Ego

The party claiming that a corporation is an alter ego of another bears the burden of proof.

Torts > Business Torts > Unfair Business Practices > General Overview

HN23[] Business Torts, Unfair Business Practices

Plaintiffs/appellants lack standing to obtain relief under *Haw. Rev. Stat. §§ 480-2* and *480-13* insofar as the present matter is a private dispute between competing businesses.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN24[] Antitrust & Trade Law, Exemptions & Immunities

The "state action immunity" doctrine provides that losing bidders are barred from bringing antitrust claims against either the agency or successful bidder, where the state has exclusive control of a bidding process and creates a monopoly by awarding all contracts to one successful bidder. The challenging bidder must show that: (1) the challenged behavior is sanctioned by a clearly articulated and affirmatively expressed state policy, and (2) the state expressly supervises the private anticompetitive conduct at issue.

Civil Procedure > Remedies > Damages > Monetary Damages

Torts > Business Torts > Unfair Business Practices > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

HN25[] Damages, Monetary Damages

The unclean hands defense is precluded in *Haw. Rev. Stat. § 480-13* claims for monetary damages.

Governments > Legislation > Overbreadth

Torts > Business Torts > Unfair Business Practices > General Overview

[**HN26**](#) [L] Legislation, Overbreadth

Reading the statutory language of [Haw. Rev. Stat. §§ 480-2](#) and [480-13](#) in pari materia, the court in the past held that [§ 480-13](#) affords a private remedy for any violation of [§ 480-2](#). However, those cases involved claims of unfair or deceptive acts or practices, not unfair methods of competition. Their holdings are overbroad, and the court restricts their application to unfair or deceptive acts or practices claims.

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 > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[**HN27**](#) [L] Antitrust & Trade Law, Sherman Act

[Haw. Rev. Stat. § 480-4](#) (1993), which prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, traces, verbatim, the language of Sherman Antitrust Act [§ 1, 15 U.S.C.S. § 1](#). Similarly, [Haw. Rev. Stat. § 480-9](#) (1985 & Supp. 1992) provides that 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, tracing Sherman Antitrust Act [§ 2, 15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Administrative Law > Sovereign Immunity

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

[**HN28**](#) [L] Trade Practices & Unfair Competition, Federal Trade Commission Act

The private remedy provision contained in the Clayton Act § 4, [15 U.S.C.S. § 15](#), does not extend to Federal Trade Commission Act §5(a)(1), [15 U.S.C.S. § 45](#), that is, the "unfair methods of competition" section, and that the Federal Trade Commission Act does not afford a private cause of action.

Administrative Law > Sovereign Immunity

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

91 Haw. 224, *224 A.982 P.2d 853, **853 A.999 Haw. LEXIS 261, ***1

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN29 [blue icon] **Administrative Law, Sovereign Immunity**

Federal Trade Commission Act § 5, [15 U.S.C.S. § 45](#), is not limited to the prohibitions of the Sherman or the Clayton Act. Indeed, § 5 is not confined by antitrust concepts at all. It allows the Commission to condemn conduct that is "unfair" in senses beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

Administrative Law > Sovereign Immunity

Torts > Business Torts > Unfair Business Practices > General Overview

HN30 [blue icon] **Administrative Law, Sovereign Immunity**

There is no private claim for relief under [Haw. Rev. Stat. § 480-13](#) for unfair methods of competition in violation of [Haw. Rev. Stat. § 480-2](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Torts > Business Torts > Unfair Business Practices > General Overview

HN31 [blue icon] **Conspiracy to Monopolize, Elements**

Generally speaking, the accepted definition of a conspiracy is a combination of two or more persons or entities by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. [Haw. Rev. Stat. § 480-9](#), like the Sherman Act [§ 2, 15 U.S.C.S. §2](#), also condemns those who combine or conspire to monopolize. A conspiracy in violation of [§ 480-9](#) requires the same proof needed to prove a combination or conspiracy in restraint of trade under [Haw. Rev. Stat. § 480-4](#).

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

HN32 [blue icon] **Piercing the Corporate Veil, Alter Ego**

It is impossible to conspire with an alter ego. Furthermore, an officer of a corporation cannot conspire with the corporation. Nevertheless, the court recognizes that, when officers of a corporation act for their own personal purposes, they become independent actors, who can conspire with the corporation.

Torts > Business Torts > Unfair Business Practices > General Overview

HN33[] Business Torts, Unfair Business Practices

Under [Haw. Rev. Stat. § 480-13\(a\)](#), in order to have standing to bring a claim for relief, a plaintiff must show: (1) a violation of Haw. Rev. Stat. chap. 480, (2) injury to plaintiff's business or property, (3) proof of the amount of damages, and (4) a showing that the action is in the public interest.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Torts > Business Torts > Unfair Business Practices > General Overview

HN34[] Clayton Act, Claims

An attempt to monopolize claim, under [Haw. Rev. Stat. § 480-9](#), requires proof: (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. For a claim to succeed it must also appear that there is a causal connection between the conduct and the monopoly power.

Torts > Business Torts > Unfair Business Practices > General Overview

HN35[] Business Torts, Unfair Business Practices

Although [Haw. Rev. Stat. § 480-2](#) does not define unfair competition, it was constructed in broad language in order to constitute a flexible tool to stop and prevent unfair competition and fraudulent, unfair or deceptive business practices for the protection of both consumers and honest businessmen and businesswomen. Generally speaking, competitive conduct is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Administrative Law > Sovereign Immunity

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

[HN36](#) [blue icon] Trade Practices & Unfair Competition, Federal Trade Commission Act

Federal Trade Commission Act § 5, [15 U.S.C.S. § 45](#), specifically dictates that it is an unfair method of competition to violate specific trade regulations, to attempt to circumvent antitrust statutes, or to engage in practices that violate the spirit of antitrust laws. The word "unfair" means conduct that threatens an incipient violation of an [antitrust law](#), or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Torts > Business Torts > Unfair Business Practices > General Overview

[HN37](#) [blue icon] Business Torts, Unfair Business Practices

Regarding the element of a specific intent to monopolize, under [Haw. Rev. Stat. § 480-9](#), one must do more than show that the defendant had the specific intent to prevail over one's rivals. One must show that the defendant desired, for example, to achieve monopoly power, to accomplish a forbidden monopoly, or to exclude competition. Although anticompetitive conduct may supply sufficient inference of this necessary intent, intent alone is insufficient to establish a dangerous probability of success.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Torts > Business Torts > Unfair Business Practices > General Overview

[HN38](#) [blue icon] Attempts to Monopolize, State Regulation

With respect to the third and final element, an attempt to monopolize claim under [Haw. Rev. Stat. § 480-9](#) includes activities embodying the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it. In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market. There is universal agreement that monopoly power is the power to exclude competition or control prices. The existence of such power ordinarily may be inferred from a predominant share of the market.

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

[HN39](#) [blue icon] Inchoate Crimes, Attempt

A subsequent failure to achieve monopoly status cannot itself vitiate a claim of attempted monopoly where other evidence substantially supports the attempt without eviscerating the entire attempt offense.

Torts > Business Torts > Unfair Business Practices > General Overview

[HN40](#) [blue icon] Business Torts, Unfair Business Practices

Although a predominant share of the relevant market is indirect evidence of monopoly power, the mere existence of a predominant share of the market, alone, does not equal the power to control prices or exclude competition.

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

Torts > Business Torts > Commercial Interference > General Overview

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

HN41 [blue icon] **Intentional Interference, Elements**

The court definitively recognizes the intentional tort of tortious interference with prospective business advantage.

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

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

HN42 [blue icon] **Intentional Interference, Elements**

The tort of intentional interference with prospective contractual relation is that one who intentionally and improperly interferes with another's prospective contractual relation (except to marry) is subject to liability to the other for pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

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

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

HN43 [blue icon] **Intentional Interference, Elements**

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to 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 to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

Governments > Legislation > Effect & Operation > General Overview

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

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

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

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

[HN44](#) [blue] Legislation, Effect & Operation

The following elements have evolved into the tort of intentional or tortious interference with prospective business advantage: (1) the existence of a valid business relationship or a prospective advantage or expectancy sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff; (2) knowledge of the relationship, advantage, or expectancy by the defendant; (3) a purposeful intent to interfere with the relationship, advantage, or expectancy; (4) legal causation between the act of interference and the impairment of the relationship, advantage, or expectancy; and (5) actual damages. There must be a colorable economic relationship between the plaintiff and a third party with the potential to develop into a full contractual relationship. The prospective economic relationship need not take the form of an offer but there must be specific facts proving the possibility of future association.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

[HN45](#) [blue] Conspiracy, Elements

Civil conspiracy does not alone constitute a claim for relief. Moreover, mere acquiescence or knowledge is insufficient to constitute a conspiracy, absent approval, cooperation, or agreement.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Torts > ... > Prospective Advantage > Intentional Interference > Remedies

Civil Procedure > Remedies > Damages > Punitive Damages

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

[HN46](#) [blue] Standards of Review, Abuse of Discretion

Whenever a court disregards rules or principles of law or practice to the substantial detriment of a party, it abuses its discretion.

Counsel: On the briefs:

Paul Alston, David A. Nakashima, and Jade Lynne Holck, of Alston Hunt Floyd & Ing, for Plaintiffs-Appellants Robert's Hawaii School Bus, Inc., and Student Transportation, Inc.

George W. Playdon, Jerrold K. Guben, and Ronald T. Ogomori, for Defendants-Appellees Laupahoehoe Transportation Company Inc., Central Transportation Company, Inc., Double K Transportation Services, Inc., and Nobu Shinohara, as Personal Representative of the Estate of Chiaki Matsuo.

John Francis Perkin and Wayne S. Sakamoto, for Defendant-Appellee T&N Transportation Services, Inc.

Judges: RONALD T.Y. MOON, C.J., ROBERT G. KLEIN, STEVEN H. LEVINSON, PAULA A. NAKAYAMA, MARIO R. RAMIL, JJ. OPINION OF THE COURT BY MARIO R. RAMIL, J.

Opinion by: MARIO R. RAMIL

Opinion

[*230] [**859] OPINION OF THE COURT BY RAMIL, J.

The instant appeal arises from the procurement of public school buses for 1991 to 1998 by the School Bus Transportation Branch of the State of Haw. Department of Accounting and General Services (DAGS). Plaintiffs-appellants Robert's Hawaii School Bus, Inc. (RHSB) and Student [*2] Transportation, Inc. (STI)¹ filed a complaint, on April 8, 1993, against defendants-appellees Laupahoehoe Transportation Company, Inc. (Laupahoehoe), Central Transportation Company, Inc. (Central), Double K Transportation Services, Inc. (Double K), T&N Transportation Services, Inc. (T&N), and Chiaki Matsuo² (collectively, appellees or defendants).

The complaint alleged, *inter alia*, that appellees, acting in concert, created, operated, and/or controlled shell corporations to circumvent DAGS's bidding rules and specifications in order to: (1) gain unfair competitive advantage for Laupahoehoe and Central over other bidders; [*3] (2) attempt to monopolize the school bus industry; and (3) defraud the State and all prospective bidders. The complaint contained claims of: (1) unfair competition and attempted monopolization in violation of [Hawai'i Revised Statutes \(HRS\) §§ 480-2\(a\)](#) and [480-9](#) (1985 & Supp. 1992) brought pursuant to [HRS § 480-13\(a\)](#) (Supp. 1992) (Count I); (2) violations of the Racketeer Influenced Corrupt Organizations Act, [18 U.S.C. §§ 1961 et seq.](#), as to Laupahoehoe, Central, Matsuo, and Doe Defendants (Count II); (3) civil conspiracy by Laupahoehoe, Central, Double K, and Matsuo with respect to the Oahu Contract (Count III); (4) tortious interference with prospective business advantage by Laupahoehoe, Central, Double K, and Matsuo as to the Oahu Contract (Count IV); (5) civil conspiracy by Laupahoehoe, Central, T&N, and Matsuo with respect to the Big Island Contract (Count V); (6) tortious interference with prospective business advantage by Laupahoehoe, Central, T&N, and Matsuo with respect to the Big Island Contract (Count VI); and (7) punitive damages on all counts (Count VII).

After defendants moved to dismiss counts II, III, and V, the circuit court, on February 16, 1994, dismissed [*4] Count II with prejudice and declined to do so as to Counts III and V, insofar as they asserted a civil conspiracy to [*231] [*860] commit actionable wrongs. Bench trial commenced February 1, 1995 and concluded March 1, 1995. The trial court entered findings of fact (FOFs) and conclusions of law (COLs) on April 26, 1995. In short, the trial court held that there was insufficient evidence to: (1) find or conclude (a) that Double K and T&N were shell corporations or (b) that appellees engaged in unfair competition (with the exception of Matsuo and Laupahoehoe on the Big Island); (2) show a dangerous probability that defendants would successfully monopolize the geographic area of the State of Hawaii or any of its individual islands/counties; (3) establish that any two or more defendants conspired; (4) show that STI sustained injury or damages; and/or (5) show that STI's relationship with DAGS carried with it a future probability of success.

On appeal, appellants contend³ that the trial court ignored substantial evidence in the record that: (1) Double K was operated as a shell corporation of Matsuo and Central, causing injury to RHSB; (2) T&N was operated as a shell corporation of Matsuo and Laupahoehoe, [*5] causing injury to STI; (3) defendants' conduct violated [HRS §§ 480-2](#) and [480-9](#), causing antitrust injury and damage to RHSB and STI; (4) Central violated DAGS's rules by leasing buses to Ground Transport, Inc. (GTI), thereby causing injury to RHSB; (5) defendants' conduct was designed to disrupt the relationship between RHSB/STI and DAGS and tortiously interfered with appellants'

¹ RHSB and STI are subsidiaries of Robert's Hawaii, Inc. Robert's Hawaii, Inc. incorporated STI in May 1986 and RHSB in late 1990. Robert Iwamoto is President, Secretary, Director, and sole shareholder of Robert's Hawaii, Inc., RHSB, and STI.

² Matsuo passed away on August 13, 1995. Nobu Shinohara was substituted as personal representative for Matsuo's Estate on November 3, 1995.

³ Appellants challenge FOFs Nos. 18, 26, 42, 51, 54, 55, 68, 112, 115, 125, 135, 157, 168, 174, 194, and 195, and COLs Nos. 9, 10, 11, 12, 13, 14, 15, 16, 18, 20, 21, 22, 27, 29, 34, 35, 36, 37, 38, 40, 41, 42, 43, and 44.

prospective business advantage; and (6) two or more defendants-appellees conspired to engage in unfair competition and commit tortious interference.⁴

[***6] For the reasons discussed below, we affirm in part and vacate in part the circuit court's (1) FOFs and COLs, filed April 26, 1995, and (2) judgment entered May 18, 1995. We remand this matter to the circuit court for further findings and conclusions to be entered consistent with this opinion.

I. BACKGROUND

A. The School Bus Bid Controversy

1. The Oahu Contract

On December 5, 1990, DAGS issued a request for sealed bids to procure student transportation for eighty-two designated Maui and Oahu school bus routes for the period of September 3, 1991 to June 1997 (hereinafter the "Oahu Contract"). The Oahu Contract was the first bid solicitation to include section 3.2.1 of the General Conditions and Special Provisions,⁵ which required successful bidders to "implement and manage" the contract, to refrain from assigning, subcontracting, or selling the contract or its operation for four years, and to maintain its own baseyard "separate and apart from that of another school bus contractor doing business with the State." Section 3.2.1 also restricted the successful bidder from using buses that had been purchased, leased, or supplied by another bidder who had bid on the same [***7] routes or groups of routes, unless the losing bidder had lost more than fifty percent of its total routes maintained during the previous school year as the result of the bid proposal. A failure to provide the location of the baseyard and the buses to be used mandated rejection of the bid. Moreover, competing subsidiaries or jointly-owned companies were prohibited from submitting bids for the same routes. If competing subsidiaries or jointly-owned companies submitted bids, section 2.5 of the Purchasing and Supply Division's General Conditions, dated [*232] [**861] April 1, 1982, required submission of certificates of non-collusion.

Incorporated into DAGS's bid solicitations since the 1970s, Specification M, entitled "Prevention Against Monopolization of School Bus Routes," also provided:

Inasmuch as the State is the sole customer of school bus services in Hawaii and therefore, school bus service seems to be a unique line of commerce, the State [***8] will deem it to be in its best interest to reject all or part of any bid if the effect of awarding part of or the entire bid may substantially lessen competition or tend to create a monopoly in the school bus industry in any one county within the State of Hawaii. Therefore, the State will consider the award of or control of more than 50% of the total routes to transport regular students to and from school in a particular county to have the effect of substantially lessening competition or tending to create a monopoly in that area of the State. The State will, therefore, reject that part of a bid which will allow a bidder to exceed the 50% figure specified herein and award that part of the bid to the next lowest bidder.

However, the State retains the right to award more than 50% of the routes in any one county to a single bidder in those situations where: (1) [the] bidder is the sole bidder on a route or group of routes; (2) in the event that the difference between the lowest bid price and the second lowest bid price is more than ten percent (10%) above the bid price submitted by the lowest price bidder; or (3) the number of routes within the group which is required to exceed the [***9] 50% figure constitutes at least 75% of the group.

⁴ Appellants also contest (1) the "order denying in part defendants' motion to dismiss the complaint" and (2) the trial court's denial of their motion for summary judgment; however, they did not include issue (1) in the points of error section in their opening brief and did not advance any argument or analysis on issues (1) or (2). See *Associated Engineers & Contractors, Inc. v. State, 58 Haw. 187, 215, 567 P.2d 397, 415, reh'g denied, 58 Haw. 322, 568 P.2d 512 (1977)* (burden on party seeking reversal includes "the presentation of an analysis."). Because only issues presented pursuant to *Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(6)* will be addressed, we decline to address these issues on appeal.

⁵ See [HN1](#) [↑] [HRS § 103-11](#) (1993) (DAGS's "rules shall have the force of law").

Finally, section 2.12(a) of the General Conditions provided that "[a] bidder shall be disqualified and his bid automatically rejected for . . . proof of collusion among bidders, in which case, all bids involved in the collusive action will be rejected and any participant [in] such collusion will be barred from future bidding until reinstated as a qualified bidder."

At trial, George Okano, a contract specialist in DAGS's student transportation branch during the relevant time period, testified that DAGS included the foregoing provisions to guarantee fairness, to prevent collusive bidding practices that DAGS suspected had occurred in the past, to address price fixing, and to insure that bidders were truly independent. Specifically, Okano testified that DAGS suspected prior collusive bidding practices between Laupahoehoe and T&N. Okano explained that Specification M was enacted to maximize competition within the industry and to address potential monopolies, but that, to his knowledge, DAGS had never enforced Specification M. According to Okano, certain defects could be waived, and Specification M was discretionary. However, [***10] defects were only waived so long as they did not violate the law, and collusion in violation of section 2.12 could not be waived.

a. The Participants on Oahu

During the relevant times herein, Central was the largest school bus company on Oahu, controlling 207 out of 263 routes, approximately 78.7% of the Oahu market. Central and Laupahoehoe were wholly owned subsidiaries of C.M. Holding Corporation.⁶ In 1990, Chiaki Matsuo owned ninety-four percent of C.M. Holding Corporation's stock; two of his daughters owned the remaining six percent. Matsuo, the former president of Central and Laupahoehoe, served as the chief executive officer of Central.

Sometime in 1990, DAGS held a pre-bid meeting to insure that bidders were aware of the new bid restrictions. Matsuo, Ralph Koga (Matsuo's administrative assistant and Central's vice-president), [***11] and Wesley Yamamoto (Laupahoehoe and Central's president and director from March 1987 to March 1992) attended the meeting. Matsuo became concerned over the effect that the new DAGS provisions would have on Central, because the Oahu Contract contained sixty-two of its existing routes. Yamamoto testified that Matsuo originated the idea of forming Double K. Matsuo testified, in deposition, that the primary reason for Double K's creation [*233] [**862] was to permit Central to "get around" the 50%/10% rule of Specification M, thereby permitting Central to lease its buses to the successful bidders. Yamamoto testified that he harbored concerns over the legality of Matsuo's idea and that he contacted an attorney.

Yamamoto approached his college friend, Kurt Kaminaka, in December 1990 and suggested forming Double K. Matsuo and Yamamoto assisted in Double K's incorporation. Matsuo's attorney was retained to incorporate Double K, and Matsuo furnished Double K with \$ 72,500.00, later characterized by appellees as a "loan between friends." On December 3, 1990, two days before the Oahu Bid Request was published, Kurt and his father, Burt Kaminaka, incorporated Double K, each owning fifty percent of Double K's [***12] stock. Yamamoto testified that the Kaminakas were considered "silent or passive investors." They, however, invested no funding in Double K. The articles of incorporation named Kurt as president and director and Burt as vice-president and director. Philip N. Main, Central and Grayline Hawaii's Safety Director from 1972 to 1980 and 1982 to 1992, was named a director and vice-president of operations.⁷

b. The Oahu Bids and Awards

On December 28, 1990, Double K submitted a sealed bid for the Oahu Contract, bidding on sixty-two of the routes operated by Central. Yamamoto and Koga drafted Double K's bid. The Kaminakas did not prepare Double K's bid.

⁶ Prior to 1990, Central was a division of Laupahoehoe, which was a wholly owned subsidiary of C.M. Holding Corporation. In 1990, C.M. Holding Corporation underwent major restructuring.

⁷ Even though Main's name is listed in the articles of incorporation, he never signed them or any other documents associated with Double K.

Central did not bid on the Oahu Contract and, instead, intended to lease buses to the successful bidders. According to Yamamoto, Matsuo intended to have Central lease its buses to Double K, if Double K was awarded routes.

RHSB [***13] submitted a bid proposal for the same sixty-two routes. The bids were opened on January 3, 1991. Neither Double K nor RHSB was the lowest bidder for any of the routes. Rather, Gomes School Bus Service was the lowest responsible bidder as to Groups 1, 2, 3, and 7, and Ground Transport, Inc. ("GTI") was the lowest responsible bidder as to Groups 4, 5, and 6. Double K submitted the second lowest bid and RHSB submitted the third lowest bid for Group 4. RHSB was the second lowest bidder as to Groups 5 and 6.

Sometime thereafter, GTI encountered problems in securing financing to acquire buses. RHSB suggested to GTI that it forfeit Groups 5 and 6. Instead, GTI forfeited the Group 4 routes on May 8, 1991 and leased buses for Groups 5 and 6 from Central. DAGS awarded Group 4 to Double K on May 13, 1991.

c. RHSB's Complaints to DAGS

RHSB submitted a complaint to DAGS on May 31, 1991, protesting the award and claiming that Double K was a shell corporation formed by Matsuo and Laupahoehoe to circumvent Specification M. Because RHSB was the next lowest bidder after Double K, RHSB would have been awarded Group 4 if Double K and Central were disqualified.⁸ [***15] As a result, DAGS initiated an [***14] investigation into Double K and Laupahoehoe's relationship, but DAGS's representatives never inquired into the relationship between Central and Double K.⁹ On July 12, 1991, the state comptroller informed Double K of the allegations and requested, *inter alia*, lists of all loans within the past year and "copies of all prior agreements (between Laupahoehoe and Double K) for securing common equipment, [*234] [**863] maintenance, personnel, facilities, or leases, etc." DAGS explained that, if appellants' protest claims were true, the "award will not be made to Double K but instead to the next lowest bidder." In a responsive letter dated July 17, 1991, Kurt Kaminaka stated that he was "surprised, concerned and upset about [the] unsubstantiated allegations," and informed DAGS that (1) Double K had no outstanding loans and (2) there were no written agreements between Laupahoehoe and Double K at that time.

As part of the initial investigation conducted after the bid opening, but prior to the award, Okano drove to the site Double K identified as its baseyard and examined City and County zoning maps. He discovered a vacant lot with a zoning designation that did not permit it to be used as a baseyard. By letter, Double K was directed to secure a baseyard. It complied. On August 22, 1991, DAGS informed RHSB that, "in response to your client's belief that Double K Transportation, Inc. is a 'shell' corporation of Laupahoehoe Transportation Co., our Office of the Attorney General's investigation turned up no evidence to support the claim." DAGS formally awarded the eight routes of Group 4 to Double K. RHSB again protested.

In 1991, after the award of the contract, DAGS continued to monitor Double K's compliance. Patrick Dela Garza, Double K's operations manager during the relevant time period, denied any relationship between Central [***16] and Double K. However, subsequent investigation revealed that Central ran the daily operations of Double K. Double K leased from eight to twelve buses from Central, although, at trial, defendants were unable to produce a lease agreement. Central maintained all Double K buses, including inspection, fueling, and repairs. Central also prepared Double K's bookkeeping, financial records, and payroll and retained custody of and used Kurt's signature stamp. Double K, however, maintained separate bank accounts, filed separate tax returns, and accounted for its profits and losses independently of those of Laupahoehoe and Central.

⁸ For Group 4, RHSB bid the total gross amount of \$ 1,120.00 (for eight routes per day) versus Double K's \$ 1,118.00. If Double K were a shell of Central, it would have had to bid \$ 1,008.00 or less, *i.e.*, 10% less than the next lowest bidder to qualify as the lowest responsible bidder under Specification M, because Central, Double K's alter ego, already operated over fifty percent of the existing bus routes on Oahu. Okano testified that, if Central had bid on Group 4, Central would have been disqualified by the fifty percent rule. Mits Nakatsuka also testified that, in the case of tie-bids, if one bidder already operated over fifty percent of the market routes, DAGS would automatically award the contract to the other bidder.

⁹ Explaining that DAGS apparently did not ask the right questions, Okano testified that the defendants did not "lead [him] astray," but "nobody turned the lights on" either.

During pretrial discovery, Kurt Kaminaka testified in deposition that Double K leased buses from Laupahoehoe and/or Central and that he viewed the two entities (Laupahoehoe and Central) as one and the same. He also remembered the \$ 72,500.00 loan from Matsuo but could not explain his failure to inform DAGS of its existence. Apparently, because of a falling out between Yamamoto and Matsuo, Yamamoto left Central and Laupahoehoe in 1992. Upon Yamamoto's departure, Matsuo approached Eugene Obara and asked him to become president of Double K, replacing Kurt Kaminaka. Eugene [***17] testified, in deposition, that it was his understanding that Matsuo owned and controlled Double K. Eugene and his brother, Dennis, purchased the Kaminakas' stock in mid-July 1992 with \$ 15,000 provided by Koga. According to Eugene, Koga instructed him to deposit the funds into his personal checking account and pay the Kaminakas with a personal check. The Obara brothers thereafter became officers, directors, and shareholders of Double K. Like the Kaminakas, they had no experience in running a school bus company and invested no money in Double K. The Obaras resigned on April 27, 1993. On or about July 2, 1993, the Obaras assigned their stock to Central to pay Double K's outstanding debts to Central. Neither Obara received any consideration for the shares, and a stock purchase agreement was never produced. Koga became the Double K operations manager. Dela Garza, apparently fired and disgruntled, contacted Okano and "changed his tune," admitting that Double K was, in fact, controlled by Central.

2. *The Big Island Contract*

On January 27, 1992, DAGS issued a request for sealed bids to procure student transportation for designated Hawaii school bus routes for the period of September 1, 1992 to [***18] June 1998 (hereinafter the "Big Island Contract"). Similarly to the Oahu Contract, the bid specifications required independence and prohibited collusion and monopolization.

a. *The Participants on the Big Island*

In 1990, Laupahoehoe was the largest school bus operator on the island of Hawai'i, operating 91 out of 141 routes and controlling approximately 63.8% of the Big Island market. [*235] [**864] Matsuo was the chairman, president, and CEO of Laupahoehoe. Yamamoto later succeeded Matsuo as president. STI, by comparison, had never bid on a bus contract. At that time, STI did not have an existing operation on the Big Island.

Similarly to Double K, T&N was conceived by Matsuo. Matsuo's self-described friend of twenty years, Ted Ura, however, incorporated T&N on June 3, 1988. Ura could not recall who prepared or drafted the articles, but he recalled signing them in Laupahoehoe's office. Matsuo approached Nobu Shinohara, the existing CEO of Bacon Universal Co., Inc., and asked him to become an officer and director of T&N. Ura was sole shareholder of T&N and became president, treasurer, and director. His wife also became an officer. T&N never convened any board meetings.

Although Ura testified [***19] that he operated T&N out of his home upon its incorporation, he could not recall performing any work for T&N from 1988 until the award of the Big Island Contract in 1991. Ura testified that Matsuo loaned him money to "start-up" T&N, to keep T&N "rolling" until the bid was awarded, and to obtain surety bonds. Ura also stated that Matsuo extended several loans to T&N, none of which were memorialized in writing, and that T&N had repaid Matsuo. Prior to incorporating T&N, Ura was a retired high school football coach and counselor, who worked for Laupahoehoe, sweeping its office and washing buses.¹⁰ Shinohara never participated in the daily operations of T&N, and in October 1992, he resigned, becoming president of Central, Laupahoehoe, and other companies of Matsuo. Although Ura testified that he ran the company, he conceded that T&N could not have been formed without the active assistance of Matsuo and Laupahoehoe.

[***20] b. *The Big Island Bids and Awards*

Matsuo and Dayton Oniwa (Matsuo's administrative assistant) prepared T&N's bid proposal. Ura testified that, because he had no experience in preparing school bus bids, he asked Matsuo to assist him and that Matsuo helped

¹⁰ After retiring from the DOE in 1985, Ura was unemployed for a year-and-a-half and then worked as personnel director of Suisan for one year.

him in any financial matters. Although T&N's bid amount was always lower, Laupahoehoe bid on the same groups of routes, apparently without Ura's knowledge. Ura explained that he only browsed through the contract specifications and that he did not know that T&N was violating any provisions.

T&N submitted bids for all Big Island routes. It was the responsible low bidder as to Groups 2 and 3, for which Matsuo supplied the bid guaranties. STI and Laupahoehoe also submitted bids for all routes but were not the lowest bidders as to any group of them. On group 3, STI and Laupahoehoe submitted identical bids, which were the second lowest. V. Bragado Bus Co. (Bragado) was the lowest responsible bidder as to Groups 1 and 4 and was awarded these groups.

Appellees adduced evidence that, after entering into the contract with DAGS for Groups 2 and 3, Ura supervised the daily operations of T&N, often spending twelve or more hours per day [***21] at the baseyard. Ura dispatched the buses, supervised the drivers, prepared the daily worksheets and bimonthly billings, handled complaints from parents, and produced a company newsletter. He reviewed T&N's accounting books and checkbook and possessed sole authority to sign T&N checks. However, T&N employed no bookkeepers or accountants on its payroll. Ura received a salary of \$ 800.00 per month and had the use of a company car. T&N maintained its own bank accounts and books.

Appellants adduced evidence that, according to Koga, Ura was akin to an operations manager. Moreover, in contravention of bid rules, T&N shared office space with Laupahoehoe, leased its baseyard and all of its buses from Laupahoehoe, and had a standing order for replacement buses in the event of a breakdown. Laupahoehoe also serviced, repaired, and fueled T&N's vehicles, and provided the bus drivers. Laupahoehoe retained custody of T&N's checkbook and performed T&N's administrative work, including [*236] [**865] bookkeeping, accounts payable and receivable, driver payroll, and taxes. Matsuo paid T&N's legal fees.

With respect to the lease and servicing agreements, Ura testified that he never negotiated any of the T&N/Laupahoehoe [***22] contracts. He relied on Laupahoehoe to give him a fair deal. When asked why he permitted a competitor to prepare T&N's bid, Ura stated that he trusted Matsuo and Laupahoehoe. When asked at trial what he did for T&N in "terms of running the company," Ura testified that he "had to go and scrub, clean the place, cut the grass, poison the grass, pick up rubbish, and clean up the baseyard and today what I do is I make sure that the place is clean, scrub the toilet, mop the place." Ura was also the company cook.

B. The Trial Court's FOFs and COLs

Bench trial commenced on February 1, 1995 and concluded on March 1, 1995. The trial court entered FOFs and COLs on April 26, 1995. The trial court found and concluded, in pertinent part as follows:

DAMAGES

181. RHSB did not realize net profits, but rather sustained net losses for each year during the period from 1992 to 1994.
182. In 1991, Double K sustained a net loss of \$ 1,825.00.
183. In 1992, Double K's net income was \$ 2,608.00.
184. In 1993, Double K sustained a net loss of \$ 3,474.00.
185. For the years 1991-1993, Double K sustained an aggregate net loss of \$ 2,691.00.

186. In 1991, T&N's net income was \$ 3,104. [***23]
187. In 1992, T&N incurred a net loss of \$ 11,976.00.
188. In 1993, T&N's net income was \$ 3,871.00.
189. For the years 1991-1993, T&N sustained an aggregate net loss of \$ 5,001.00,

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191. As to Plaintiff's claim for lost profit damages, the total revenue Plaintiffs claim they would have received if the forty-one (41) routes in question had been awarded to them, is the sum of the following:
 - (a) Contract revenue for the forty-one (41) routes, calculated at Plaintiff's bid prices, and
 - (b) Charter revenue projected at 40% of contract revenue ("charter revenue ratio").

192. The amount of charter revenue is determined by such factors as price, marketing strategy, service and bus capacity.

193. A company is free to market routes in an area of the State or an island regardless of whether or not it operates any school bus contract routes in that particular area.

194. With regard to the Big Island routes, there is insufficient evidence to show a correlation between charter revenue and contract revenue.

195. Without charter revenue, STI would have sustained a net loss, rather than a net profit, in operating the Big Island routes at its bid price.

....

CONCLUSIONS OF [***24] LAW

....

9. There is insufficient evidence to show that Double K was merely an agency, instrumentality, adjunct or alter ego of Central, Laupahoehoe, and/or Matsuo while under the ownership of the Kaminakas.

10. There is insufficient evidence to show that Central, Laupahoehoe or Matsuo dominated the finances, policy and practices of Double K during the Kaminakas' ownership to such an extent that Double K had no separate mind, will or existence of its own but was simply a business conduit for Central, Laupahoehoe, and/or Matsuo.

11. There is insufficient evidence to show that Double K was controlled by and operated solely for the benefit of Central, [*237] [**866] Laupahoehoe, and/or Matsuo during the Kaminakas' ownership.

....

13. There is insufficient evidence to show that T&N was controlled by and operated solely for the benefit of Central, Laupahoehoe, and/or Matsuo.

14. There is insufficient evidence to show that T&N was merely an agency, instrumentality, adjunct or alter ego of Central, Laupahoehoe, and/or Matsuo or that these Defendants dominated T&N's finances, policies and practices to such an extent that T&N had no separate mind, will or existence of its own but was simply [***25] a business conduit for Central, Laupahoehoe, and/or Matsuo.

15. The Special Provision of both IFB No. F-91-140-MO and IFB No. F-92-250-H prohibited Double K and T&N from using busses [sic] that were "purchased, leased, loaned or in any other way supplied by another bidder who submitted a bid for the same routes or group of routes.". T&N and Tadashi Ura were not aware that Laupahoehoe also bid on IFB No. F-92-250-H, and unknowingly violated this provision by leasing busses [sic] from Laupahoehoe. Double K did not violate this provision.

16. Double K violated the Special Provisions which required a bidder to have its own baseyard "separate and apart from that of another school bus contractor doing business in the State." . . . After Double K entered into the contract with DAGS for the Group 4 routes, however, DAGS notified Double K of the violation and directed Double K to correct the breach. Double K cured the breach to the satisfaction of DAGS.

17. The Special Provisions of IFB NO. F-92-250-H required that: (a) T&N have "its own base of operation from which to perform all substantive administrative requirements of the contract," (b) T&N's base of operation be solely under its [***26] control and physically separate and apart from that of any other school bus contractor doing business with the State, and (c) T&N have its own personnel, office space, telephones and whatever else necessary to constitute a business which is separate and apart from any other school bus contractor doing business with the State. . . .

18. After contracting with T&N for the Group 3 routes on the Big Island, DAGS monitored T&N's operation and notified T&N that it must comply with the foregoing requirements. The evidence shows that T&N complied in this regard to the satisfaction of DAGS.

19. T&N violated the Special Provisions of IFB No. F-92-250-H, which prohibited T&N from fueling, servicing, or repairing its busses [sic] at the facility of another school bus contractor doing business with the State.

....

22. Except as provided in paragraphs 38, 39, and 41 of these COL, the evidence is not sufficient to establish that Defendants' conduct constituted unfair competition under Section 480-2, HRS, or that Defendants' conduct

was designed to disrupt the relationship between DAGS and the Plaintiffs relative to the claim of tortious interference with prospective business advantage. [**27]

23. There are four essential elements of an attempt to monopolize claim: 1) specific intent to control prices or destroy competition with respect to a part[icular] commerce; 2) predatory or anti-competitive conduct directed to accomplishing the unlawful purpose; 3) a dangerous probability of success; and 4) antitrust injury.

The trial court next compared the parties' market shares on Oahu and the Big Island from 1990 through 1993. The trial court noted that, in 1990, Central and Laupahoehoe operated approximately 78.7% of the routes on Oahu and 52.9% of the routes in the State. Double K maintained 3% of the Oahu market, and T&N maintained 10.2% of the Big Island market. Laupahoehoe also operated approximately 63.8% of the routes on the Big Island. By 1993, their shares had declined to 3.2% on Oahu and to 16.9% in the state. During the same time period, RHSB's share of the Oahu market had increased from zero to 39.9% and from 14% to 33.5% in the state. The trial court then ruled that:

[*238]

[**867] 34. Whether the geographic market is identified by the physical boundaries of each island or the entire State of Hawai'i, the evidence is insufficient to show a dangerous probability of success [***28] by Defendants in these geographic markets to sustain Plaintiffs' attempt to monopolize claim.

....

36. Except as provided in paragraphs 38, 39, and 41 of these COL, the evidence is insufficient to establish Defendants' specific intent to hinder or destroy competition or monopolize the school bus industry in Oahu, the Big Island, or the State of Hawai'i.

37. The evidence is insufficient to establish that any two or more of the Defendants engaged in concerted action to accomplish an unlawful objective. Plaintiffs do not prevail on their claims of conspiracy.

38. Laupahoehoe and Matsuo calculated and designated the bid amounts in the bid proposals submitted by Laupahoehoe and T&N Although Laupahoehoe and Matsuo were aware, T&N and Ted Ura were not aware, that Laupahoehoe intended to bid [on the same contract] . . . when Matsuo and Laupahoehoe assisted T&N with its bid preparation.

39. The conduct of Laupahoehoe and Matsuo operated to hinder competition among bidders and was designed to secure an unfair advantage for Laupahoehoe. Such conduct is contrary to the competitive bidding law and against public policy.

40. However, the evidence is insufficient to show that STI [***29] sustained injury or damage as a result of the conduct described in Paragraph 38 of these COL, or that STI would have realized a net profit if DAGS had awarded STI the four (4) Big Island routes of Group 3.

41. The Court concludes that the conduct of Laupahoehoe and Matsuo described in Paragraph 38 of these COL constitutes an unfair method of competition under Section 480-2, HRS. However, as there is insufficient evidence to show actual injury or damage to STI resulting from such wrongful conduct or a dangerous probability of Defendants' success in monopolizing the school bus market in Oahu, the Big Island, or the State of Hawai'i, Plaintiffs do not prevail on their claims under Chapter 480, HRS.

42. The evidence is also insufficient to sustain Plaintiffs' claim against Defendants Matsuo and Laupahoehoe for tortious interference with prospective business advantage, based upon the conduct described in Paragraph 38 of these COL. As a bidder for the routes in IFB No. F-92-250-H [the Hawai'i Bus Contract], Plaintiff STI had an economic relationship with DAGS, of which Matsuo and Laupahoehoe were aware. However, there is insufficient evidence to show that the relationship had the probability [***30] of ripening into a future economic benefit for STI, or that the Big Island routes would have been awarded to STI if Laupahoehoe and Matsuo had not engaged in the conduct described in Paragraph 38 of these COL, or that such conduct caused injury or damage to STI.

43. The Court concludes that there is insufficient evidence to sustain any cause of action asserted by Plaintiffs against Defendants.

44. Accordingly, Judgment shall be entered in favor of Defendants . . . and against Plaintiffs . . . as to all claims against Defendants.

Final judgment was entered on May 18, 1995. This appeal ensued.

II. STANDARDS OF REVIEW

HN2[] Generally speaking, the question whether a corporation is a mere agency, instrumentality, or alter ego of another corporation or individual is one of fact. See 1 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41.95, at 699-705 (perm. ed. 1999) (hereafter *Fletcher Cyclopedia*). However,

When all material facts are undisputed, application of the alterego doctrine is a question of law. Thus, summary judgment may be granted in a case where no genuine issue of fact is raised or shown. However, it is recognized that [***31] the determination of whether there are sufficient grounds for [*239] [**868] piercing the corporate veil ordinarily should not be disposed of by summary judgment, in view of the complex economic questions often involved, especially if fraud is alleged.

Id. at 699-700 (footnotes omitted).

HN3[] The question whether one's actions amount to unfair methods of competition is also one of fact. We review a trial court's findings of fact under the clearly erroneous standard. See *Associates Fin. Services Co., of Hawaii, Inc. v. Mijo*, 87 Haw. 19, 28, 950 P.2d 1219, 1228 (1998) (citations omitted). "A finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed." *In re Estate of Marcos*, 88 Haw. 148, 153, 963 P.2d 1124, 1129 (1998) (citation omitted). Findings of fact that are unchallenged on appeal are the operative facts of a case. See *Crosby v. State Dept. of Budget & Finance*, 76 Haw. 332, 340, 876 P.2d 1300, 1308 (1994), cert. denied, 513 U.S. 1081, 130 L. Ed. 2d 635, 115 S. Ct. 731 (1995) (citation omitted). **HN4**[]

[***32] Hawai'i appellate courts review conclusions of law *de novo*, under the right/wrong standard. See *Associates Fin. Services Co. of Hawaii, Inc.*, 87 Hawai'i at 28, 950 P.2d at 1228. "Under the right/wrong standard, this court 'examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it.'" *Estate of Marcos*, 88 Hawai'i at 153, 963 P.2d at 1129 (citation omitted). A conclusion of law will not be overturned if supported by the trial court's findings of fact and by the application of the correct rule of law. See *Hilo Crane Service, Inc. v. Ho*, 5 Haw. App. 360, 378-79, 693 P.2d 412, 424 (1984), cert. denied, 67 Haw. 685, 744 P.2d 781 (1985). However, a trial court's label is not determinative of the standard of review to be applied on appeal. See *Crosby*, 76 Haw. at 340, 876 P.2d at 1308.

"**HN5**[] The interpretation of a statute is [also] a question of law reviewable *de novo*." *Wilson v. AIG Hawaii Ins. Co.*, 89 Haw. 45, 47, 968 P.2d 647, 649 (1998) (brackets added) (citation omitted). Furthermore,

HN6[] the starting point [***33] in statutory construction is to determine the legislative intent from the language of the statute itself. Our foremost obligation when interpreting a statute is to ascertain and give effect to the intention of the legislature, which is obtained primarily from the language contained in the statute itself. We read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Id. (quoting *Mendes v. Hawaii Ins. Guar. Ass'n*, 87 Haw. 14, 17, 950 P.2d 1214, 1217 (1998) (internal citations, quotation marks, and brackets omitted)).

HN7[] When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .

In construing an ambiguous statute, "the meaning of the ambiguous words may be sought by examining the context, with which ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § I-15(10) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. . . . This court may also consider [***34] "the reason and spirit of the law, and the cause which induced the legislature to enact it . . . to

discover its true meaning." [HRS § 1-15\(2\)](#) (1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." [HRS § 1-16](#) (1993).

[Government Employees Ins. Co. v. Dang, 89 Haw. 8, 12, 967 P.2d 1066, 1070 \(1998\)](#) (quoting [Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 229-30, 953 P.2d 1315, 1327-28 \(1998\)](#)) (some internal citations omitted).

Finally, [HN8](#) [↑] an award or denial of punitive damages is within the sound discretion of the trier of fact and will not be reversed absent a clear abuse of discretion. See [Ditto v. McCurdy, 86 Haw. 84, 91, 947 P.2d 952, 959 \(1997\)](#) (citations omitted). "A court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." [Ho v. Leftwich, 88 Haw. 251, 256, 965 P.2d 793, 798 \(1998\)](#) (citations, internal quotation marks, [***35] and ellipses omitted).

III. DISCUSSION

A. Standing under HRS Chapter 103: The Viability of Appellants' Claims within the State Bidding Process

Appellee T&N contends that the Hawai'i Public Procurement Code and DAGS's General Conditions do not provide for a private cause of action against a successful bidder on the part of the disappointed bidder, and, therefore, that appellants' claims are barred. We disagree. The General Conditions, which were adopted on April 1, 1982 pursuant to HRS Chapter 103 (1965 & 1985), did not limit legal remedies. At most, the General Conditions limited the liability of the State and gave broad discretion to the state agency to review bids and to award or terminate contracts. Further, HRS Chapter 103 did not contain the "Exclusivity of Remedies" provision that it contains today. See [HRS §§ 103D-704](#) (1993);¹¹ [In re Southern Food Groups. L.P., dba Meadow Gold Dairies, 89 Haw. 443, 974 P.2d 1033 \(1999\)](#). In fact, prior to the 1992 amendments to the Hawai'i Public Procurement Code, an "informal" legal remedy evolved whereby the disappointed bidder sought declaratory relief as a taxpayer. See [Brewer Envtl. Indus. Inc. v. A.A.T. Chem., Inc., 73 Haw. 344, 347, 832 P.2d 276, 278 \(1992\)](#); [***36] [Wilson v. Lord-Young Eng'g Co., 21 Haw. 87, 88, 94 \(1912\)](#). Because this remedy was not binding, neither HRS Chapter 103 (1985) nor the General Conditions precluded appellants' cause of action.

Appellants in the present case challenge the trial court's (1) refusal to disqualify appellees and (2) findings and conclusions regarding DAGS's discretion to enforce bidding rules and to award contracts. Appellants seek equitable relief with respect to contracts between DAGS and the winning bidders. However, DAGS is not a party to the instant action. Appellants cite no authority to support their assertion that a trial court has the authority to disqualify a bidder based upon violations of DAGS's regulations or upon its failure to enforce such regulations *when the State of Hawai'i, here DAGS, is not a party*. See generally [Rose v. Oba, 68 Haw. 422, 425-26, 717 P.2d 1029, 1031 \(1986\)](#) [***37] (stating that [HN9](#) [↑] agency regulations affect internal management and do not affect private rights of or procedures available to the public). Insofar as DAGS is not a party, the trial court properly refused to disqualify appellees.

B. The Alter Ego and Piercing the Corporate Veil Doctrines

Appellants advocate for the disregard of Double K and T&N's corporate identities by application of the doctrine known as "piercing the corporate veil." We agree with appellants' characterization of Double K and T&N as shell corporations, yet disagree with appellants' request to pierce the corporate veil.

It is well settled that [HN10](#) [↑] establishing a corporation to limit personal liability is proper and is, alone, an insufficient basis for the application of the doctrines of alter ego or piercing the corporate veil. See 1 *Fletcher Cyclopedia*, *supra*, § 41.20, at 596; see generally [Henry Waterhouse Trust Co. v. Home Ins. Co. of Hawai'i, 27 Haw. 572, 581-82 \(1927\)](#).

¹¹ We expressly decline to decide whether appellants' claims would be preempted by HRS Chapter 103D (1993). We leave that issue for another day.

HN11[] The common purpose of statutes providing limited shareholder liability is to offer a valuable incentive to business investment. Although the greatest judicial deference normally is accorded to the separate corporate [***38] entity, this entity is still a fiction. Thus, when particular circumstances merit--e.g., when the incentive value of limited liability is outweighed by the competing value of basic fairness to parties dealing with the corporation--courts may look past a corporation's formal existence [*241] [**870] to hold shareholders or other controlling individuals liable for "corporate" obligations. *Labadie Coal Co. v. Black*, 217 U.S. App. D.C. 239, 672 F.2d 92, 96 (D.C. Cir. 1982) (citing Dodd, *The Evolution of Limited Liability in American Industry*, 61 Harv.L.Rev. 1351 (1948)). When a corporation is the mere instrumentality or business conduit of another corporation or person, the corporate form may be disregarded.

HN12[] The alter ego doctrine has been adopted by the courts in cases where the corporate entity has been used as a subterfuge and to observe it would work an injustice. The rationale behind the theory is that, if the shareholders or the corporations themselves disregard the proper formalities of a corporation, then the law will do likewise as necessary to protect individual and corporate creditors. The rule is designed to give incentives to those using the corporate form to obey the state's [***39] laws fully by maintaining the formalities and the legal separateness of the corporation. Thus, those who fail to maintain the corporate formalities cannot expect the state to grant them the limited liability that flows from the corporate form. While the instrumentality doctrine has its origin in the context of parent-subsidiary relationships, it has been suggested that a similar analysis is applicable to an individual shareholder's relationship with a corporation.

HN13[] A claim based on the alter ego theory is not in itself a claim for substantive relief, but rather to disregard the corporation as a distinct defendant is procedural. A finding of fact of alter ego, standing alone, creates no cause of action. It merely furnishes a means for a complainant to reach a second corporation or individual upon a cause of action that otherwise would have existed only against the first corporation. An attempt to pierce the corporate veil is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract. The alter ego doctrine is thus remedial, not defensive, in nature. *One who seeks to disregard the corporate veil must show that the corporate form has been abused* [***40] *to the injury of a third person.*

HN14[] Courts apply the alter ego doctrine with great caution and reluctance. In fact, many courts require exceptional circumstances before disregarding the corporate form.

1 *Fletcher Cyclopedia, supra*, § 41.10, at 568-581 (emphasis added). ¹²

[***41] Accordingly, we must decide whether Laupahoehoe and Central were the alter egos of Double K and T&N and whether the corporate veil ought to be pierced in the instant case.

1. *The Alter Ego Doctrine*

¹² Hawai'i courts have been reluctant to disregard the corporate entity. See *Evanston Ins. Co. v. Luko*, 7 Haw. App. 520, 525, 783 P.2d 293, 297 (1989) (piercing corporate veil will "accomplish nothing"); *Hilo Crane Service*, 5 Haw. App. at 374-75, 693 P.2d at 422 (refusing to disregard corporate entity to apply principle of equitable subordination, stating that "mere control or domination of a corporation is not proscribed by law and is in itself insufficient to justify piercing the corporate veil and subordinating claims"); *Chung v. Animal Clinic, Inc.*, 63 Haw. 642, 645, 636 P.2d 721, 723 (1981) (refusing to pierce corporate veil in order to deny owner/employee's workers' compensation benefits); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 526, 543 P.2d 1356, 1360 (1975) (refusing to apply alter ego doctrine); *Tropic Builders, Ltd. v. Naval Ammunition Depot Lualualei Quarters, Inc.*, 48 Haw. 306, 326, 402 P.2d 440, 452 (1965) ("We see no valid reason why the corporate veil should be pierced merely to add another string to plaintiff's bow."); *Henry Waterhouse Trust Co.*, 27 Haw. at 582, 586 (refusing to pierce corporate veil and stating that party claiming corporation is mere instrumentality carries the burden of proof); cf. *Kahili, Inc. v. Yamamoto*, 54 Haw. 267, 269-70, 271-72, 506 P.2d 9, 11-12 (1973) (piercing corporate veil because (1) two shareholders owned all stock, (2) corporation was undercapitalized, and (3) shareholders' behavior in lease negotiations suggested they were acting for their behalf rather than for the corporation).

Appellants argue that the trial court's findings and conclusions that Double K and T & N were not shell corporations of Central, Laupahoehoe, and/or Matsuo were clearly erroneous. We agree with respect to Central and Laupahoehoe.

HN15[¹⁵] Generally speaking, a corporation will be deemed the alter ego of another "where recognition of the corporate fiction would bring about injustice and inequity or [*242] [**871] when there is evidence that the corporate fiction has been used to perpetrate a fraud or defeat a rightful claim." *Chung v. Animal Clinic, Inc.*, 63 Haw. 642, 645, 636 P.2d 721, 723 (1981); see also *Kahili, Inc. v. Yamamoto*, 54 Haw. 267, 271-72, 506 P.2d 9, 11-12 (1973).

Before a corporation's acts and obligations can be legally recognized as those of a particular person, and vice versa, it must be made to appear that [1] the corporation is not only influenced and governed by that person, but that there is such a unity of interest . . . that the individuality, [***42] or separateness, of such person and corporation has ceased, and [2] that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.

Associated Vendors, Inc. v. Oakland Meat Co., Inc., 210 Cal. App. 2d 825, 26 Cal. Rptr. 806, 813 (Cal. Ct. App. 1962) (citations and internal quotation marks omitted). In *Oakland Meat Co.*, 26 Cal. Rptr. at 813-15, the California Court of Appeals catalogued **HN16**[¹⁶] factors that many courts have weighed in determining whether a corporate entity is the alter ego of another. These include:

[1] Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; [2] the treatment by an individual of the assets of the corporation as his own; [3] the failure to obtain authority to issue stock or to subscribe to or issue the same; [4] the holding out by an individual that he is personally liable for the debts of the corporation; [5] the identical equitable ownership in the two entities; [6] the identification [***43] of the equitable owners thereof with the domination and control of the two entities; [7] *identity of . . . directors and officers of the two entities in the responsible supervision and management*; [8] sole ownership of all of the stock in a corporation by one individual or the members of a family; **HN17**[¹⁷] [9] *the use of the same office or business location*; [10] *the employment of the same employees and/or attorney*; [11] *the failure to adequately capitalize a corporation*; [12] *the total absence of corporate assets, and undercapitalization*; [13] *the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation*; [14] *the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities*; [15] *the disregard of legal formalities and the failure to maintain arm's length relationships among related entities*; [16] the use of the corporate entity to procure labor, services or merchandise for another person or entity; **HN18**[¹⁸] [17] the diversion stockholder [sic] or other person or [***44] entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; [18] the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and [19] the formation and use of a corporation to transfer to it the existing liability of another person or entity.

Id. (internal citations omitted) (brackets and emphases added).

This list, however, is not exhaustive. For example, **HN19**[¹⁹] other courts have looked at: (1) incorporation for the purpose of circumventing public policy or statutes; (2) whether the parent finances the subsidiary; (3) whether the subsidiary has no business or assets except those conveyed to it by the parent; (4) whether the parent uses the subsidiary's property as its own; (5) whether the directors of the subsidiary do not act independently in the interest of the corporation but take their orders from and serve the parent; and (6) whether the "fiction of corporate entity . . . has been adopted or used to evade the provisions [***45] of a statute." *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 717 (7th Cir. 1965); see also *Central States, Southeast and Southwest Areas Pension Fund v. Sloan*, 902 F.2d 593, 596-98 (7th Cir. 1990) (finding that creation of alter ego was motivated by a desire to circumvent federal pension fund laws); *Houston-American Life Ins. Co. v. [*243] [**872] Tate*, 358 S.W.2d 645, 656 (Tex. 1962) (corporate fiction ignored when it is used, *inter alia*, to "achieve or perpetrate monopoly" or to circumvent the

insurance code and usury statutes); [United States v. Advance Machine Co., 547 F. Supp. 1085, 1093 \(D. Minn. 1982\)](#) ("The law will not recognize corporate formalities used to circumvent statutory policy or to violate a law."); 1 *Fletcher, supra*, § 43.20, at 767 ("Shared officers and directors are a strong indication of control by the parent, and may be taken into consideration by a court as inferring domination. Thus, a careful review of the entire relationship between various corporate entities, their directors and officers, may reveal that piercing the corporate veil is warranted.").¹³ Ultimately, no one factor is dispositive.

[***46] Appellees contended below that exclusive stock ownership is a prerequisite to a conventional alter ego action. In support of appellees' argument that, at least, "some ownership" interest is required, they cited [Evanston Ins. Co. v. Luko, 7 Haw. App. 520, 525, 783 P.2d 293, 297 \(1989\)](#), and [Estate of Daily v. Title Guar. Escrow Serv. Inc., 178 B.R. 837, 845 \(D. Haw. 1995\)](#), aff'd, 81 F.3d 167 (9th Cir. 1996). This court has stated that [HN20](#)¹⁴ [exclusive ownership and control are not "solely determinative on the issue of whether we should disregard the corporate entity" [Chung, 63 Haw. at 646, 636 P.2d at 724](#). Indeed, "the question is one of control, not merely paper ownership." [Labadie Coal Co., 672 F.2d at 97](#). The mere existence or nonexistence of formal stock ownership is not conclusive. See [J.J. McCaskill Co. v. United States, 216 U.S. 504, 515, 54 L. Ed. 590, 30 S. Ct. 386 \(1910\)](#) (looking "beyond the corporate form to the purpose of it"); [Wolfe v. United States, 798 F.2d 1241, 1242 \(9th Cir.\)](#), amended on other grounds, [806 F.2d 1410 \(9th Cir. 1986\)](#), cert. denied, 482 U.S. 927, 96 L. Ed. 2d 697, 107 S. Ct. 3210 (1987) [***47] (corporation may have separate tax status but be so dominated that it may be regarded as an alter ego); [Shades Ridge Holding Co., Inc. v. United States, 880 F.2d 342, 345-46 \(11th Cir. 1989\)](#), amended on other grounds, [888 F.2d 725](#), cert. denied, 494 U.S. 1027, 108 L. Ed. 2d 609, 110 S. Ct. 1472 (1990); cf. [In re Tax Appeal of Ulupalakua Ranch, Inc., 52 Haw. 557, 562, 481 P.2d 612, 615 \(1971\)](#) (stating that to hold a taxable event had occurred under the general excise law would be "to overemphasize form and to ignore the underlying realities of the situation"); 1 *Fletcher Encyclopedia, supra*, § 41.10, at 581. Therefore, because control is determined by the actual relationship of the parties, formal stock ownership is not dispositive.

Applying the aforementioned legal standards to the instant case, we are led ineluctably to hold that Central was the alter ego of Double K and that Laupahoehoe was the alter ego of T&N. In order to guarantee fairness and to prevent collusive¹⁴ [***49] bidding practices and monopolization, the bid solicitations for the Oahu and Big Island Contracts contained special provisions that restricted the successful bidders from purchasing, [***48] leasing, or using the buses of another bidder who had bid on the same routes or groups of routes. Successful bidders were also required to: (1) "implement and manage" the contract; (2) refrain from assigning, subcontracting, or selling the contract or its operation for four years; and (3) maintain a separate baseyard, "separate and apart from that of another school bus contractor doing business with the State." Competing subsidiaries and/or jointly-owned companies were not permitted to submit bids for the same routes or groups of routes. Further, Specification M's primary purpose was to maximize competition [*244] [**873] within the industry and to address potential monopolies.¹⁵ We reiterate that it is not improper, in and of itself, to form corporations to limit liability; however, it is improper to create or operate another corporate entity in order to circumvent agency rules and regulations carrying the force and effect of law and to contravene clearly enunciated public policy proscribing collusion and monopolization.

¹³ See [HRS § 480-8](#) (1993), which prohibits "interlocking directorates and relationships" that work to eliminate competition by agreement.

¹⁴ [HN21](#)¹⁴ Collusion is defined as

an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose. [Tomiyasu v. Golden, 81 Nev. 140, 400 P.2d 415, 417](#), cert. denied, 382 U.S. 844, 15 L. Ed. 2d 85, 86 S. Ct. 89 (1965)]. A secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose. See Conspiracy.

Black's Law Dictionary 264 (6th ed. 1990) (brackets added).

¹⁵ As noted earlier, [HRS § 103-11](#) expressly provides that DAGS's "rules shall have the force of law."

With respect to the Oahu Contract, Matsuo and Central created Double K in order to control Double K and its bids, while simultaneously leasing Central's buses to Double K and GTI. Matsuo admitted in deposition, and Yamamoto testified at trial, that Matsuo had conceived the idea of forming Double K to circumvent Specification M's ten percent handicap and DAGS's new bus lease restrictions, rather than risk submitting a losing bid and being precluded from leasing Central's buses. Yamamoto, Central's vice-president, suggested the idea to Kurt Kaminaka. Matsuo's attorney incorporated Double K. Matsuo provided Double K with \$ 72,500.00 for start-up. Double K's articles of incorporation authorized the issuance of 250,000 shares of capital stock with a par value of \$ 1.00 per share, yet Double K had no assets except for Matsuo's loan. Although called silent investors by Yamamoto, the Kaminakas, as the incorporating shareholders, never personally paid for any of the stock issued to them and never invested [***50] any money in Double K. Burt Kaminaka and Philip Main were shocked to discover that they were officers and directors of Double K. Kurt Kaminaka, the president of Double K during the relevant period, did not know: (1) whether Double K had sustained a profit or loss during his ownership of the corporation; (2) the name of the bank where Double K maintained its accounts; or (3) the address or geographical location of its baseyard.

Eugene Obara was asked by Matsuo to become president of Double K and was assured by Matsuo and Koga that he would not have to do any work. Eugene testified that Koga gave him \$ 15,000.00 with instructions to deposit the money into his personal checking account and to write a personal check to Kurt Kaminaka. When Double K was sold to the Obaras, Kurt did not negotiate the terms of the sale, yet he received \$ 15,000.00 for the outstanding shares of Double K. The Obaras, like Kurt, also did not participate in the sale negotiations. The Obaras and Kaminakas never attended any board meetings, could not identify where Double K's office and baseyard were located, did not know how many buses, drivers, or routes Double K managed, and were unaware whether Double K made [***51] a profit or loss between 1991 and 1993. Dennis Obara was also "shocked" to discover that he was an officer and director of Double K. The Obaras did not know when their shares were sold, never received any consideration for them, and could not produce any documents transferring or selling their stock to Central, the subsequent owner of record.

With respect to Double K's school bus operation bids, Matsuo and Koga prepared Double K's bid on the Oahu Contract. Kurt's involvement in the process was limited to signing the bid proposal. Double K shared the same baseyard and office space with Central. Employees of Central performed all of Double K's administrative tasks, including the preparation of financial records, tax returns, and payroll. Central had custody of Kurt's signature stamp, which was used on all checks and other matters. Additionally, Central leased approximately ten or twelve buses to Double K, maintained the vehicles, and provided the drivers. When DAGS conducted its investigation of Double K, Double K concealed evidence of loans and lease arrangements with Central. In fact, during his deposition, Kurt Kaminaka testified that he believed that both the clerical tasks and [***52] the bus arrangements were provided pursuant to a lease. Yet Kurt could not explain why he had told the State Comptroller, in his July 17, 1991 letter to DAGS, that no loan agreements or "written" leases existed between Double K and Laupahoehoe, especially in light of the fact that he [*245] [*874] considered Central and Laupahoehoe to be the same entity.

On this record, Double K was so organized and controlled and its affairs conducted in such a manner that it was a mere instrumentality of Central, inasmuch as Central, through Matsuo and other employees, exerted such domination of finances, policies, and practices over Double K that it had no separate mind, will, or existence of its own and merely served as a conduit for Central. Failure to recognize that Central is the alter ego of Double K would sanction a fraud and promote injustice.¹⁶

[***53] With respect to the Big Island Contract, we also hold that the trial court's finding that Laupahoehoe was not the alter ego of T&N is clearly erroneous. Although T&N was incorporated well before the Big Island bid request, similarly to Double K, Matsuo was involved in the creation of T&N, providing the money to "start-up" the fledgling corporation. We note that Specification M had been incorporated into DAGS' bids since the 1970s and that section 3.2.1 was incorporated into the new bids because of suspected collusion between Laupahoehoe and T&N.

¹⁶ Furthermore, although appellees argued that the leasing of buses to Double K and T&N was conducted in arms-length transactions, appellants adduced evidence showing that Central and Laupahoehoe leased 1981 model buses to Double K and T&N at \$ 150 and \$ 160, respectively, yet leased the same buses to GTI at a rate ranging from \$ 300 to \$ 420.

Laupahoehoe's control over T&N is further evidenced by the fact that Ura, T&N's one hundred percent stock holder, president, and operations manager, contributed no money to T&N's assets and could not recall having performed any work for T&N between 1988 and 1990, the period just prior to the Big Island Contract. Ura also could not recall who prepared or drafted the articles of incorporation even though he signed them.

With respect to T&N's operation, Matsuo and Dayton Oniwa, an employee of Laupahoehoe, calculated and prepared T&N's bid proposal. T&N shared office space with and leased its baseyard from Laupahoehoe. Although Ura possessed [***54] sole authority to sign checks, received a salary of \$ 800.00 per month, and had use of the company car, Laupahoehoe retained custody of T&N's checkbook and performed its administrative work--including bookkeeping, accounts payable and receivable, driver payroll, and taxes. T&N also leased its buses from Laupahoehoe, with a standing order for replacement buses in the event of a breakdown. Laupahoehoe serviced, repaired, and fueled all T&N's vehicles, and provided its bus drivers. Upon T&N's being awarded the contract, Matsuo extended loans for T&N's bid guaranties.¹⁷ Finally, although Ura proclaimed that T&N was his company, when asked what he did, with respect to running the company, he defined his position to be that of a janitor or handyman.

[***55] With regard to the collusive nature of Laupahoehoe and Matsuo's conduct in simultaneously controlling T&N and Laupahoehoe's bids, George Okano testified:

Q [by Mr. Nakashima]: Was there any other reason that [section 3.2.1] was implemented [to prohibit] a bidder [from] leasing buses to the winning bidder, one bidder?

....
A [by Okano]: Okay, there were previous bids whereby T&N and Laupahoehoe had bid and one of the companies would withdraw their bid if both companies were the low bid, allowing the higher bid to win the award.

Q: What would happen if there was a middle bidder between Laupahoehoe and T&N?

A: Then the lower bidder would accept the award of the contract. I think that just happened once.

....

Q: What did you mean by not fully independent?

[*246] [**875] A: Companies that would speculate or [were] suspected of being affiliated with another company, we'd suspect.

Q: Would that include T&N and Laupahoehoe?

A: T&N, the emergence of T&N did present a lot of suspicion.

Q: Going back to my original question, in that scenario where an affiliated company would bid one amount and the other affiliated company would bid at a higher amount on the same route, what [***56] would you describe that as?

A: Unfair.

Q: That's because--why would that be unfair to have affiliated companies bidding high and low?

A: Essentially putting in two bids and selecting according to your advantage.

Based on the overwhelming weight of the evidence, we hold that T&N was so organized and controlled and its affairs conducted in such a manner that it was, in fact, a mere instrumentality of Laupahoehoe, inasmuch as Laupahoehoe exerted such domination of finances, policies, and practices of T&N that it had no separate mind, will, or existence of its own and merely served as a conduit for Laupahoehoe.¹⁸

¹⁷ Relying mainly upon a lack of commingled assets, the trial court held that there was insufficient evidence to conclude that Double K and T&N were mere instrumentalities or alter egos of Matsuo, Central and/or Laupahoehoe. See FOF No. 117. This lone factor is not dispositive of the issue.

¹⁸ Although appellants presented evidence that Matsuo was a key figure in the shell scheme, *i.e.*, as 94% owner and C.E.O. of C.M. Holding Corporation, as an officer and director of Laupahoehoe and Central, and as a participant in daily operations, the record supports a conclusion that Matsuo was acting as the owner and leader of the corporations, rather than as their alter ego.

[***57] 2. *Piercing the Corporate Veil*

We must now determine whether the corporate veil ought to be pierced. Are the plaintiffs, RHSB and STI, asserting a claim against a second corporation or individual, *i.e.*, Matsuo, Laupahoehoe, or Central, upon a cause of action that otherwise would have existed only against the first corporations, *i.e.*, Double K and T&N? Are plaintiffs attempting to pierce the corporate veil as a means of imposing liability on an underlying cause of action, such as a tort or breach of contract, incurred solely by the shell corporations? The answer to both of these questions is no.

Appellants complaint is lodged directly against Laupahoehoe, Central, and Matsuo, as well as Double K and T&N. Although we acknowledge that it is the "factual" recognition of the scheme that is necessary to the survival of appellants' claims, such claims survive without this court unnecessarily "piercing the corporate veil." Because, as a factual matter, Matsuo, Laupahoehoe, and Central's control over Double K and T&N touches appellants' statutory and common law claims, we hold that Central and Laupahoehoe are alter egos of Double K and T&N, respectively. Insofar as appellants [***58] have maintained their claims directly against Matsuo, Laupahoehoe, and Central, we need not "pierce the corporate veil."

C. *Claims under HRS Chapter 480*

Appellants contend that Matsuo, Laupahoehoe, and Central "secretly acting in concert" incorporated, controlled, and/or operated Double K and T&N as shell corporations, circumventing DAGS's regulations, to gain unfair competitive advantage for Laupahoehoe and Central and to monopolize the school bus industry in violation of [HRS §§ 480-2](#) and [480-9](#). Appellees contend, as a threshold matter, that [HN23](#) [↑] appellants lack standing to obtain relief under [HRS §§ 480-2](#) and [480-13](#) insofar as the present matter is a private dispute between competing businesses.¹⁹ We agree.

[***59] [*247] [**876] 1. *Standing to Assert Unfair Methods of Competition under HRS §§ 480-2 and 480-13*

[HN22](#) [↑] The party claiming that a corporation is an alter ego of another bears the burden of proof. See [Henry Waterhouse Trust Co., 27 Haw. at 582](#). Thus, in this regard, we affirm the trial court's findings and conclusions.

¹⁹ Appellees also contend that appellants' [HRS § 480-2](#) claims fail because appellees are shielded by the doctrine of "state action immunity." [HN24](#) [↑] The "state action immunity" doctrine provides that losing bidders are barred from bringing antitrust claims against either the agency or successful bidder, where the state has exclusive control of a bidding process and creates a monopoly by awarding all contracts to one successful bidder. See [Buckley Constr., Inc. v. Shawnee Civ. & Cultural Dev. Auth., 933 F.2d 853 \(10th Cir. 1991\)](#). The challenging bidder must show that: (1) "the challenged behavior is sanctioned by a clearly articulated and affirmatively expressed state policy;" and (2) "the state expressly supervises the private anticompetitive conduct at issue." [Lease Lights, Inc. v. Public Serv. Co. of Oklahoma, 849 F.2d 1330, 1333 \(10th Cir. 1988\)](#), cert. denied, [488 U.S. 1019, 102 L. Ed. 2d 807, 109 S. Ct. 817 \(1989\)](#) (citing [Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 \(1985\)](#)); see also [California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104-06, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#); 1 Philip E. Areeda & Herbert Hovenkamp, [Antitrust Law. An Analysis of Antitrust Principles and Their Application](#) P221, at 357 (rev. ed. 1997). Appellees defense in this regard is meritless. It is patently obvious that DAGS intended to foster competition. Without addressing the state immunity doctrine in greater depth, we have serious reservations that it would apply to shield a successful bidder where there is evidence that such bidder attempted to deceive a state agency concerning its independence from another bidder in order to circumvent bidding rules.

Appellees also adduced considerable evidence at trial to prove that RHSB and STI had unclean hands. It is well settled that [HN25](#) [↑] the unclean hands defense is precluded in [HRS § 480-13](#) claims for monetary damages. See [Davis v. Wholesale Motors, Inc., 86 Haw. 405, 417-18, 949 P.2d 1026, 1038-39 \(App. 1997\)](#) (citing [International Tel. and Tel. Corp. v. General Tel. & Elecs. Corp., 296 F. Supp. 920, 926 \(D. Haw. 1969\)](#)). "The U.S. Supreme Court has explained that 'the plaintiff who reaps the reward of treble damages [in an antitrust suit] may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.'" *Id.* (citing [Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139, 20 L. Ed. 2d 982, 88 S. Ct. 1981 \(1968\)](#), overruled on other grounds by [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 765-66, 716, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#)) (footnote omitted).

HN26[] Reading the statutory language of [HRS §§ 480-2](#) and [480-13](#) *in pari materia*, this court, in [Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 612, 607 P.2d 1304, 1308-09 \(1980\)](#), and [Island Tobacco Co. Ltd. v. R.J. Reynolds Tobacco Co., 63 Haw. 289, 296-97, 627 P.2d 260, 266 \(1981\)](#), held that [HRS § 480-13](#) affords a private remedy for any violation of [HRS § 480-2](#).²⁰ However, both *Ai* and *Island Tobacco Co.* involved claims of unfair or deceptive acts or practices, *not* unfair methods of competition. The following explains why we must revisit the overly broad holdings of both *Ai* and *Island Tobacco Co.* and restrict their application to unfair or deceptive acts or practices claims.

As recognized in [Island Tobacco Co., 63 Haw. at 296-97, 627 P.2d at 266](#), HRS Chapter [***60] 480 was first enacted "in 1961 to fill a vacuum created by the advent of statehood." Prior to statehood, federal antitrust laws applied to trade in Hawaii as a territory of the United States. See *id.* "When the state legislature undertook the task of fashioning Hawaii's antitrust law, it logically followed the federal paradigm." *Id.* For example, **HN27**[] [HRS § 480-4](#) (1993), which prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce[,"] traces, verbatim, the language of [Section 1](#) of the Sherman Antitrust Act, 26 Stat. 209, as amended, [15 U.S.C. § 1](#).²¹ [***61] Similarly, [HRS § 480-9](#) (1985 & Supp. 1992) provides that "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," tracing [Section 2](#) of the Sherman Antitrust Act, [15 U.S.C. § 2](#).²²

[*248] [**877] [HRS § 480-13\(a\)\(1\)](#) (Supp. 1992) was also included within the 1961 enactment and permits any person²³

who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter . . . [to] . . . sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$ 1,000 or threefold damages by the plaintiff sustained, whichever sum is greater, and reasonable attorneys fees together with [***62] the costs of suit

See also 6 Julian von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 111.07, at 111-18 (2d ed. 1998) (*Von Kalinowski on Antitrust*). [HRS § 480-13](#) traces the language of Section 4 of the Clayton Act, 38 Stat. 731, as amended, [15 U.S.C. § 15](#),²⁴ which provides a private cause of action for violations of the antitrust laws, namely the substantive provisions of the Sherman and Clayton Acts.

²⁰ See also [Paulson, Inc. v. Bromar, Inc., 775 F. Supp. 1329, 1338 \(D. Haw. 1991\)](#).

²¹ In 1890, the Sherman Antitrust Act was enacted to target unreasonable restraints of trade and was intended to codify well recognized principles of the common law. See 2 Philip R. Areeda & Herbert Hovenkamp, [Antitrust Law. An Analysis of Antitrust Principles and Their Application](#) PP302-3, at 2-7 (rev. ed. 1997) (Areeda & Hovenkamp). [Section 1](#) of the Sherman Antitrust Act provides in part: "**Trusts, etc., in restraint of trade illegal; penalty.** 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. . . ."

²² [Section 2](#) of the Sherman Antitrust Act provides:

Monopolizing trade a felony; penalty. 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.

²³ "Person," as defined by [HRS § 480-1](#) (1985 & Supp. 1992), includes a corporation.

²⁴ Enacted in 1914, the Clayton Act was targeted at activities which substantially lessened competition, providing more specific proscriptions to antitrust legislation, as well as a private remedies provision. See 2 Areeda & Hovenkamp, *supra*, P303, at 2-10. Section 4 of the Clayton Act provides in relevant part:

[***63] Hawaii's **antitrust law**, currently found within HRS Chapter 480, was amended in 1965 to include:

Sec. 205A-1.1. **Unfair competition, practices, declared unlawful.** Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Sec. 205A-1.2. **Interpretation.** It is the intent of the legislature that in construing section 205A-1.1 the courts *will be guided by the interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1)*²⁵ of the Federal Trade Commission Act."

1965 Haw. Sess. L. Act 129, § 1, at 176-77 (emphasis and footnote added). HRS § 480-2 was again amended in 1980 to slightly change the guidance language of Section 480-2(b) and in 1987 to add sections 480-2(c) and (d) (Supp. 1992). The amendments provided:

(b) In construing this section, the courts and the office of consumer protection *shall give due consideration* to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time [***64] to time amended.

(c) *No showing that the proceeding or suit would be in the public interest* (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section.

(d) *No person other than a consumer*, the attorney general or the director of the office of consumer protection may bring an action based upon *unfair or deceptive acts or practices* declared unlawful by this section.

(Emphases added.)

Whether we are "guided by the interpretations of" or "give due consideration to the rules, regulations, and decisions [***65] of the Federal Trade Commission and the federal courts interpreting section 5(a)(1)," it is apparent that HN28 [↑] the private remedy provision contained in section 4 of the Clayton Act does not extend to Section 5(a)(1) of the FTCA, [*249] [**878] i.e., the "unfair methods of competition" section, and that the FTCA does not afford a private cause of action. See Pan American World Airways, Inc. v. United States, 371 U.S. 296, 306, 9 L. Ed. 2d 325, 83 S. Ct. 476 (1963); Federal Trade Commission v. Cement Institute, 333 U.S. 683, 703 n.12, 92 L. Ed. 1010, 68 S. Ct. 793, reh'g denied, 334 U.S. 839, 92 L. Ed. 1764, 68 S. Ct. 1492 (1948); Amalgamated Utility Workers v. Consolidated Edison Co. of New York, Inc., 309 U.S. 261, 269, 84 L. Ed. 738, 60 S. Ct. 561 (1940); Federal Trade Commission v. Klesner, 280 U.S. 19, 25-30, 74 L. Ed. 138, 50 S. Ct. 1 (1929); 2 Philip R. Areeda & Hebert Hovenkamp, Antitrust Law, An Analysis of Antitrust Principles and Their Application P305a, at 15 (rev. ed. 1997) (hereafter Areeda & Hovenkamp). In 1914, the FTCA was enacted to supplement the Sherman Act, 15 U.S.C. §§ 1 to 7, and the Clayton Act, 15 U.S.C. §§ 12 to 27, by empowering the FTC with cumulative remedies against activities detrimental [***66] to competition. See Federal Trade Commission v. Raladam Co., 283 U.S. 643, 647-48, 75 L. Ed. 1324, 51 S. Ct. 587 (1931); Federal Trade Commission v. Cement Institute, 333 U.S. 683, 690-93, 92 L. Ed. 1010, 68 S. Ct. 793, reh'g denied, 334 U.S. 839, 92 L. Ed. 1764, 68 S. Ct. 1492 (1948); Federal Trade Commission v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394, 97 L. Ed. 426, 73 S. Ct. 361, reh'g denied, 345 U.S. 914, 97 L. Ed. 1348, 73 S. Ct. 638 (1953). In fact, the legislative history to the FTCA provided:

Suits by persons injured. (a) Amount of recovery; prejudgment interest[.] Except as provided in subsection (b) of this section, 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. . . .

²⁵ Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45 (FTCA) provides in relevant part: **Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade.** (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

It is now generally recognized that the only effective means of establishing and maintaining monopoly, where there is no control of a natural resource . . . [without the use] of transportation, is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition. *This can be best accomplished through the action of an administrative body of practical men thoroughly informed in regard to business, who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations.*

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human [***67] inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances. What is harmful under certain circumstances may be beneficial under different circumstances.

H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., at 18-19 (1914) (brackets and emphasis added); see also 2 Areeda & Hovenkamp, *supra*, P305a, at 12. Section 5 was amended in 1938 to extend the FTC's jurisdiction to "unfair or deceptive acts or practices." *Id.* P305c, at 13 n.4. Therefore, Congress enacted section 5 of the FTCA to combat activities in their incipiency that exhibit a strong potential for stifling competition. See [Federal Trade Commission v. Texaco, 393 U.S. 223, 225, 21 L. Ed. 2d 394, 89 S. Ct. 429 \(1968\)](#).

It is commonly understood that [HN29](#) [↑] section 5 is not limited to "the prohibitions of the Sherman or the Clayton [***68] Act. Indeed, [section] 5 is not confined by antitrust concepts at all. It allows the Commission to condemn conduct that is 'unfair' in senses 'beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.'" Areeda & Hovenkamp, *supra*, P307a, at 21-22 (brackets added); see also [Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 454, 90 L. Ed. 2d 445, 106 S. Ct. 2009 \(1986\)](#). In other words, the FTC, as an agency acting within its field of expertise, administers and enforces section 5 of the FTCA to terminate conduct that it deems to have a strong potential of reducing or eliminating legitimate competition in the future.

In light of the decisions of the FTC and federal interpretations of section 5(a)(1) of the FTCA, the statutory language of [HRS § 480-2](#) is ambiguous. We must, therefore, [*250] [**879] look to the legislative history of [HRS § 480-2](#) for further guidance.

The 1965 legislative history underlying [HRS § 480-2](#) includes the following:

H.B. No. 136 would amend the Hawaii Antitrust Act by adding a new section declaring unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce unlawful. [***69] *The purpose of the bill is to provide the Attorney General with much needed authority to bring proceedings to enjoin unfair and deceptive business practices by which consumers are defrauded and the economy of the State is harmed.*

There has been established in the Attorney General's Office of a Fair Business Practices Division. That division has been assigned the responsibility for developing and administering an effective fair business program to protect both consumers and honest businessmen from fraudulent, unfair or deceptive business practices. The authority to stop and prevent practices of this nature, which H.B. No. 136 would provide, is essential to an effective fair business program.

....

The Hawaii Antitrust Act now contains appropriate enforcement provisions, including authority to the Attorney General to bring proceedings to enjoin any violations of the provisions of the act. The amendment of the act, as provided by H.B. 136, would make all of its enforcement provisions, except the criminal provisions, applicable

*to the amendment.*²⁶ Primarily, as indicated above, it would empower the Attorney General to maintain suits to enjoin the continuation of unfair methods [***70] *of competition and unfair or deceptive acts or practices in the conduct of trade and commerce.*

....

Hse. Stand. Comm. Rep. No. 55, in 1965 House Journal, at 538 (emphases and footnote added); see also Hse. Stand. Comm. Rep. No. 267, in 1965 House Journal, at 599-600 ("H.B. No. 136 would authorize the Attorney General to seek an injunction from the courts against continuing particular practices.").

[**71] The legislative history relating to the 1987 amendment also stated in relevant part:

The purposes of this bill were to establish definitions of "class action" and "de facto class action" and to make several amendments to Chapter 480, Hawaii Revised Statutes, including the following:

(1) Provided that the \$ 1,000 minimum recovery provision is only applicable to consumer suits based upon unfair or deceptive practices brought under Section 480-2, unfair and deceptive practices;

....

(5) Provided that suits based upon unfair or deceptive acts or practices under Section 480-2 may be brought only by consumers, the Attorney General, or the Office of Consumer Protection, *in effect precluding its application to private disputes between businessmen.*

Your Committee finds that current law is unclear and the procedure confusing. Upon further consideration, your Committee [*251] [**880] has made numerous amendments to the bill including the following:

....

2. Amended Section 480-2, Hawaii Revised Statutes, by requiring that the court and Office of Consumer Protection shall be guided by rules, regulations, and decisions of the Federal Trade Commission and the federal court[s] and [***72] by providing that it shall not be necessary to show that the proceeding or suit brought under this section would be in the public interest and that no other person other than a consumer, the Attorney General or the director of the Office of Consumer Protection may bring an action under this section. The amendment to Section 480-2 is intended to clarify actions of unfair and deceptive acts and is not intended to affect suits based upon unfair methods of competition. . . .

Hse. Conf. Comm. Rep. No. 104, in 1987 House Journal, at 1053 (emphases added). Additional legislative history states:

....

Your Committee has received testimonies from attorneys who have litigated in this area of law.

Presently, Chapter 480 has been interpreted by some courts as allowing individual plaintiffs who can prove that they have been injured because of an antitrust violation to recover a minimum amount of \$ 1,000 regardless of the actual amount of damages sustained. Other courts have decided differently. The applicable penalties

²⁶ This court, in Ai, 61 Haw. at 612 n.10, 607 P.2d at 1309 n.10, interpreted this language as establishing conclusively the legislature's intent to create a private cause of action for all violations of Section 480-2. However, as noted above, Ai entailed an unfair or deceptive acts or practices claim, not an unfair methods of competition claim. Furthermore, the Ai court cited, among other cases, Radovich v. National Football League, 352 U.S. 445, 454, 1 L. Ed. 2d 456, 77 S. Ct. 390, reh'g denied, 353 U.S. 931, 1 L. Ed. 2d 724, 77 S. Ct. 716 (1957), which is inapposite to private enforcement of unfair competition claims. Radovich, 352 U.S. at 446-47, involved violations of sections 1 and 2 of the Sherman Antitrust Act, which fall squarely within the private enforcement measures of section 4 of the Clayton Act--unlike section 5 of the FTCA. What is most telling is that (1) nearly all of the legislative history relating to HRS § 480-2 focuses upon consumer protection through unfair or deceptive acts or practices and (2) there is no discussion of the effects that recognizing a private claim for unfair competition would have on competition--when protecting competition is one of the fundamental purposes of antitrust legislation. This leads us to conclude that the legislature did not intend to extend HRS § 480-13 to unfair methods of competition claims. Insofar as Ai, 61 Haw. at 612, 607 P.2d at 1308-09, holds that a private cause of action exists for unfair methods of competition under HRS § 480-2, it is overruled.

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provisions require classification. When this law was enacted, the Legislature did not intend to impose draconian measures upon defendants in the guise of enforcing [***73] our antitrust laws. . . .

Hse. Stand. Comm. Rep. No. 575, in 1987 House Journal, at 1371 (emphasis added).

We now interpret the legislative history to the 1965 and 1987 amendments *not* to recognize or create a private claim for relief under [HRS § 480-13](#) for unfair methods of competition in violation of [HRS § 480-2](#).²⁷ This interpretation in no way limits consumer claims for unfair or deceptive acts or practices under [HRS § 480-2](#) or, *inter alia*, private claims for violations of [HRS §§ 480-4](#) or [480-9](#). The Hawai'i legislature has made clear pronouncements on these claims, either through the statutory language of [HRS § 480-2\(d\)](#) or through the guidance of similar federal antitrust statutes as permitted in [HRS § 480-3](#).

[***74] In a similar vein, the United States Court of Appeals for the Ninth Circuit succinctly stated that

it is a simple but important truth . . . that our antitrust laws are designed to protect the integrity of the market system by assuring that competition reigns freely. While much has been said and written about the antitrust laws during the last century of their existence, ultimately the court must resolve a practical question in every . . . [antitrust] case: Is this the type of situation where market forces are likely to cure the perceived problem within a reasonable period of time? Or, have barriers been erected to constrain the normal operation of the market, so that the problem is not likely to be self-correcting? In the latter situation, it might well be necessary for a court to correct the market imbalance; in the former, a court ought to exercise extreme caution because judicial intervention in a competitive situation can [*252] [*881] itself upset the balance of market forces, bringing about the very ills the antitrust laws were meant to prevent. See R. Coase, *The Firm. The Market, and the Law* 117-19 (1988); R. Posner, *Economic Analysis of Law* 324-25, 338-39 (3d ed. 1986). [***75]

[United States v. Syufy Enterprises, 903 F.2d 659, 663 \(9th Cir. 1990\)](#) (addressing claims under the Sherman Antitrust Act) (brackets added).

As one might guess, the broad and flexible language of [HRS § 480-2](#) could prove to have deleterious effects on competition when used as an instrument by private plaintiffs with predominantly private interests. See [Holloway v. Bristol-Myers Corp., 158 U.S. App. D.C. 207, 485 F.2d 986, 989-91 \(D.C. Cir. 1973\)](#) ("the breadth of prohibition carried with it a danger that the [FTCA] might become a source of vexatious litigation" (Brackets added.)). Indeed, we must be careful to avoid constructions of [HRS § 480-2](#) "which might chill competition, rather than foster it." [Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 \(1993\)](#); see also [Syufy Enterprises, 903 F.2d at 668](#) ("It can't be said often enough that the antitrust laws protect competition, not competitors." (emphasis in original)); but see [Cel-Tech Communications Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 560-565, 973 P.2d 527 \(Cal. 1999\)](#) (clarifying California's Unfair Competition Statute, Bus. & Prof. Code, § [***76] 17200, et seq., which recognizes private standing); [Inka's S'Coolwear, Inc. v. School Time, L.L.C., 725 So. 2d 496, 501 \(La. Ct. App. 1998\)](#) (recognizing an existing private action for unfair trade practices).

²⁷ This court, in [Island Tobacco Co., 63 Haw. at 301, 627 P.2d at 269](#), stated that [HRS § 480-2](#) is

designed to aid "competitors," as much as to protect "competition." And unlike the Federal Trade Commission Act, the policy of Hawaii law, as expressed in [HRS § 480-13](#), is to foster private suits grounded on unfair or deceptive trade practices even where the unlawful acts do not culminate in injury to "competition."

See [id. at 301 n.12, 627 P.2d at 269 n.12](#) (citing Hse. Standing Comm. Rep. No. 735-74, in 1974 House Journal 829, 830; Sen. Stand. Comm. Rep. No. 703-74, in 1974 Senate Journal 1020, 1021). As noted above, *Island Tobacco Co.* did not involve an unfair methods of competition claim. Furthermore, because the legislature specifically limited a competitor's ability to bring an unfair or deceptive acts or practices claim to consumers, see [HRS § 480-2\(d\); Cieri v. Leticia Query Realty, Inc., 80 Haw. 54, 61-62, 905 P.2d 29, 36-37 \(1995\)](#), we do not regard *Island Tobacco Co.* as being dispositive on this issue. Insofar as [Island Tobacco Co., 63 Haw. at 301, 627 P.2d at 269](#), holds that a private cause of action exists for unfair methods of competition under [HRS § 480-2](#), it is also overruled.

Therefore, because the fundamental purpose underlying the FTCA is to empower the FTC with the authority to prevent activities that have the strong potential for lessening or destroying competition and because the legislative history of [HRS § 480-2](#) establishes that the primary purpose of its insertion into HRS Chapter 480 is to empower the Fair Business Practices Division of the Department of the Attorney General with the means and authority to do the same, we hold that [HN30](#)[↑]] there is no private claim for relief under [HRS § 480-13](#) for unfair methods of competition in violation of [HRS § 480-2](#). Given the danger of chilling competition and suppressing legitimate business innovations, we decline to deviate from the distinct and well understood statutory policy of section 5(a)(1) of the FTCA, in the absence of a clear pronouncement on the part of the Hawai'i legislature.

2. Violations of [HRS § 480-9](#)

Appellants contend that the trial court erred in (1) holding [***77] that there was insufficient evidence to conclude that appellees attempted to monopolize the school bus industry and (2) employing a retrospective rather than a prospective test in its analysis of the dangerous probability of success. Although we agree with appellants that the trial court erred in relying solely on appellees' lack of subsequent market success, we affirm the trial court's conclusion that there was insufficient evidence to support appellees' attempt to monopolize claim.

As a threshold matter, we must address the form of appellants' claim. Appellants alleged in their complaint that appellees *conspired*²⁸ [***78] to monopolize the school bus industry. Prior to and during trial, appellants conceded that the facts of the case supported an attempt to monopolize claim rather than an actual monopolization claim. We assume that appellants were attempting to allege a concerted attempt to monopolize. Such an allegation implicates both [HRS §§ 480-4\(a\)](#) (1993) and [480-9](#).²⁹

[*253] [**882] In [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 768-773, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984), the United States Supreme Court explained the distinction between unilateral and concerted conduct for purposes of a single firm under [section 1](#) of the Sherman Act. Focusing upon [***79] the singular nature of economic interests within a single firm, the Court stated that it is clear that officers or employees, as well as unincorporated divisions, of the same corporation or business cannot provide the plurality of actors necessary for a [section 1](#) conspiracy. *Id. at 769-770*. Similarly,

the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of [§ 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 consciousness, but one....

Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A [§ 1](#) agreement may be found when "the conspirators had 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. 781, 810, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 (1946)....

²⁸ [HN31](#)[↑]] Generally speaking, "the accepted definition of a conspiracy is a combination of two or more persons [or entities] by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." [Duplex Printing Press Co. v. Deering](#), 254 U.S. 443, 466, 65 L. Ed. 349, 41 S. Ct. 172 (1921) (citation omitted); see also [Island Tobacco Co. v. R.J. Reynolds Tobacco Co.](#), 513 F. Supp. 726, 739 (D. Haw. 1981); [Bonds v. Landers](#), 279 Ore. 169, 566 P.2d 513, 516 (Or. 1977) (citing 15A C.J.S. 599 *Conspiracy* § 1(2)).

²⁹ [HRS § 480-4](#), like [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 in the State, or in any section of this State[,] is illegal." [HRS § 480-9](#), like [section 2](#) of the Sherman Act, also condemns those who "combine or conspire . . . to monopolize." "The prohibition is curious because, given [§ 1](#), it seems entirely redundant." 3A Areeda & Hovenkamp, *supra*, P809, at 370. A conspiracy in violation of [HRS § 480-9](#) requires the same proof needed to prove a combination or conspiracy in restraint of trade under [HRS § 480-4](#). See [International Distrib. Centers v. Walsh Trucking Co.](#), 812 F.2d 786 (2d Cir.), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987) (addressing [sections 1](#) and [2](#) of the Sherman Act).

[467 U.S. at 772.](#)

Previously, we have held that Central and Laupahoehoe are [***80] alter egos of Double K and T&N, respectively. It would be wholly inconsistent to hold that Double K and Central or T&N and Laupahoehoe could constitute a plurality of actors for purposes of a conspiracy whether construed under [HRS §§ 480-4](#) or [480-9](#). See [Ulrich v. The Security Investment Co., Ltd.](#), 35 Haw. 158, 167 (1939) (stating that [HN32](#)[[↑]] it is "impossible" to conspire with an alter ego). Moreover, inasmuch as Laupahoehoe and Central are two wholly owned subsidiaries of the same parent, C.M. Holding Corporation, and inasmuch as they share a singular economic interest (akin to unincorporated divisions of the same corporation), they cannot constitute a plurality of actors for purposes of antitrust conspiracy. See 7 Philip Areeda, [Antitrust Law. An Analysis of Antitrust Principles and Their Application](#) PP 1463h and 1464a, at 230-233 (1986). In fact, testimony was adduced that Laupahoehoe and Central were perceived as one and the same company. Thus, Laupahoehoe and Central cannot conspire in violation of [HRS §§ 480-4](#) or [480-9](#).

Furthermore, Matsuo was also unable to conspire for purposes of [HRS §§ 480-4](#) or [480-9](#). Matsuo was an officer of Laupahoehoe and Central during [***81] the relevant time period. It is well recognized that an officer of a corporation cannot conspire with the corporation. See [Herrmann v. Moore](#), 576 F.2d 453, 459 (2d Cir.), cert. denied, 439 U.S. 1003, 58 L. Ed. 2d 679, 99 S. Ct. 613 (1978); [Nelson Radio & Supply Co. v. Motorola, Inc.](#), 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925, 97 L. Ed. 1356, 73 S. Ct. 783 (1953). Nevertheless, we recognize that, "when officers of a corporation act for their own personal purposes, they become independent actors, who can conspire with the corporation." [Dussouy v. Gulf Coast Inv. Corp.](#), 660 F.2d 594, 603 (5th Cir. 1981) (cited in [Rowland v. Union Hills Country Club](#), 157 Ariz. 301, 757 P.2d 105, 110 (Ariz. Ct. App. 1988), and [Benningfield v. City of Houston](#), 157 F.3d 369, 378 (5th Cir. 1998), cert. denied, 143 L. Ed. 2d 543, 119 S. Ct. 1457 (1999)). However, here, Matsuo was also the 94% owner of C.M. Holding Corporation (with his daughters owning the remaining six percent). Insofar as the facts reveal that Matsuo's economic interest, with regard to this case, was the same as that of Laupahoehoe and Central, we hold that Matsuo could not conspire [***82] for purposes of [HRS §§ 480-4](#) or [480-9](#).

[*254] [**883] Turning to appellants' claims [HN33](#)[[↑]] under [HRS § 480-13\(a\)](#),³⁰ [***83] in order to have standing to bring a claim for relief, a plaintiff must show: (1) a violation of HRS Chapter 480; (2) injury to plaintiff's business or property;³¹ [***84] (3) proof of the amount of damages;³² [***85] and (4) a showing that the action is

³⁰ It has been argued that [section 480-13\(a\)](#) is an automatic damages provision. The plain language of [HRS § 480-13\(a\)](#), however, requires some evidence of damage. Indeed, "while proof of a violation of chapter 480 is an essential element of an action under [HRS § 480-13](#), the mere existence of a violation is not sufficient ipso facto to support the action; forbidden acts cannot be relevant unless they cause [some] private damage." [Ai](#), 61 Haw. at 618, 620-21, 607 P.2d at 1312, 1313 (citing E. Timberlake, *Federal Treble Damage Antitrust Actions* § 3.04 (1965)) (brackets added); see also, 4 Rudolph Callmann, *Unfair Competition, Trademarks and Monopolies*, § 22.03, at 10-13 (4th ed. 1997); Sen. Stand. Comm. Rep. No. 600, in 1969 Senate Journal, at 1111 (Hawai'i legislature amended [HRS § 480-13](#) to provide a minimum \$ 1,000 award to encourage private consumers to bring unfair or deceptive acts or practices suits).

³¹ It is not clear whether the trial court viewed the elements of (1) resulting injury to business or property and (2) damages as one and the same. These are two distinct elements of [HRS § 480-13](#). Indeed, federal case law has interpreted the "injury to business or property" language of section 4 of the Clayton Act as a causation requirement, requiring a showing of "antitrust injury." "Plaintiffs must prove . . . [an] injury of the type the antitrust laws were intended to prevent[, one] . . . 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.'" [Brunswick Corp. v. Pueblo Bowl-O-Mat](#), 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) (citation omitted); see also [Atlantic Richfield Co. v. USA Petroleum Co.](#), 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990); [Pacific Exp., Inc. v. United Airlines, Inc.](#), 959 F.2d 814, 818 (9th Cir. 1992), cert. denied, 506 U.S. 1034, 121 L. Ed. 2d 686, 113 S. Ct. 814 (1992); 1 Callmann on *Unfair Competition*, *supra*, § 4.47, at 433-36.

Also known as the "fact of damage" requirement, the antitrust plaintiff need not prove with particularity the full scope of profits that might have been earned. Instead, it requires a showing, with some particularity, of actual damage caused by anticompetitive conduct that the antitrust laws were intended to prevent. See [Zenith Radio Corp. v. Hazeltine Research, Inc.](#), 395 U.S. 100, 113,

in the public interest.³³ See *Ai, 61 Haw. at 612, 607 P.2d at 1311*. The following reveals that appellants' claim fails because they failed to prove a violation of HRS Chapter 480.

HN34 [↑] An attempt to monopolize claim, under [HRS § 480-9](#), requires proof: (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. See *Spectrum Sports, Inc., 506 U.S. at 456* (citation omitted); *Bartleys Town and Country Shops, Inc. v. Dillingham Corp., 530 F. Supp. 499 at 512* (placing antitrust injury element within attempt test rather than within elements for relief under Clayton Act, § 4); 1 *Von Kalinowski on Antitrust, supra*, § 2.03[2], at 2-23 to 2-14.

With respect to the element of predatory or anticompetitive conduct, appellants have alleged that appellees engaged in unfair competition in their circumvention of DAGS's [*255] [**884] bidding rules and regulations in order to bid on contracts and lease buses simultaneously. Although appellants do not have standing to bring an unfair methods of competition claim under [HRS § 480-2](#), we agree [***86] that appellees' conduct constitutes unfair competition³⁴ for purposes of an attempt to monopolize claim. However, for appellants' claim to succeed, "it must also appear that there is a causal connection between the conduct and the monopoly power." 3A *Areeda & Hovenkamp, supra*, P806c, at 330.

[**87] **HN37** [↑]

Regarding the element of a specific intent to monopolize, one must do more than show that the defendant had the specific intent "to prevail over one's rivals." 3A *Areeda & Hovenkamp, supra*, P805a, at 322-23. One must show that the defendant desired, for example, "to achieve monopoly power, to accomplish a forbidden monopoly,³⁵ . . . or to

[23 L. Ed. 2d 129, 89 S. Ct. 1562 \(1969\)](#); *William Inglis & Sons Baking Co. v. Continental Baking Co., Inc.*, 942 F.2d 1332, 1339-40 (9th Cir. 1991), aff'd in part and rev'd in part, [981 F.2d 1023 \(9th Cir. 1992\)](#).

³² In contrast to the "fact of damage" requirement, the damages element of [section 480-13\(a\)](#) is the "amount of damage." See *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-67, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981); *Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1511 (9th Cir. 1985) (citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946), reh'g denied, 327 U.S. 817, 90 L. Ed. 1040, 66 S. Ct. 815 (1946)). The plaintiff must present "sufficient evidence to permit 'a just and reasonable estimate of the damages[.]'" *William Inglis & Sons Baking Co., 942 F.2d at 1340*; see also *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990), such that "the [trier of fact] is not left to 'speculation or guesswork' in determining the amount of damages to award." *Dolphin Tours, Inc., 773 F.2d at 1509-10* (citing *Bigelow, 327 U.S. at 263-65*); see also *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986); *Houston Mercantile Exchange Corp. v. Dailey Petroleum Corp.*, 930 S.W.2d 242, 248 (Tex. Ct. App. 1996); 4 *Callmann on Unfair Competition, supra*, § 22.51, at 443-46.

³³ The public interest requirement is not required for consumer claims of unfair or deceptive acts or practices. See [HRS § 480-2\(c\)](#).

³⁴ **HN35** [↑] Although [HRS § 480-2](#) does not define unfair competition, it "was constructed in broad language in order to constitute a flexible tool to stop and prevent [unfair competition and] fraudulent, unfair or deceptive business practices for the protection of both consumers and honest businessmen and businesswomen." *Han v. Yang*, 84 Haw. 162, 177, 931 P.2d 604, 619 (App. 1997) (quoting *Ai, 61 Haw. at 616, 607 P.2d at 1311*) (footnote omitted) (some brackets added and some omitted); see also 6 *Von Kalinowski on Antitrust, supra*, § 111.07, at 111-18; 1 *Callmann on Unfair Competition, supra*, § 2.08, at 27-28; *Restatement (Third) of the Law of Unfair Competition § 1, cmt. g*, at 9-11 (1995). Generally speaking, competitive conduct "is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *State ex rel. Bronster v. United States Steel Corp.*, 82 Haw. 32, 51, 919 P.2d 294, 313 (1996) (citations and brackets omitted). Further, **HN36** [↑] section 5 of the FTCA specifically dictates that it is an unfair method of competition to violate specific trade regulations, to attempt to circumvent antitrust statutes, or to engage in practices that "violate the spirit of antitrust laws." *Island Tobacco Co. v. R.J. Reynolds Industries Inc.*, 513 F. Supp. 726, 737 (D. Haw. 1981); see also *Cel-Tech Communications Inc.*, 83 Cal. Rptr. 2d at 560-565 ("The word 'unfair' . . . means conduct that [(2)] threatens an incipient violation of an antitrust law, or [(2)] violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or [(3)] otherwise significantly threatens or harms competition." (Brackets added.)).

exclude competition." *Id.* (some footnotes omitted and some added). Although anticompetitive conduct may supply sufficient inference of this necessary intent, see generally *Spectrum Sports, Inc., 506 U.S. at 454-56*; *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 491 F. Supp. 1199, 1218 (D. Haw. 1980)*, aff'd, *732 F.2d 1403 (9th Cir. 1984)*, intent alone is insufficient to establish a dangerous probability of success. See *Swift & Co. v. United States, 196 U.S. 375, 402, 49 L. Ed. 518, 25 S. Ct. 276 (1905)*.

[***88] [HN38](#)[

With respect to the third and final element, an attempt to monopolize claim "includes activities embodying 'the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.'" *Bartleys Town and Country Shops, Inc., 530 F. Supp. at 511* (citing *American Tobacco Co. v. United States, 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*). "In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports, Inc., 506 U.S. at 456* (brackets added). "There is universal agreement that monopoly power is the power to exclude competition or control prices." *Syufy Enterprises, 903 F.2d at 664* (citing *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*). "The existence of such power ordinarily may be inferred from [a] predominant share of the market." *United States v. Grinnell Corp., 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. [***89]

When looking at appellees' share of the relevant market (which can be viewed as either several county markets or one state market), appellants urge this court to apply [*256] [**885] a prospective rather than a retrospective test, i.e., appellants urge this court to examine *only* appellees' market share at the time appellees created and submitted bids through Double K and T&N to determine whether a "dangerous probability" existed.³⁶ Appellees counter that subsequent market performance, i.e., appellees' subsequent loss of market share, "is highly relevant in establishing that the defendant lacked the necessary power to raise prices or exclude competition." We agree with appellees that subsequent performance is relevant and admissible; however, subsequent market performance is not dispositive. See *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 270-71 (7th Cir. 1981)*, cert. denied, 455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982) ("[HN39](#)[ A subsequent failure to achieve monopoly status cannot itself vitiate a claim of attempted monopoly where other evidence substantially supports the attempt without eviscerating the entire attempt offense.") (citing *Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971)*, [***90] cert. denied, 405 U.S. 1066, 31 L. Ed. 2d 796, 92 S. Ct. 1500 (1972)); *Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co., 614 F.2d 832 (2d Cir. 1980)*; *Broadway Delivery Corp. v. United Parcel Serv. of America, Inc., 651 F.2d 122, 128 (2d Cir.)*, cert. denied, 454 U.S. 968, 70 L. Ed. 2d 384, 102 S. Ct. 512 (1981); *United States v. American Airlines, Inc., 743 F.2d 1114, 1119 (5th Cir. 1984)*, reh'g denied, 756 F.2d 882 (5th Cir.), cert. dismissed, 474 U.S. 1001, 88 L. Ed. 2d 370, 106 S. Ct. 420 (1985) (applying prospective test); *Greyhound Computer Corp., Inc. v. International Bus. Mach. Corp., 559 F.2d 488, 496 n.18 (9th Cir. 1977)*, cert. denied, 434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 782 (1978) (declining market share may reflect lack of power but not foreclose a finding of power); *Winter Hill Frozen Foods & Serv. Inc. v. Haagen-Dazs Co., Inc., 691 F. Supp. 539, 547 (D. Mass. 1988)*.

³⁵ "Monopoly exists when one firm controls all or the bulk of a product's output, and no other firm can enter the market, or expand output, at comparable costs." 2A Philip Areeda, Herbert Hovenkamp, & John Solow, *Antitrust Law, An Analysis of Antitrust Principles and Their Application* P403a, at 5 (1995).

³⁶ Appellants rely upon *Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 988-89*, reh'g denied, *716 F.2d 901 (5th Cir. 1983)*, cert. denied, *465 U.S. 1100, 80 L. Ed. 2d 126, 104 S. Ct. 1594 (1984)*. The United States Court of Appeals for the Fifth Circuit disavowed *Multiflex, Inc. in Deauville Corp. v. Federated Department Stores Inc., 756 F.2d 1183, 1192 n.5 (5th Cir. 1985)*, insofar as it conflicts with *Northwest Power Products v. Omak Industries, 576 F.2d 83, 90 (5th Cir.)*, reh'g denied, *579 F.2d 643 (1978)*, cert. denied, *439 U.S. 1116, 59 L. Ed. 2d 75, 99 S. Ct. 1021 (1979)* (holding that to prove an antitrust violation under the rule of reason the plaintiff must show defendants' conduct actually adversely affected competition).

[***91] At the time of the alleged violations, Central maintained 78.7% of the Oahu market and Laupahoehoe maintained 63.8% of the Big Island market.³⁷ By 1993, their shares had declined to 3.2% on Oahu, 51% on the Big Island, and 16.9% throughout the state. During the same time period, RHSB's share of the Oahu market had increased from zero to 39.9% and from 14% to 33.5% throughout the state. Insofar as the trial court might have focused *solely* upon appellees' loss of market share, the trial court erred. This, however, does not rescue appellants' claim. [HN40](#)[↑] Although a predominant share of the relevant market is indirect evidence of monopoly power, the mere existence of a predominant share of the market, alone, does not equal the power to control prices or exclude competition. See *3A Areeda & Hovenkamp, supra*, P807e1, at 358 ("To be sure, market share is only an imperfect proxy for market power.").

Time after time, we have recognized this basic fact of economic life: 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 defendants' inability to control prices or exclude [***92] competitors.

Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 366 (9th Cir.), cert. denied, 488 U.S. 870, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988) (citation omitted). See also *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980), cert. denied, 450 U.S. 921, 101 S. Ct. 1369, 67 L. Ed. 2d 348 (1981) ("Blind reliance upon market share, divorced from commercial reality, [can] give a misleading picture of a firm's actual ability to control [*257] [*886] prices or exclude competition."). There is nothing magic about this proposition; it is simple common sense, embodied in the Antitrust Division's own Merger Guidelines:

If entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time, the Department is unlikely to challenge mergers in that market.

Antitrust Policies and Guidelines, U.S. Dep't of Justice, Merger Guidelines § 3.3, reprinted in 4 Trade Reg. Rep. (CCH) P13,103 at 20,562 (1988).

Syufy Enterprises, 903 F.2d at 664 (brackets in original) (footnote omitted); see also [***93] 2A Philip Areeda, Herbert Hovenkamp, & John Solow, *Antitrust Law, An Analysis of Antitrust Principles and Their Application* P420b, at 59 (1995).

Here, the trial record does *not* support a finding that Central or Laupahoehoe had the power to control prices or exclude competition. Although appellees controlled an unusually large share of the school bus markets, the record reveals that there were absolutely no barriers to entry, except those minimally imposed by the state through the bidding process. Moreover, the record shows that no barriers to competition were created by appellees' corporate shell scheme. Three independent competitors, unrelated to appellees (GTI, Gomes, and Bragado), successfully bid on the majority of school bus routes and/or groups contained in the instant bid solicitations. The record also [***94] reveals that, although appellees adduced evidence that Laupahoehoe and T&N had engaged in "bid rigging" in the past, appellees' corporate shell scheme apparently proved unsuccessful to control bid prices in the instant case. Appellants have failed to adduce evidence of a causal connection between appellees' "anticompetitive" conduct and appellees' alleged monopoly power. We, therefore, affirm the trial court's conclusions that there was insufficient evidence to show a dangerous probability of success in the relevant county or state school bus markets in order to sustain appellants' attempt to monopolize claim.

D. Tortious Interference with Prospective Business Advantage

Appellants claim that the trial court erred (1) in determining that there was insufficient evidence to find or conclude that appellees tortiously interfered with RHSB and STI's prospective business advantages with DAGS and (2) in

³⁷ We decline to adopt a bright line rule, at this time, regarding a minimum market share necessary for an attempt to monopolize claim. See *3A Areeda & Hovenkamp, supra*, P807d, at 353-55.

concluding that appellees' actions were not designed to interfere with RSHB's business relationship with DAGS. Appellants also contend that the trial court erred insofar as it failed to enter any findings or conclusions with respect to the Oahu Contract. With regard to the Oahu Contract [***95] we agree, and we also acknowledge that [HN41](#)[[↑]] this court has not yet definitively recognized the intentional tort of tortious interference with prospective business advantage.³⁸ We do so now.³⁹

[**96] [*258] [**887] 1. *Recognition of the Tort*

The primary objective of the tort of interference with prospective business advantage or opportunity is the protection of legitimate and identifiable business expectancies.... Weighing against social and individual interests in protection of business expectancies and efforts to acquire property are the interests in legitimate business competition. That is, much of the common law is premised on the theory that competitors should have an opportunity to compete for business until such time as it is cemented by contract or agreement. Public and individual interests in free competition become particularly acute where a plaintiff anticipates, but is not yet assured, that a contractual or firm business relationship will materialize. Where the plaintiff's contractual relations are merely contemplated or potential, the public interest is best served by allowing any competitor the opportunity to divert those prospects to itself, so long as the means used are not themselves improper. Any contrary rule may tend to establish and perpetuate trade monopolies. As the "expectancy" becomes more remote or less firmly established, the interest in free competition [**97] among business persons becomes more compelling.

² Joseph D. Zamore, *Business Torts* § 12.01[2], at 12-5 to 12-6 (1999) (footnotes omitted) (emphasis added).

The [Restatement \(Second\) of Torts § 766B](#), at 20 (1979) defines [HN42](#)[[↑]] the tort of "Intentional Interference with Prospective Contractual Relation" as follows:

One who intentionally and improperly interferes with another's prospective contractual relation (except to marry) is subject to liability to the other for pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
 (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
 (b) preventing the other from acquiring or continuing the prospective relation.

The Restatement also provides:

[HN43](#)[[↑]] In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

³⁸ See [Lesser v. Boughey](#), 88 Haw. 260, 264 n.3, 965 P.2d 802, 806 n.3 (1998); [Kutcher v. Zimmerman](#), 87 Haw. 394, 399 n.8, 405 n.15, 957 P.2d 1076, 1084 n.8, 1097 n.15 (App. 1998).

³⁹ Appellees contend that a claim of tortious interference with prospective business advantage cannot be maintained within a state bidding framework. We disagree. DAGS encouraged competition in the instant bidding process. Because the former Chapter 103 did not limit private remedies, we hold that appellants' claim of tortious interference is viable. See [Hoefer v. Wisconsin Education Ass'n Ins. Trust](#), 470 N.W.2d 336, 341-42 (Iowa 1991) (implicitly recognizing viability of tortious interference with prospective business advantage in state bidding system); [Polote Corp. v. Metric Constructors, Inc.](#), 880 F. Supp. 836, 847-48 (S.D. Ga. 1995) (same); cf. [Kahn v. Salomon Brothers Inc.](#), 813 F. Supp. 191, 195-96 (E.D.N.Y. 1993) (holding that violation of state bidding rules promulgated by press release does not constitute improper conduct to support tortious interference claim). We decline to decide whether this claim is viable under [HRS § 103D-704](#) (1993).

Appellees cited several cases in support of their argument. See [Perkins v. Lukens Steel Co.](#), 310 U.S. 113, 84 L. Ed. 1108, 60 S. Ct. 869 (1940); [Coyne-Delany Co., Inc. v. Capital Dev. Bd. of State of Illinois](#), 616 F.2d 341 (7th Cir. 1980); [Sowell's Meats and Services, Inc. v. McSwain](#), 618 F. Supp. 140 (D.S.C. 1985) aff'd, 788 F.2d 226 (4th Cir. 1986); [ARA Services, Inc. v. School Dist. of Philadelphia](#), 590 F. Supp. 622 (E.D. Pa. 1984) (mem.); [Kasom v. City of Sterling Heights](#), 600 F. Supp. 1555 (E.D. Mich. 1985) (mem.), aff'd, 785 F.2d 308 (6th Cir. 1986); [J.P. Mascaro & Sons, Inc. v. Township of Bristol](#), 497 F. Supp. 625 (E.D. Pa. 1980); [Estey Corp. v. Matzke](#), 431 F. Supp. 468 (N.D. Ill. 1976) (mem.). Insofar as these cases involved violations of constitutional due process, equal protection, and/or statutory civil rights, they are inapposite.

- (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 to be advanced [***98] by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference[,] and
- (g) the relations between the parties.

Id. § 767, at 25-26 (brackets added).

Based in part upon the foregoing, [HN44](#)[⁴⁰] the following elements have evolved into the tort of intentional or tortious interference with prospective business advantage: (1) the existence of a valid business relationship or a prospective advantage or expectancy sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff;⁴⁰ (2) knowledge of the relationship, advantage, or expectancy by the defendant; (3) a purposeful intent to interfere with the relationship, advantage, or expectancy; (4) legal causation between the act of interference and the impairment of the relationship, advantage, or expectancy; and (5) actual damages. See [*Locricchio v. Legal Services Corp., 833 F.2d 1352, 1357 \(9th Cir. 1987\)*](#); [*Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1166 \(9th Cir. 1997\)*](#), [***99] cert. denied, 142 L. Ed. 2d 36, 119 [*259] [**888] S. Ct. 46 (1998); see also 2 *Business Torts*, *supra*, §§ 12.01[4]-12.03[6], at 12-11 to 12-46.

Here, with respect to the Big Island Contract, the trial court specifically found that STI had an economic relationship with DAGS of which Matsuo and Laupahoehoe were aware and that Laupahoehoe and Matsuo's conduct operated to hinder competition and to obtain an unfair advantage for Laupahoehoe.⁴¹ Nevertheless, the trial court concluded that there was *insufficient* evidence to show that: (1) such conduct was designed to disrupt appellants' relationship with DAGS; (2) the [***100] relationship had the probability of ripening into a future economic benefit for STI; (3) STI would have been awarded the Big Island routes; and/or (4) STI was injured and suffered damages.

Appellants adduced evidence of damage to STI on the basis of gross lost profits which equaled the sum of lost contract revenues and charter revenues.⁴² According to appellants, school bus operators commonly obtained charter revenue which equaled approximately forty percent of their contract revenue. Appellees, however, adduced evidence that charter revenue was not commonly obtained by school bus operators on the Big Island and that RSHB and STI's calculations were based solely on RSHB's financial figures on Oahu. Considering appellants' failure to establish a reasonable correlation between contract and charter revenues on the Big Island and considering that, without any charter revenue, STI would have suffered a loss ranging from \$ 14,220 to \$ 8,140 if awarded the Big Island [***101] contracts, we cannot hold that the trial court erred in concluding that STI suffered no appreciable amount of damage on the Big Island. Appellants' tortious interference claim with respect to STI therefore fails.

Presumably, because the trial court found that Central was not the alter ego of Double K, with respect to the Oahu Contract, the trial court's only COL on the present subject was that "the evidence is insufficient to establish . . . that Defendants' conduct was designed to disrupt the relationship between DAGS and the Plaintiffs to the claim

⁴⁰ "There must be a colorable economic relationship between the plaintiff and a third party with the potential to develop into a full contractual relationship. The prospective economic relationship need not take the form of an offer but there must be specific facts proving the possibility of future association." [*Locricchio v. Legal Services Corp., 833 F.2d 1352, 1357 \(9th Cir. 1987\)*](#).

⁴¹ These findings are not challenged on appeal.

⁴² Charter revenue is obtained between 8:00 a.m. and 3:00 p.m., the time in which buses dedicated for school routes can be used by public and private schools and/or non-profit organizations for field trips or excursions. Mits Nakatsuka, a former DAGS officer of twenty-three years, testified that charter revenue correlates with contract revenue, constitutes a considerable amount of income for school bus operators, and serves as an incentive to obtain contracts.

of [***102] tortious interference with prospective business advantage." Considering our holding, *supra*, that Central is the alter ego of Double K, creating Double K to bid on contracts and lease buses simultaneously in circumvention of Specification M, we hold that there was a basis for the trial court to review whether appellees' conduct was intended to disrupt the reasonable expectancy of future economic relationships of the finite number of bidders, namely RHSB, with DAGS. Appellants adduced evidence showing that DAGS customarily awarded the contract to the next lowest bidder without rebidding the contract and that, but for appellees' conduct, RHSB would have been awarded Group 4. Accordingly, we remand this claim to the circuit court for the entry of new findings and conclusions with respect to the Oahu Contract on all of the elements of tortious interference with prospective business advantage.⁴³

[***103] We note, for purposes of guidance, that the standard for assessing an expert's assumptions when calculating lost profits is *reasonableness*. Here, appellees challenged several of appellants' expert's assumptions, including: the ten-year versus six-year contract [*260] [**889] period (based upon two two-year extensions), the forty percent charter revenue on Oahu, the charter drivers and benefits costs (*i.e.*, appellants' projected 32.2% versus appellees' projected 47.3%), fuel and lubricants, repair and maintenance, and driver contact expenses. The test is not whether appellants have supported these assumptions to an absolute certainty. See *supra* note 32. The test is whether appellants have supported these assumptions with a *reasonable* estimate of damages, considering, *for example*, such evidence as: (1) Nakatsuka's testimony that charter revenue is a considerable or substantial percentage of contract revenue; (2) appellees' expert's testimony that Double K, T&N, and STI's actual driver-cost-to-total-revenue-ratio ranged from 34.9%, 30.8%, to 26.5% during the relevant time periods; (3) appellees' expert's testimony regarding RHSB's driver-cost-to-revenue-ratio on charters; and (4) [***104] Nakatsuka, Okano, Governs, and Koga's testimony that two two-year extensions are customarily granted.

2. Conspiracy to Commit Tortious Interference with Prospective Business Advantage

Appellants also alleged that appellees engaged in a civil conspiracy to commit tortious interference with their prospective business advantage with DAGS. For similar reasons as those discussed in connection with their conspiracy to attempt to monopolize claim, appellants' civil conspiracy claim fails.⁴⁴

[***105] Although addressing the concept of conspiracy for purposes of the Sherman Act, the United States Supreme Court, in *Copperweld Corp.*, explained that "in reality a parent and a wholly owned subsidiary always have a 'unity of purpose or a common design.' They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests." *Copperweld Corp.*, 467 U.S. at 771-72; cf. *Shared Communications Services of 1800-80 JFK Boulevard, Inc. v. Bell Atlantic Properties Inc.*, 692 A.2d 570, 572-74 (Pa. Super. 1996), appeal denied, 555 Pa. 704 (Pa. 1998) (although a parent corporation and its wholly owned subsidiary may constitute a plurality of actors under concepts of civil conspiracy, "under certain circumstances, the arrangement between a parent and its wholly owned subsidiary could be such that the two legal corporations are not truly separate and are essentially corporate alter egos." (citations omitted)). Although we do not adopt, wholesale, the principles enunciated in *Copperweld*, because

⁴³ We note that "nominal damages may be awarded [for tortious interference with prospective business advantage] when the fact of damage is established but the extent of damage is not proven." 2 *Business Torts*, *supra*, § 12.03[6], at 12-44 (brackets added). Furthermore, "punitive damages may be awarded where actual damage is established and actual malice--that is, ill-will, hatred or spite--is shown or where other outrageous or oppressive conduct by the wrongdoer is demonstrated." *Id.* § 12.03, at 12-45 to 12-46. Such an award is appropriate only so long as the "punitive damages award . . . relate[s] to the wrongdoing within the court's jurisdiction, and the defendant . . . receive[s] fair notice of the severity of the penalty." *Id.*

⁴⁴ **HN45** Civil conspiracy does not alone constitute a claim for relief. See *Weinberg v. Mauch*, 78 Haw. 40, 49, 890 P.2d 277, 286, reconsideration denied, 78 Haw. 421, 895 P.2d 172 (1995); *Ellis v. Crockett*, 51 Haw. 45, 57, 451 P.2d 814, 822-23, 51 Haw. 86 (1969); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 46, at 324 (5th ed. 1984). Moreover, mere acquiescence or knowledge is insufficient to constitute a conspiracy, absent approval, cooperation, or agreement. See *Winslow v. Brown*, 125 Wis. 2d 327, 371 N.W.2d 417, 419 (Wis. Ct. App.), appeal denied, 126 Wis. 2d 518 (1985); *More v. Johnson*, 193 Colo. 489, 568 P.2d 437, 440 (Colo. 1977) ("Silent knowledge of an unlawful act is insufficient to establish the requisite agreement.").

the instant civil [***106] conspiracy claim is not premised upon the Sherman Act, we recognize that the "singular enterprise" principle can be applied on a case-by-case, factual basis.

Insofar as we have affirmed the circuit court's FOFs and COLs with regard to appellants' claim of tortious interference in the Big Island Contract, we conclude that appellants' conspiracy claim in this regard also fails. With respect to the Oahu Contract, insofar as we have held above that Central is the alter ego of Double K, Central and Double K cannot conspire. See *Ulrich, 35 Haw. at 167*. Moreover, trial testimony was adduced showing that Laupahoehoe and Central were viewed as one and the same corporation. "The mere formality of separate incorporation is not, without more, sufficient to provide the capability for conspiracy." *Island Tobacco Co., 63 Haw. at 308, 627 P.2d at 273; Island Tobacco Co., 513 F. Supp. at 739* (internal quotation marks and citations omitted). We note that there was no evidence adduced showing that C.M. Holding [*261] [**890] Corporation,⁴⁵ Laupahoehoe, and Central were incorporated for anything other than legitimate corporate purposes, such as allocation of resources [***107] and responsibilities. Insofar as Laupahoehoe and Central, without cooperation and agreement between them, might have acted at Matsuo's direction individually, the record supports the trial court's finding and conclusion that "the evidence is insufficient to establish that any two or more of the Defendants engaged in concerted action to accomplish an unlawful objective." In this regard, the trial court's finding/conclusion is not clearly erroneous. Furthermore, insofar as Matsuo (1) was an officer of Laupahoehoe and Central during the relevant time period, (2) was a 94% owner of C.M. Holding Corporation, the parent of Laupahoehoe and Central, and (3) apparently maintained the same economic objective as Laupahoehoe and Central, we cannot say that the circuit court's finding/conclusion in this regard is clearly erroneous. Accordingly, the trial court's finding/conclusion is affirmed.

E. Punitive Damages

[***108] Appellants contend that the trial court erred in refusing to award punitive damages. We agree in part.

As noted above, an award or denial of punitive damages is within the sound discretion of the trier of fact and will not be reversed absent a clear abuse of discretion. See *Ditto, 86 Haw. at 91, 947 P.2d at 959. HN46*⁴⁶ Whenever a court disregards rules or principles of law or practice to the substantial detriment of a party, it abuses its discretion. See *Ho, 88 Haw. at 256, 965 P.2d at 798*. Insofar as the trial court failed to enter sufficient findings regarding appellees' claim for tortious interference with prospective business advantage on Oahu, we hold that the trial court abused its discretion with respect to punitive damages. We vacate the trial court's findings and conclusions in this regard and remand with instructions to enter findings of fact and conclusions of law.

IV. CONCLUSION

For the foregoing reasons, we vacate the judgment, entered May 18, 1995, and the findings of fact and conclusions of law, filed April 26, 1995, with respect to issues of: (1) alter ego regarding Central, Double K, Laupahoehoe, and T&N; (2) tortious interference [***109] with prospective business advantage against Matsuo, Laupahoehoe, Central, and Double K on the Oahu Contract; and (3) punitive damages regarding tortious interference against Matsuo, Laupahoehoe, Central, and Double K on the Oahu Contract. In this regard, we remand with instructions to enter new findings of fact and conclusions of law consistent with this opinion.

Albeit for somewhat different reasons, we affirm the judgment, entered May 18, 1995, and the findings of fact and conclusions of law, filed April 26, 1995, with respect to the issues of: (1) unfair competition against Matsuo, Laupahoehoe, Central, Double K, and T&N; (2) attempt to monopolize and conspiracy to monopolize against Matsuo, Laupahoehoe, Central, Double K, and T&N; (3) conspiracy in restraint of trade against Matsuo, Laupahoehoe, Central, Double K, and T&N; and (4) conspiracy to commit tortious interference with prospective business advantage against Matsuo, Laupahoehoe, Central, Double K, and T&N. We accordingly affirm the trial court's judgment, findings, and conclusions in all other respects.

Ronald T.Y. Moon, Robert G. Klein, Steven H. Levinson, Paula A. Nakayama, Mario R. Ramil

⁴⁵ Additionally, we note that C.M. Holding Corporation is not named as a party in the instant action.

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[Angelico v. Lehigh Valley Hosp., Inc.](#)

United States Court of Appeals for the Third Circuit

December 4, 1998, Argued ; July 16, 1999, Filed

No. 97-1927

Reporter

184 F.3d 268 *; 1999 U.S. App. LEXIS 16044 **; 1999-2 Trade Cas. (CCH) P72,581

RICHARD J. ANGELICO, M.D., Appellant v. LEHIGH VALLEY HOSPITAL, INC.; SAINT LUKE'S HOSPITAL OF BETHLEHEM PENNSYLVANIA; EASTON HOSPITAL; PANEBIANCO-YIP HEART SURGEONS; BETHLEHEM CARDIOTHORACIC SURGICAL ASSOCIATES, P.C.; BRIAN M. PETERS, ESQ.; POST & SCHELL, P.C.; Caption amended pursuant to 2/10/98 order

Prior History: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. (D.C. No. 96-cv-02861). District Judge: The Honorable J. Curtis Joyner.

Disposition: Affirmed in part, and reversed and remanded in part.

Core Terms

district court, antitrust, antitrust claim, conspiracy, state actor, sanctions, subpoena, anti trust law, anticompetitive, attorney's fees, state official, cardiothoracic, privileges, defendants', competitor, surgeon, Sherman Act, damages

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

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

HN1[] Private Actions, Costs & Attorney Fees

Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), provides 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 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 standing, however, is narrower than the statute's wording indicates. An antitrust injury is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The focus is broader than the injury suffered by the potential plaintiff. Although a showing of antitrust injury is necessary, it is not always sufficient to establish standing under section 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under section 4 for other reasons.

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

HN2 [down arrow] **Private Actions, Standing**

An antitrust injury 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 > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN3 [down arrow] **Clayton Act, Claims**

The factors to be employed in a standing analysis under section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), 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 > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN4 [down arrow] **Sherman Act, Claims**

[Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), prohibits contracts, combinations or conspiracies in restraint of trade. To establish a [section 1, 15 U.S.C.S. § 1](#), claim under the rule of reason test, 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 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. The second element may be satisfied in two ways: the plaintiff may satisfy this

burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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 > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

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

HN5 [down] Practices Governed by Per Se Rule, Boycotts

Group boycotts or concerted refusals to deal are not always per se violations of the Sherman Act, [15 U.S.C.S. § 1](#); rather, the analysis turns on the facial effects of the challenged practice.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN6 [down] Protection of Rights, Section 1983 Actions

If a plaintiff sues private individuals for actions taken in their roles as attorneys under [42 U.S.C.S. § 1983](#), he must point to some action that is fairly attributable to the state. To do this, a plaintiff must show (1) that the attorney defendants' acts were the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible and (2) that the attorney defendants may fairly be said to be state actors.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN7 [down] Protection of Rights, Section 1983 Actions

A person may be found to be a state actor when (1) he is a state official, (2) he has acted together with or has obtained significant aid from state officials, or (3) his conduct is, by its nature, chargeable to the state. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Governments > Courts > Court Personnel

HN8 [down] Protection of Rights, Section 1983 Actions

Attorneys performing their traditional functions will not be considered state actors solely on the basis of their position as officers of the court. A lawyer representing a client is not, by virtue of being an officer of the court, a state actor under color of state law within the meaning of [42 U.S.C.S. § 1983](#).

Civil Procedure > Judgments > Pretrial Judgments > Judgments by Confession

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Civil Procedure > Judgments > Pretrial Judgments > General Overview

[**HN9**](#) [blue icon] **Pretrial Judgments, Judgments by Confession**

Before private persons can be considered state actors for purposes of [42 U.S.C.S. § 1983](#), the state must significantly contribute to the constitutional deprivation, e.g., by authorizing its own officers to invoke the force of law in aid of the private person's request.

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

[**HN10**](#) [blue icon] **Discovery, Subpoenas**

An attorney does not become a state actor simply by employing the state's subpoena laws.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

[**HN11**](#) [blue icon] **Remedies, Costs & Attorney Fees**

Awarding attorney's fees as a means of sanctioning a party is within the district court's inherent power. The district court can assess attorney's fees when a party has acted in bad faith.

Civil Procedure > Sanctions > Baseless Filings > General Overview

[**HN12**](#) [blue icon] **Sanctions, Baseless Filings**

Although, like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. The concept of due process is flexible and whether a hearing is required depends upon the circumstances.

Counsel: Henry F. Siedzikowski, Esq. (Argued), Elliott, Reihner, Siedzikowski & Egan, Blue Bell, PA, Attorney for Appellant.

Richard F. Stevens, Esq. (Argued), Stevens & Johnson, Allentown, PA. Edward C. Mengel, Jr., Esq., David E. Edwards, Esq., White & Williams, Philadelphia, PA. Wayne A. Mack, Jr., Duane, Morris & Heckscher, Philadelphia, PA. Donald H. Lipson, Esq., Tallman, Hudders & Sorrentino, Allentown, PA. Mark H. Scoblionko, Esq., Scoblionko,

Scoblionko, Muir & Bartholomew, Allentown, PA. Frederick B. Buck, III, Esq., Rawle & Henderson, Philadelphia, PA. Jeffrey G. Weil, Esq., (Argued), Dechert, Price & Rhoads, Philadelphia, PA, Attorneys for Appellees.

Judges: BEFORE: SLOVITER, NYGAARD, and WOOD, * Circuit Judges.

Opinion by: NYGAARD

Opinion

[*272] OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

Dr. Richard Angelico [*2] appeals a summary judgment for the defendants, Lehigh Valley Hospital, St. Luke's Hospital of Bethlehem, Pennsylvania, Easton Hospital, the Panebianco-Yip Heart Surgeons, and Bethlehem Cardiothoracic Surgical Associates ("Bethlehem") (collectively, the "hospital defendants") on his antitrust claims. The District Court held that Angelico did not have standing to assert antitrust claims because he had not shown an injury to competition. We will reverse and remand for further proceedings.

Angelico also appeals the dismissal of his due process claims under [42 U.S.C. § 1983](#) against Brian M. Peters, Esq., his law firm Post & Schell, P.C., and the firm's client, Lehigh Valley Hospital (collectively, the "attorney defendants"). Finally, he appeals the District Court's sanction in the form of attorney's fees for Peters. We will affirm the dismissal and attorney's fees award.

I. Facts and Procedural History

Angelico is a cardiothoracic surgeon. The three hospitals are located in the Lehigh Valley area in Pennsylvania. Panebianco-Yip and Bethlehem are physician practice groups specializing in thoracic and cardiothoracic surgery in the same area. Angelico began [*3] his career in the Lehigh Valley area with a group of cardiovascular specialists and became a member of the active medical staff of Lehigh Valley Hospital, where he performed cardiothoracic surgery. Just over a year later, Angelico left his original practice group, joined Panebianco-Yip as that practice group's primary surgeon, and acquired active privileges at St. Luke's.

In 1989, Angelico resigned from Panebianco-Yip and established his own practice. He maintained his privileges at both Lehigh Valley and St. Luke's until January of 1991, when he requested that his active privileges at Lehigh Valley be reduced to "courtesy" privileges, which allowed him to perform only a limited number of operations there each year. He maintained his courtesy privileges at Lehigh Valley until October 15, 1995.

In March 1994, Angelico notified St. Luke's that he was resigning his staff privileges. He then attempted to apply for staff privileges at Easton. Easton, however, informed him that it had adopted a temporary moratorium on applications in its newly established heart program because it was considering whether to award an exclusive contract. Later, Easton informed Angelico that it had awarded [*4] an exclusive contract to another surgeon from outside of the region.

Angelico asserts that he resigned from St. Luke's because the hospital willfully failed to provide him with competent surgical support and that he was therefore constructively terminated. He further contends that the hospital defendants had a sufficient share of the relevant market to control it and that they conspired to eliminate him as a competitor through "various predatory acts," including circulating defamatory remarks regarding his interpersonal

* The Honorable Harlington Wood, Jr., Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

and patient care skills. Angelico claims that his courtesy privileges at Lehigh Valley were improperly terminated as a part of this conspiracy and that he has now been "blackballed" by the three hospitals.

[*273] Angelico sued the three hospitals and two practice groups, alleging that they had violated the Sherman Act by conspiring to eliminate him as a competitor. Specifically, he claims that the hospital defendants engaged in exclusive dealing and a group boycott in violation of [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), and that they control a dominant (monopoly) share of the market in violation of [section 2](#) of the Sherman Act, [15 U.S.C. § 2](#). [**5] He seeks treble damages under section 4 of the Clayton Act, [15 U.S.C. § 15](#). Angelico also argues that the attorney defendants violated his constitutional rights through their use of the state subpoena process and that the District Court improperly assessed attorney's fees against him.

The District Court dismissed Angelico's claims against the attorney defendants and granted the attorney defendants' motion for sanctions. See [Angelico v. Lehigh Valley Hosp., Inc., 1996 U.S. Dist. LEXIS 13494, No. Civ.A. 96-2861, 1996 WL 524112](#) (E.D. Pa. Sept. 13, 1996) ("Angelico I"). On Angelico's antitrust claims, the District Court granted a motion by the hospital defendants for limited discovery on the issues of antitrust standing and antitrust injury. Following discovery, the court granted the hospital defendants summary judgment on the antitrust claims, holding that Angelico had failed to establish standing to pursue them. See [Angelico v. Lehigh Valley Hosp., Inc., 984 F. Supp. 308 \(E.D. Pa. 1997\)](#) ("Angelico II").

The District Court noted that Angelico suffered significant lost income but held that "an injury to Dr. Angelico personally does not confer standing [**6] upon him without a showing that his absence from the relevant product and geographic markets injured competition and/or the consumers of cardiothoracic surgical services in these markets." [Id. at 313](#). Focusing on the effect of Angelico's removal on the market, the court found "no evidence" that there were any fewer competing surgeons or that the quality of cardiothoracic care had been reduced by his absence, [see id.](#), and "insufficient evidence of a negative impact on price." [Id. at 314](#). Based on these findings, the District Court concluded that Angelico had not "suffered the type of injury that the antitrust laws were designed to prevent . . . [or] that Dr. Angelico is the most efficient enforcer of those laws." [Id.](#)

On appeal, Angelico argues that the District Court erred by: (1) holding that he failed to establish antitrust standing because he could not show an effect on the prices, quantity or quality in the relevant market; (2) failing to declare that the hospital defendants' acts were illegal "per se"; (3) holding that he failed to state a [section 1983](#) claim upon which relief could be granted against the attorneys for Lehigh Valley, [**7] and (4) imposing sanctions against him without holding a hearing. We have plenary review of the antitrust standing question, see [McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 847 \(3d Cir. 1996\)](#), and of the summary judgment on Angelico's claims against the hospital defendants. See [Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1297 \(3d Cir. 1993\)](#). We review an assessment of attorney's fees for abuse of discretion if the court applied the correct legal standard. See [In re Tutu Wells Contamination Litig., 37 V.I. 398, 120 F.3d 368, 387 \(3d Cir. 1997\)](#).

II. The Antitrust claims

In this case, we must distinguish the antitrust injury that is required for a plaintiff to have standing to bring an antitrust claim from the anticompetitive market effect element of a claim under [section 1](#), which is also generally referred to as "antitrust injury."

A. Antitrust Standing

HN1 [↑] Section 4 of the Clayton Act, [15 U.S.C. § 15](#), provides 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 [**8] United States . . . without respect to the amount in controversy, [*274] and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." [Id.](#) Antitrust standing, however, is narrower than the statute's wording indicates. See [Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 \(1983\)](#) ("AGC"); II Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law: An Analysis of Antitrust Principles and Their Application](#) P 360, at 192 (rev. ed. 1995)

("The limitations on antitrust standing are only hinted at by the simple and apparently broad language of § 4 of the Clayton Act.").)

HN2 An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 109, 107 S. Ct. 484, 489, 93 L. Ed. 2d 427 (1986) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)); see also *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1163 n.9 (3d Cir. 1993) [**9] (standing analysis involves consideration of "the nexus between the antitrust violation and the plaintiff's harm" and "whether the harm alleged is of the type for which Congress provides a remedy"). The focus is broader than the injury suffered by the potential plaintiff. Although a showing of antitrust injury is necessary, it is "not always sufficient[] to establish standing under [section] 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under [section] 4 for other reasons." *Cargill*, 479 U.S. at 110 n.5, 107 S. Ct. at 489 n.5.

Drawing on AGC, we have stated **HN3** the factors to be employed in a standing analysis under section 4 of the Clayton Act. These 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) [**10] the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

In re Lower Lake Erie Iron, 998 F.2d at 1165-66 (citing AGC, 459 U.S. at 545, 103 S. Ct. at 912). We hold that, applying these factors, Angelico has standing to challenge the alleged conspiracy, boycott and monopoly.

First, because no discovery was allowed on the issue, we must assume Angelico's allegation that the defendants acted in concert and with an anticompetitive motive, i.e., conspired, is true. Following this assumption, Angelico's harm clearly resulted from the conspiracy that prevented him from competing in the market and thereby earning a living. At this stage, therefore, the causal connection/defendant intent element of the standing analysis is satisfied.

Turning to the second element, whether Angelico's alleged injury is of the type the antitrust laws were meant to redress, we conclude that the injury he suffered, when shut out of competition for anticompetitive reasons, is indeed among those the antitrust laws were designed to prevent. In *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3d Cir. 1995), [**11] a doctor sued a hospital and individual physicians, alleging similar claims under sections 1 and 2 of the Sherman Act. The district court dismissed the claims, and we reversed, holding that Brader, as a potential competitor shut out of a market by a purported group boycott, had alleged the type of injury protected by the antitrust laws. We stated: "the type of injury alleged by Brader (the loss of income due to an inability to practice in the relevant market [*275] area) is directly related to the illegal activity in which the defendant allegedly engaged: a conspiracy to exclude Brader from the relevant market." *Id. at 877*.¹ Angelico, like Brader, alleges a concerted

¹ Appellees assert that only persons with the same interests as consumers have standing under the antitrust laws and cite *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977), in which the Supreme Court stated:

The antitrust laws . . . were enacted for the protection of competition not competitors 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.

429 U.S. 477, 488-89, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (internal quotes omitted) (emphasis added). Nevertheless, the fact that the antitrust laws are intended to protect competition rather than competitors does not mean that a competitor is never a proper antitrust plaintiff. Indeed, protecting a competitor's ability to compete from a conspiracy, the sole purpose of which is to decrease competition by eliminating that competitor, is clearly in the interest of competition.

effort to exclude him from the market for cardiothoracic surgery and his injury flows directly from this action. See [In re Lower Lake Erie, 998 F.2d at 1164 n. 14](#) ("Because the [plaintiffs] themselves were direct competitors of the [defendants] and because they were injured by the conspiracy's goal to preclude them from market entry, no standing problem is posed by their quest for damages."); [Fuentes v. South Hills Cardiology, 946 F.2d 196, 202 \(3d Cir. 1991\)](#) (not addressing [**12](#) standing directly, but noting that similar allegations by a doctor were sufficient to state a claim and to avoid a motion to dismiss).

[**13](#) Angelico also satisfies the third, fourth and fifth elements of the AGC standing analysis. The injury to Angelico from the assumed conspiracy is clearly direct (and substantial). Angelico's injury is the direct result of the alleged conspiracy. In contrast, the harm to consumers is less direct because it will only arise from higher costs or poorer treatment that result from the removal of a strong competitor from the market. A consumer would be highly unlikely to sue for a loss of this type. Finally, there is no potential for duplicative recovery or complex apportionment of damages, see, e.g., [Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)](#), because Angelico's injury has not been passed along to others.

In sum, we hold that Angelico has standing. This is not a case, however, in which we grant standing to a competitor who was simply harmed by strong competition. Rather, Angelico has asserted facts indicating that he was harmed by a conspiracy with an illegal anticompetitive intent. He has standing because he has asserted an injury of "the type the antitrust laws were designed to prevent" flowing from "that which makes [**14](#) the defendants' acts unlawful." [Cargill, 479 U.S. at 109, 107 S. Ct. at 489](#). Because the District Court's determination was based on its premise that Angelico did not have standing, we must remand the cause.²

B. Anticompetitive market effect

[HN4](#)  [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), prohibits "contracts, combinations or conspiracies 'in restraint of trade.' " [City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 267 \(3d Cir. 1998\)](#). [**15](#) To establish a [section 1](#) claim under the rule of reason test,³ plaintiffs must prove,

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² The District Court erred by incorporating the issue of anticompetitive market effect into its standing analysis, confusing antitrust injury with an element of a claim under [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), which prohibits "contracts, combinations or conspiracies 'in restraint of trade.' " The court's approach may have been the result of the similar "antitrust injury" label which is applied to the injury component of antitrust standing analysis and to the marketplace harm element under [section 1](#).

³ We reject Angelico's assertion (citing [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 3 L. Ed. 2d 741, 79 S. Ct. 705 \(1959\)](#)) that the hospital defendants' acts should be held illegal per se. Courts follow one of two lines of analysis to assess the validity of [section 1](#) claims. See [Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342-47, 102 S. Ct. 2466, 2472-74, 73 L. Ed. 2d 48 \(1982\)](#). The first, "rule of reason" analysis, applies in most cases under this section, while the second, "per se" analysis, applies only to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." [National Soc'y of Prof. Engl's v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 \(1978\)](#).

[HN5](#)  Group boycotts or concerted refusals to deal are not always per se violations of the Sherman Act; rather, the analysis turns on the facial effects of the challenged practice. See [Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 \(1985\)](#). Similar cases involving medical professionals have utilized the "rule of reason" analysis. See [Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079, 1088-93 & n. 9 \(6th Cir. 1996\)](#) (discussing and rejecting application of per se analysis to a doctor's claims under [section 1](#) and citing, in the footnote, [Lie v. St. Joseph Hosp., 964 F.2d 567, 570 \(6th Cir. 1992\)](#), and other cases holding that rule of reason analysis is normally applied to claims by physicians in the position of Angelico). We see no reason to depart from this approach.

(1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within 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.

Tunis Bros., 952 F.2d 715 at 722 (citations omitted). The second element may be satisfied in two ways:

The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services. Due to the difficulty of isolating the market effects of the challenged conduct, however, such proof is often impossible to make. Accordingly, the courts allow proof of the defendant's "market power" instead. Market power--the ability to raise prices above those that would prevail in a competitive market--is essentially a "surrogate for detrimental effects."

"Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996) [**16] (citations omitted); see also VII Phillip E. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application P 1511, at 429 (1986).

[**17] Although the District Court considered Angelico's proffered evidence of an actual anticompetitive market effect, we will not address that evidence because it is appropriate that the District Court reconsider it within the legal framework we have outlined.⁴ [**18] This will give the court the opportunity to address Angelico's claim that he need not show actual anticompetitive market effect in this instance because of the Appellees' alleged market power.

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III. The section 1983 claim

Angelico asserts that the District Court erred by holding that he failed to state a [*277] claim upon which relief could be granted against the attorney defendants under section 1983. This claim arises out of the litigation of a related state court suit that was resolved during the course of this litigation. Geoffrey Toonder, a cardiothoracic surgeon, sued Lehigh Valley Hospital, claiming that it improperly denied [**19] Toonder an "active manpower slot" that would have been filled by Angelico. See *Toonder v. Lehigh Valley Hosp.*, No. Civ.A. 94-E-18 (Pa. Ct. of Common Pleas May 31, 1995) [the "Toonder litigation"]. Toonder was represented by the same attorneys who represent Angelico. Lehigh Valley, through its attorneys -- defendants Peters and his firm, Post & Schell, P.C. -- subpoenaed various members of St. Luke's staff, seeking information regarding Angelico's resignation from that hospital. Angelico claims that, through the use of the subpoenas, the attorney defendants violated his constitutionally protected property and liberty interests. The District Court dismissed these claims. See Angelico I, 1996 WL 524112.

⁴ We note in this regard that Angelico's counsel conceded at oral argument that he did not need further discovery into the element of marketplace harm.

We likewise decline the hospital defendants' suggestion that we affirm the District Court's holding on the ground that Angelico failed to properly define or prove the relevant product and geographic markets because the District Court did not address the issue. See Angelico II, 984 F. Supp. at 313 (assuming for the purposes of the limited motion for summary judgment that the relevant product market was "cardiothoracic surgical services" and that the relevant geographic market was "the greater Lehigh Valley consisting of Carbon, Monroe, Lehigh, Northampton and Schuylkill Counties").

⁵ Moreover, a finding of no anticompetitive market effect would not suffice to dispose of Angelico's claim under section 2 of the Sherman Act. See Mahone v. Addicks Util. Dist., 836 F.2d 921, 939 (5th Cir. 1988) ("Proving an injury to competition is not an element of a monopolization-based antitrust claim."). It is sufficient to note that it remains for the District Court to further assess these issues at the summary judgment stage. See Brader, 64 F.3d at 876 ("The adequacy of a physician's contentions regarding the effect on competition is typically resolved after discovery, either on summary judgment or after trial.").

HN6 [↑] Under [42 U.S.C. § 1983](#), Angelico must show that the attorney defendants acted under the color of state law and denied him a federally protected constitutional or statutory right. See [Lugar v. Edmondson Oil Co., 457 U.S. 922, 930, 102 S. Ct. 2744, 2750, 73 L. Ed. 2d 482 \(1982\)](#); [Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1264 \(3d Cir. 1994\)](#). Because Angelico sued private individuals for [**20] actions taken in their roles as attorneys, he must point to some action that is "fairly attributable" to the state. [Lugar, 457 U.S. at 937, 102 S. Ct. at 2753](#). To do this, Angelico must show (1) that the attorney defendants' acts were "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" and (2) that the attorney defendants may fairly be said to be state actors. *Id.*

HN7 [↑] A person may be found to be a state actor when (1) he is a state official, (2) "he has acted together with or has obtained significant aid from state officials," or (3) his conduct is, by its nature, chargeable to the state. [Id. at 937, 102 S. Ct. at 2753-54](#). The Supreme Court noted that "without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." [Id. at 937, 102 S. Ct. at 2754](#).

HN8 [↑] Attorneys performing their traditional functions will not be considered state actors solely on the basis of their position as officers of the court. [**21] See, e.g., [Polk County v. Dodson, 454 U.S. 312, 318, 102 S. Ct. 445, 450, 70 L. Ed. 2d 509 \(1981\)](#) ("[A] lawyer representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of [§ 1983](#)."); [Barnard v. Young, 720 F.2d 1188, 1189 \(10th Cir. 1983\)](#) ("Private attorneys, by virtue of being officers of the court, do not act under color of state law within the meaning of [section 1983](#)."). Angelico asserts, however, that the attorneys acted as state officers in issuing the subpoenas because the "state subpoena procedures now empower the attorneys, as officers of the state, to use subpoenas to seize property without a hearing before a state court judge and without participation by the sheriff." Appellant's Br. at 44. Angelico, however, offers no authority to support this statement. Nor does Pennsylvania law provide any indication that attorneys have been granted elevated powers to use subpoenas.⁶

[**22] [*278] As we said in *Jordan*, "**HN9** [↑] before private persons can be considered state actors for purposes of [section 1983](#), the state must significantly contribute to the constitutional deprivation, e.g., authorizing its own officers to invoke the force of law in aid of the private persons' request." [20 F.3d at 1266](#). Angelico claims that by issuing a subpoena, private attorneys use "the same compulsive powers of the state." Appellant's Br. at 45. We disagree. In *Jordan*, attorneys, on behalf of a client, entered a judgment by confession and then executed on that judgment. See [id. at 1264-67](#). We held that an "entry of the judgment is not a state action involving the force of law to an extent sufficient to hold that private persons become state actors." [Id. at 1266](#). Then, focusing on the role of the sheriff, a state official, in the execution of the judgment, we stated:

a private individual who enlists the compulsive powers of the state to seize property by executing on a judgment without pre-deprivation notice or hearing acts under color of law and so may be held liable under [section 1983 if his acts cause a state official to use \[**23\] the state's power of legal compulsion to deprive another of property.](#)

⁶The Pennsylvania Rules of Procedure state:

(a) A subpoena is an order of the court commanding a person to attend and testify at a particular time and place. It may also require the person to produce documents or things which are under the possession, custody or control of that person.

(b) A subpoena may be used to command a person to attend and to produce documents or things only at (1) a trial or hearing in an action or proceeding pending in the court, or (2) the taking of a deposition in an action or proceeding pending in the court.

(c) A subpoena may not be used to compel a person to appear or to produce documents or things ex parte before an attorney, a party or a representative of the party.

Id. at 1267 (emphasis added).

In dismissing Angelico's claim, the District Court properly applied *Jordan* by focusing on the distinction between the potential for state involvement and actual state involvement.

Although plaintiff notes that there are potential legal consequences attached to failure to obey a subpoena which might ultimately involve invoking the assistance of state officials, such possibility serves only to highlight the difference between resorting to an available state procedure and actually using state officials to enforce or carry out that procedure. The potential for involving the coercive power of the state likewise exists when a judgment by confession is entered, yet . . . a private party is not converted into a state actor as long as the assistance of state officials remains merely a potential threat. It is only when, and if, such potential is realized that a private party may be converted into a state actor for purposes of satisfying the state action element of a [§ 1983](#) claim.

[*Angelico I, 1996 WL 524112*](#), at *2. The [**24] court's analysis is sound and consistent with the Supreme Court's analysis in *Lugar*. We hold, therefore, that [HN10](#) an attorney does not become a state actor simply by employing the state's subpoena laws. See [*Barnard, 720 F.2d at 1189*](#) ("If an attorney does not become a state actor merely by virtue of instigating state court litigation, then the attorney does not become a state actor merely by employing state authorized subpoena power." (citations omitted)). Angelico's [section 1983](#) claim against the attorney defendants therefore fails. ⁷

[**25] [*279] IV. Sanctions

In the same order in which it dismissed the [section 1983](#) claims, the District Court agreed to award sanctions to the attorney defendants in the form of attorney's fees. See [*Angelico I, 1996 WL 524112*](#). In his complaint, Angelico stated his antitrust claims against "all defendants," thereby including the attorney defendants as defendants to the antitrust claims. Angelico declined to dismiss the charges against them despite their verbal request that he do so. Only after the attorney defendants filed their motion to dismiss, addressing the antitrust claims, did Angelico voluntarily dismiss these claims. Angelico's counsel then informed the attorney defendants that the antitrust claims had not been intentionally asserted against them. Following a motion for sanctions and the filing of an affidavit of costs by the defendants, a Motion to Vacate, Reconsider or Certify Pursuant to [28 U.S.C. § 1292\(b\)](#) by Angelico, and a response thereto by the attorney defendants, the District Court awarded \$ 1,000 to attorney Peters for his costs in preparing to defend the withdrawn antitrust claims against him and his firm. ⁸

[**26] [HN11](#)

Awarding attorney's fees as a means of sanctioning a party is within the District Court's inherent power. See [*Chambers v. NASCO, Inc., 501 U.S. 32, 45, 111 S. Ct. 2123, 2133, 115 L. Ed. 2d 27 \(1991\)*](#). The District Court can assess attorney's fees when a party has acted in bad faith. See [*Chambers, 501 U.S. at 45, 111 S. Ct. at 2133*](#). Here the District Court found that Angelico and his attorneys acted in bad faith by failing to dismiss the antitrust claims

⁷ Because Angelico has not demonstrated that the attorney defendants were state actors, we need not address the balance of the [section 1983](#) analysis. We also reject Angelico's claim that his due process rights were violated by the attorney defendants' actions in regards to the subpoenas. Finally, we reject Angelico's allegation that the District Court engaged in improper fact finding. This allegation apparently refers to the District Court's understanding that no actual state officials were called upon to enforce the subpoenas in the *Toonder* litigation. However, the District Court was entitled to take judicial notice of the facts of that decision. See [*Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 416 n.3 \(3d Cir. 1988\)*](#); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1364, at 479 n.36 (2d ed. 1990).

⁸ The original decision stated that the court would award "modest monetary sanctions" and required the attorney defendants to submit a record of their costs. Upon receiving the submissions, the District Court found that the costs were far greater than it had anticipated and elected to award only the \$ 1,000.

against the attorney defendants, by mischaracterizing the defendants' pleadings, and by failing to inform the court of a significant change in the *Toonder* litigation (its dismissal). See *Angelico v. Lehigh Valley Hosp.*, No. Civ.A.96-2861, Order (E.D. Pa. Nov. 1, 1996). The District Court applied the correct legal standard to determine whether sanctions were in order and carefully stated the acts by Angelico's counsel upon which the order is based.⁹

[**27] [HN12](#) [↑]

Although, "like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record," *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S. Ct. 2455, 2464, 65 L. Ed. 2d 488 (1980), we have not interpreted the "opportunity for a hearing on the record" discussed by the Supreme Court to require an evidentiary hearing in every case. See *Rogal v. American Broad. Cos.*, 74 F.3d 40, 44 (3d Cir. 1996); see also *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990) (while counsel generally deserve an opportunity to brief the issue, the imposition of sanctions does not necessarily mandate an oral or evidentiary hearing). Rather, the concept of due process is flexible and whether a hearing is required depends upon the circumstances. See *Rogal*, 74 F.3d at 44. Application of this flexible standard is generally left to the District Court's discretion. See *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1359 (3d Cir. 1990) (noting that this approach "permits some cases to be disposed of on the record").

Here, the District [**28] Court decided that further factfinding was unnecessary. Appellant had both fair notice of the charges and an opportunity to respond [*280] because the motion for sanctions was made along with attorney defendants' motion to dismiss. All of the acts by Angelico and his counsel that were at issue were part of the record and could be considered without an evidentiary hearing. We find no abuse of discretion.¹⁰

V. Conclusion

We conclude that the District Court did not err by dismissing the [section 1983](#) claims against the attorney defendants, and that it was well within its considerable discretion when it imposed sanctions. Angelico, however, has standing to assert his antitrust claims, and we will remand the cause for further proceedings.

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⁹ We reject Angelico's assertion that the attorney defendants should have realized that they were not subject to the antitrust claims because it implies that the nonfiling side should bear the burden of an allegedly inadvertent pleading mistake. The attorney defendants requested that the claims against them be dropped. The fact that the attorney defendants did not specifically address the antitrust claims does not serve as an escape hatch for the defendants.

¹⁰ In addition, the District Court made additional findings of bad faith. In choosing not to sanction Appellant for this other conduct, the court doubtless took into account that it was already sanctioning him for the antitrust claims.

United States v. Nippon Paper Indus. Co.

United States District Court for the District of Massachusetts

July 16, 1999, Decided

Cr. No. 95-10388-NG

Reporter

62 F. Supp. 2d 173 *; 1999 U.S. Dist. LEXIS 11333 **; 1999-1 Trade Cas. (CCH) P72,515

UNITED STATES OF AMERICA, Plaintiff, v. NIPPON PAPER INDUSTRIES CO., LTD., formerly JUJO PAPER CO., LTD., Defendant.

Disposition: **[**1]** NPI's renewed motion for acquittal (docket # 260) GRANTED.

Core Terms

conspiracy, prices, manufacturers, price-fixing, thermal, fax, substantial effect, trading, commerce, domestic, argues, fix prices, anti-dumping, customers, increased price, stabilization, rule of reason, limitations period, indictment, houses, co-conspirators, competitors, conspirator, withdrawal, abandoned, attended, anti trust law, paper company, Sherman Act, translation

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Criminal Law & Procedure > Trials > Motions for Acquittal

HN1 Standards of Review, Harmless & Invited Error

A motion under [Fed. R. Crim. P. 29](#) should be granted only where the evidence adduced at trial is so insufficient that no rational trier of fact can find proof beyond a reasonable doubt. To be sure, this is a very heavy burden. The trial court must give the prosecution the benefit of all reasonable inferences drawn from the evidence, including circumstantial evidence, and the trial court is required to view the evidence in the light most favorable to the government with respect to each offense. In addition, the Court may not weigh the evidence.

Criminal Law & Procedure > Trials > Motions for Acquittal

Evidence > Inferences & Presumptions > Inferences

HN2 Trials, Motions for Acquittal

Under [Fed. R. Crim. P. 29](#), the trial court can determine whether the inferences that the government asks the jury to draw are reasonable, or rather inappropriately piling inference upon inference. Thus, a reviewing court must take a

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hard look at the record and reject those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative. This function is especially important in criminal cases, given the prosecution's obligation to prove every element of an offense beyond a reasonable doubt.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN3 [down] **Antitrust & Trade Law, Sherman Act**

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, or with foreign nations, is illegal. [15 U.S.C.S. § 1](#).

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Governments > Legislation > Statute of Limitations > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN4 [down] **Conspiracy, Elements**

In a price-fixing case, the government must prove three elements: (1) that the conspiracy to fix prices described in the indictment was knowingly formed and existed at or about the time alleged in the indictment; (2) that the defendant knowingly became a member of the conspiracy to fix prices; and (3) that the conspiracy had an intended and substantial effect on commerce in the United States. Moreover, all of the relevant factual conditions must have existed at the time the limitation period began.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN5 [down] **Regulated Practices, Price Fixing & Restraints of Trade**

Manufacturers can lawfully meet to discuss common concerns. Indeed, they can discuss market conditions, and even prices. They can choose to concur in the pricing decisions of others so long as they independently arrive at these decisions. What they may not lawfully do is to agree to fix the prices that they will charge in the American market.

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

HN6 [down] **Exemptions, Statements by Coconspirators**

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While the trial court can weigh the statements of co-conspirators made during the course and in furtherance of the conspiracy in making threshold determinations under Fed. R. Evid. 801(d)(2)(E), those statements alone are not sufficient, absent independent evidence.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

[HN7](#) Conspiracy, Elements

Mere presence at the scene of a crime is insufficient to prove membership in a conspiracy, and even if it is a fair inference that the defendant knew what was going on, that is not enough to establish intent to conspire.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[HN8](#) Regulated Practices, Price Fixing & Restraints of Trade

The failure of implementation of an alleged price-fixing agreement suggests that there was no such agreement.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

[HN9](#) Inchoate Crimes, Conspiracy

The standard for withdrawal from a conspiracy requires more than mere cessation of activity in furtherance of the conspiracy. In order to withdraw, a conspirator must act affirmatively either to defeat or disavow the purposes of the conspiracy. Typically, there must be evidence either of a full confession to authorities or a communication by the accused to his co-conspirators that he has abandoned the enterprise and its goals.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

[HN10](#) Conspiracy, Elements

Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Banking Law > Types of Banks & Financial Institutions > Federal Savings Associations

Antitrust & Trade Law > Sherman Act > Jurisdiction

[HN11](#) Regulated Practices, Price Fixing & Restraints of Trade

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The phrase "in restraint of trade or commerce among the several states", [15 U.S.C.S. § 1](#), is both an element of the offense of price-fixing and a vital prerequisite for federal court jurisdiction.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

International Law > Dispute Resolution > Comity Doctrine > General Overview

[HN12](#) [] **Regulated Practices, Price Fixing & Restraints of Trade**

The basic standard is the same for proving either jurisdiction and the third element of the offense on the merits under [15 U.S.C.S. § 1](#). The language of [15 U.S.C.S. § 1](#) is the same; the primary concerns of one mirror the concerns of the other. While there may be additional concerns that may be appropriate for the judge to consider in determining jurisdiction, the core question is, or should be, the same. Moreover, this is particularly so where the factual determination necessary for one, overlaps with the factual determination necessary for the other.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

[HN13](#) [] **International Aspects, International Application of US Law**

It is well established by now that the Sherman Act, [15 U.S.C.S. §1](#), applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[HN14](#) [] **Regulated Practices, Price Fixing & Restraints of Trade**

In a domestic price-fixing case, the third prong of [15 U.S.C.S. § 1](#) imposes a minimal standard. Proof of the conspiracy and an overt act are per se proof of a substantial impact on the market.

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

[HN15](#) [] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

There are two general templates for evaluating jurisdictional issues involving restraints on trade: a per se test and a rule of reason test.

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

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[**HN16**](#) [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The per se model is the traditional domestic price-fixing conspiracy in which courts have not required an appraisal of the actual magnitude of the impact in a domestic setting. Price-fixing is the paradigm of an act in violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#). Price-fixing cartels are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness.

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

International Trade Law > General Overview

[**HN17**](#) [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The "rule of reason" approach to evaluating jurisdictional issues involving restraints on trade is typically applied to restraints of trade not involving price-fixing or claims of vertical conspiracies. In those cases, proof that a given set of acts took place does not necessarily mean that they had a "substantial effect" on the market. The specific impact has to be proved under a "rule of reason" analysis which considers multiple factors.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

International Trade Law > General Overview

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

[**HN18**](#) [blue icon] US Department of Justice Actions, Criminal Actions

To say that domestic per se rules are not necessarily and automatically applicable in the international context is not to say that an antitrust court needs to hesitate very long before condemning restraints with significant and obvious effects on United States commerce, and without any plausible purpose other than the suppression of competition with and in the United States.

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

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

[**HN19**](#) [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The correct approach to a foreign price-fixing conspiracy is something akin to a "per se plus" test, adding to the traditional domestic analysis the requirement that the government show substantial effects by showing a substantial connection to the United States market. Substantial effects could be shown in any of the following ways: (1) whether the volume of commerce affected by the conspiracy was substantial; (2) whether the share of the market

allegedly impacted by the alleged conspiracy was substantial; and (3) whether the conspiracy as a whole substantially lessened competition in the relevant market.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN20[] Regulated Practices, Price Fixing & Restraints of Trade

A substantial effect on United States commerce cannot simply be assumed to continue because it once existed. There is no reason to treat having substantial effects on United States commerce like being a member of a conspiracy, which is held to continue until its goals or membership have been affirmatively abandoned. Rather, because it is a matter of objective fact, rather than subjective intent to agree, the government must prove that the test is met at the relevant time.

Counsel: For NIPPON PAPER INDUSTRIES CO., LTD, Defendant: Ian Simmons, O'Melveny & Myers, Jeffrey W. Kilduff, O'Melveny & Meyers, Washington, DC.

For NIPPON PAPER INDUSTRIES CO., LTD, Defendant: William H. Kettlewell, Dwyer & Collora, Boston, MA.

For NIPPON PAPER INDUSTRIES CO., LTD, Defendant: Alan M. Cohen, O'Melveny & Myers LLP, New York, NY.

For OJI PAPER CO., interested party: Peter E. Ball, Hill & Barlow, Boston, MA.

For OJI PAPER CO., interested party: E. Charles Routh, Garvey, Schubert & Barer, Seattle, WA.

U. S. Attorneys: Lisa M. Phelan, U.S. Department of Justice, Washington, DC.

Judges: NANCY GERTNER, U.S.D.J.

Opinion by: NANCY GERTNER

Opinion

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V. CONCLUSION

This case, in its journey to and from the Court of Appeals, and in the trial before me, has raised important questions concerning the extraterritorial application of American criminal antitrust laws to a foreign corporation. The United States indicted a Japanese corporation, Nippon Paper Industries Co., Ltd. ("NPI"), alleging that NPI's predecessor, Jujo Paper Company, Ltd. ("Jujo"), conspired with other Japanese manufacturers to fix the price of thermal fax paper for export into the United States in violation of the Sherman Antitrust Act, [15 U.S.C. § 1](#).

The charges were first dismissed by the trial court,¹ reinstated by the First Circuit,² then tried before me for over six weeks.³ While the basic jurisdictional issue - whether criminal antitrust charges could be lodged against a Japanese corporation based on the facts as alleged - was resolved by the First [\[**3\]](#) Circuit's decision, the trial of the matter proved complex and troubling. Ultimately, after more than six days of deliberation, the jury was unable to come to a decision.⁴

NPI renewed its motion for judgment of acquittal pursuant to [Fed. R. Crim. P.29](#) (docket # 260). After review of the entire record of the trial, the exhibits, and lengthy memoranda, I GRANT the motion and hereby direct a verdict of acquittal.

I. PROCEDURAL HISTORY

On December 13, 1995, a federal grand jury in Boston returned an indictment against Jujo, and NPI, as Jujo's successor. Jujo/NPI was charged in one count of price-fixing. [\[**4\]](#) The allegations were that beginning at least as early as February 1990 and continuing at least through December 1990, NPI and its co-conspirators participated in a price-fixing conspiracy involving the sale of thermal facsimile paper ("fax paper") sold in the United States and Canada ("North America").

NPI moved to dismiss. It alleged that if the conduct occurred at all, it took place entirely in Japan and as such American criminal antitrust laws could not be extraterritorially applied. The government contested both NPI's characterization of the facts - that the conduct at issue took place completely within Japan - and its characterization of the law - the limited nature of American jurisdiction. The government maintained that the case involved a horizontal conspiracy amongst NPI and other manufacturers which it conceded took place on Japanese soil, and, in effect, a vertical conspiracy between those manufacturers and the trading houses which sold their product on American soil. The Japanese conspiracy alone, the government maintained, was supportable under [Hartford Fire Ins. Co. v. California, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 \(1993\)](#), because of its [\[**5\]](#) intended and likely impact on American trade. The allegations that United States trading houses took steps to implement the scheme vitiated any concern about the extraterritorial application of American law.

¹ [United States v. Nippon Paper Indus. Co., 944 F. Supp. 55 \(D. Mass. 1996\)](#).

² [United States v. Nippon Paper Indus. Co., 109 F.3d 1 \(1st Cir. 1997\)](#).

³ The trial started on June 1, 1998, and after twenty-six trial days, a mistrial was declared on July 13, 1998.

⁴ Jury deliberations started on July 1, 1998, and on July 13, 1998, a mistrial was declared.

[*178] The District Court dismissed. As to the allegation of illegal conduct within the United States, the Court held that the government failed to adequately plead a vertical conspiracy between American trading houses and the Japanese manufacturers with whom they were affiliated. See [United States v. Nippon Paper Indus. Co., 944 F. Supp. 55, 63 \(D. Mass. 1996\)](#). As to the actions of the Japanese manufacturers, the Court dismissed the indictment on the ground that a criminal antitrust prosecution could not be based on wholly extraterritorial conduct. See [Id. at 66.](#)⁵

[**6] The First Circuit reversed. In a case of first impression, the court held that the Sherman Act, previously given extraterritorial application only in civil cases, had equal breadth in a criminal case. See [United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 \(1st Cir. 1997\)](#), cert. denied, 522 U.S. 1044, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998). Rejecting arguments derived from comity among nations, as well as those hinging on differences between civil and criminal law, the Court found that Hartford Fire "definitively established" that American antitrust laws apply to "wholly foreign conduct which has an intended and substantial effect in the United States." [Id. at 9.](#)

The case was reassigned to this Court. While concerns about comity and the exigencies of a criminal prosecution may not have been sufficient to bar the prosecution, they figured prominently in the actual trial. Fundamental issues about language and meaning - which inferences were reasonable and which were not in light of Japanese culture and traditions -- permeated the case. In short order, the Court was obliged to address: To what degree does the international [*7] nature of the investigation affect the discovery obligations of the United States Government? (Memorandum and Order, May 15, 1998) Which country's law governs the question of the liability of a successor corporation?⁶ (Order, May 29, 1998) Should the Court allow the video teleconferencing of a witness from Japan in the middle of the trial when that witness was beyond government process? (Memorandum and Order, July 28, 1998) What procedures should the Court follow when the translator for the defense and the translator for the government disagree on a critical issue (whether the word "Sando" meant agreement, which was illegal, or concurrence, which, arguably, was not)? Should the Court permit the introduction of evidence of price-fixing involving products to be sent to other countries when such activities were not illegal in those countries?

[**8] In its original and renewed motions for acquittal, NPI claims that there was no evidence that a conspiracy to set prices existed, or that its predecessor, Jujo, knowingly joined it. It also claims that even if one were to credit the evidence that Jujo was a member of a price-fixing conspiracy, the evidence is clear that it was not a member of any such conspiracy by the time the limitations period began, that is after November 15, 1990.⁷

In addition, NPI would have the Court reexamine jurisdiction, now in the light of [*179] the facts adduced at trial. The First Circuit, it argues, in reinstating this indictment, set a standard for a foreign antitrust conspiracy - even one allegedly involved in price-fixing - that was different from the domestic one, requiring, in addition to the traditional factors, a showing of "conduct which has an intended [*9] and substantial effect in the United States." [Nippon, 109 F.3d at 9.](#) While the facts as alleged in the indictment may have passed muster, the facts as proved did not. Moreover, NPI argues even if the conspiracy's contacts with the United States were at some point sufficient to meet a "substantial effects" test, the Japanese manufacturers' complete loss of market share meant that no substantial effects continued into the limitation period.

⁵ A horizontal conspiracy is one that involves defendants in a given market, at the same level of distribution. See [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811 \(1940\)](#). By contrast, a vertical conspiracy is an agreement between defendants at different levels of distribution. See [Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730, 99 L. Ed. 2d 808, 108 S. Ct. 1515 \(1988\)](#). Such conspiracies typically involve a manufacturer or supplier dictating the resale price of an item it sold to its distributor or to other customers.

⁶ The government sought to hold NPI responsible for the acts of its predecessor company, Jujo. I treated the issue as a choice of law question and concluded that Japanese law was not inconsistent with holding NPI responsible as a successor. See Memorandum and Order, dated May 29, 1998.

⁷ The indictment in this case was handed down on December 13, 1990, but NPI agrees with the government that the relevant date for the statutory period is November 15, 1990.

NPI's renewed motion for judgment of acquittal pursuant to [Rule 29](#) is ALLOWED.

II. RULE 29 STANDARD

HN1 A motion under [Fed. R. Crim. Pro. Rule 29](#) should be granted only where the evidence adduced at trial is so insufficient that no rational trier of fact can find proof beyond a reasonable doubt.⁸ To be sure, this is a very heavy burden. The Court must give the prosecution the benefit of all reasonable inferences drawn from the evidence, including circumstantial evidence, "and the trial court is required to view the evidence in the light most favorable to the Government with respect to each offense." [United States v. Mariani, 725 F.2d 862, 865 \(2nd Cir. 1984\)](#). The Court may not weigh the evidence. [\[**10\]](#) See [United States v. Arache, 946 F.2d 129, 139 \(1st Cir. 1991\)](#)("credibility of witnesses [can] not be assessed in determining the sufficiency of the government's evidence.").

HN2 But the Court can determine whether the inferences that the government asks the jury to draw are reasonable, or rather inappropriately "piling inference upon inference." [United States v. DeLutis, 722 F.2d 902, 907 \(1st Cir. 1983\)](#). Thus, a reviewing court must "take a hard look at the record and [reject] those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative. This function is especially important in criminal cases, given the prosecution's obligation to prove every element of an offense beyond [\[**11\]](#) a reasonable doubt." [United States v. Spinney, 65 F.3d 231, 234 \(1st Cir. 1995\)](#).

III. EVALUATING THE MERITS OF A PRICE-FIXING CLAIM

HN3 Section One of the Sherman Act reads: "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." [15 U.S.C. § 1.](#) **HN4** In a price-fixing case, the government must prove three elements: (1) that the conspiracy to fix prices described in the indictment was knowingly formed and existed at or about the time alleged in the indictment; (2) that the defendant, NPI, through its predecessor, Jujo, knowingly became a member of the conspiracy to fix prices;⁹ [\[**12\]](#) and (3) that the conspiracy had an intended and substantial effect on commerce in the United States.¹⁰ Moreover, all of the relevant factual conditions -- existence of the conspiracy, Jujo/NPI's membership in it, and the conspiracy's having intended and substantial effects on commerce in the United [\[*180\]](#) States -- must have existed at the time the limitation period began, November 15, 1990.

The government has failed on all three elements to show that "a reasonable mind might fairly conclude guilt beyond a reasonable doubt." [Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229, 232 \(D.C. Cir. 1947\)](#) (cited in 2 C. Wright, Federal Practice and Procedure § 467 (1982 and Supp. 1999)). The problem with regard to the first two elements is the same: Even if the government was able to show that a conspiracy to fix prices existed at one time, and included Jujo/NPI, it was unable to demonstrate to any rational trier of fact beyond a reasonable doubt that the conspiracy continued through November 15, 1990. And, with regard to the third element, the government did not present sufficient evidence that the conspiracy, even if it continued to exist on November 15, 1990, still had a substantial effect on commerce in the United States at that time.

IV. THE FACTS ADDUCED [\[13\]](#) AT TRIAL**

⁸ [Rule 29\(a\)](#) provides that "the court on motion of the defendant or of its own motion shall order the entry of judgment of acquittal. . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction." [Fed. R. Crim. P. 29\(a\)](#).

⁹ See [United States v. All Star Industries, 962 F.2d 465, 474 \(1st Cir. 1992\)](#) (in a per se violation case, the government has the burden to prove "that defendants knowingly and intentionally joined that agreement").

¹⁰ See [Nippon, 109 F.3d at 9](#) (holding "that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States.").

A. Background

The centerpiece of the government's case was a meeting that was held on March 30, 1990, attended by representatives of ten paper companies that manufacture thermal fax paper imported into the United States. They included Kanzaki Paper Manufacturing Co. Ltd. ("KSK"), Mitsubishi Paper Mills ("MPM"), Oji Paper Company ("Oji"), Honshu Paper Company ("Honshu") and Jujo/NPI. The meeting had been called to deal with a threat by an American paper company to charge these Japanese manufacturers with "dumping" paper in the American market, or selling their products at a price below their fair value to the detriment of a domestic industry.¹¹

[**14] The Japanese manufacturers made up perhaps thirty percent of the market for thermal fax paper; the American companies, seventy percent. Virtually all witnesses agreed that throughout 1990 there was a substantial downward pressure on prices because of an oversupply of thermal fax paper. Indeed, the entire product line was facing strong competition from "plain paper" fax machines.

The stakes were high: If the dumping charges were proved, the imports of the offending companies would be subject to a tariff. Given the size of their market share, the weakness of the product, and the oversupply of thermal fax paper -- any tariff increasing the cost of thermal fax paper would likely drive these companies out of the American market. They had to walk a fine line - raising prices to avoid a dumping charge, without going so far as to eliminate their market share entirely.¹²

[**15] [HN5](#) 

Manufacturers can lawfully meet to discuss common concerns. Indeed, they can discuss market conditions, and even prices. See Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984). They can choose to concur in the pricing decisions of others so long as they independently arrive at these decisions. Id. What they [*181] may not lawfully do is to agree to fix the prices that they will charge in the American market. And that, the government alleged, is just what they did: The Japanese companies illegally agreed to raise the price at which they sold thermal fax paper to \$ 20.00 per hundred square meters.

Implementation, however, was not easy. None of these manufacturing companies had sales divisions in the United States charged with importing the product. Each manufacturer would sell the paper outright to a Japanese trading company. The Japanese trading company, after marking up the product, would then sell it outright to a trading company on United States soil. The United States trading companies, after adding their own markups, would sell the product to converters, companies that would convert the thermal fax rolls into the [**16] particular sizes the customers ordered.

However complicated the implementation, the government proved overt acts in furtherance of the agreement -- that some of the conspirators told their affiliated trading houses about the manufacturer's March meeting, directed them to raise the prices, and that some of the trading houses took steps to carry out the increase, at least initially.

¹¹ See [19 U.S.C. § 1673](#). Dumping is determined by evaluating the price charged in the United States with the price in the home market, suitably adjusting for "costs, charges, and expenses incurred as a result of exporting the goods from the home country to the United States." [NSK Ltd. v. United States, 115 F.3d 965, 969 \(Fed.Cir. 1997\)](#).

¹² There was the aroma of a setup in all of this by the American companies seeking not just to eliminate their Japanese rival's competitive edge, but to eliminate their Japanese rivals entirely. One of the attendees at the March 30, 1990, meeting, KSK, was the parent company of Kanzaki Speciality Papers (KSP), an American company. (KSP was considered to be an American corporation for anti-dumping purposes). Hirosuke Fukuda, a KSP vice president, testified that he used KSK to get information about Japanese prices; KSK in turn directed its American company, KSP, to join with Appleton and threaten to file an anti-dumping petition. That, in turn, would force the Japanese companies to raise their prices and push them out of the market.

To be sure, some trading companies strongly resisted any price increases, arguing with the manufacturer's representatives, perhaps even refusing to implement it,¹³ **[**17]** or cutting special deals with customers to mitigate its effects. Indeed, by the end of the trial, the government was obliged to change its theory from price-fixing to price stabilization.¹⁴ But the complexities of implementation according to the government were not critical to their case. A price-fixing agreement, it noted, does not have to be successful to be illegal.

The defense agrees that a meeting was held, agrees that it was in response to an anti-dumping threat, but contends that the meeting was on the permissible side of the line - Japanese manufacturers meeting to discuss a common legal threat. Nothing nefarious was intended; nothing **[**18]** nefarious was accomplished. Documents which it highlighted suggested that the government's characterization of the March 30 meeting was wrong. Some participants had either second thoughts immediately about price increases or no intention of ever going along with it. Some documents suggested that the March 30 meeting was **[*182]** "all talk." They all had to make noises about price increases to deflect the anti-dumping threat; what they planned to do, however, was another matter.

Indeed, according to the defense, one indication of the innocuous nature of the March 30 meeting was the patchwork quilt of prices that resulted. There were no across-the-board increases; most prices continued to decline. In any event, there was no evidence of Jujo's participation. In a time line presented to the jury, NPI attempted to show that after each critical price-fixing event alleged by the government, Jujo *lowered* its prices. Whatever public face Jujo may have presented to other Japanese competitors was belied by its actions.

Finally, by November 15, 1990, the government can show neither the continuation of the conspiracy nor its continued "substantial effect" on American commerce. Oversupply of thermal **[**19]** fax paper, the pressures driving down prices, coupled with the strength of the American competitors create a paradox in the core of the government's case: If there had been a conspiracy to fix prices in March of 1990, and prices were raised or even stabilized, that conspirator would immediately lose customers, market share and in short order, any impact on the American market. If, recognizing that, a conspirator jumped ship at the first opportunity, abandoning all efforts to increase or stabilize prices, then it would have abandoned the conspiracy.

Indeed, the record reflects that both happened. Some companies, like Honshu, may well have tried to raise prices or at least hold the line. By November of 1990 - they lost substantial numbers of their American customers. Others, like Jujo and Oji, continued to lower prices - ignoring whatever representations they had made in March. By mid 1990 a price competition resumed - as to those still in the market - that was so vigorous that the American companies threatened a dumping charge again.

B. Co-Conspirator Hearsay and Cultural Inferences

¹³ For example, Mr. Ito of MIC (the American trading house) writes to MC (the Japanese trading house) in June of 1990: "Under the current environment, for whatever reasons this is not a market under which we can accept a price increase. I also don't think there would be a general price increase with the concern for dumping as Mitsubishi explains. If Mitsubishi needed to raise prices somehow (for public consumption) because of dumping, they can find a technical solution that would keep the actual prices with no change . . .".

"Either way, under the current circumstances I have to say that an actual price increase is impossible, and accordingly we must use an actual price <support> measure for at least the July production (if necessary I will consent to a separate public pricing). For August and beyond I would like to meet with Ichida Department Chief [from the manufacturer, Mitsubishi Paper Mills] when he visits the US. Please confirm." Another official of a trading company, Mr. McCall of DaiEi Papers U.S.A., distributor of Honshu products, peppered the manufacturers with letters and faxes urging them not to raise prices because of the market conditions.

¹⁴ NPI claimed that this change represented a material variance between the government's price-fixing indictment, and its price stabilization proof, and moved for a mistrial. While I denied the motion, on reflection I believe the ruling was in error. The indictment suggested a simple theory -- an agreement to increase prices and its implementation. Even the government's opening reflected this approach. The defense defended, in part, on the grounds that may prices in fact declined after the March 30 meeting. A price stabilization theory concedes that, but suggests that prices would have declined more had there been no agreement. In the light of that issue, one can envision a different defense -- significantly with expert witnesses, perhaps different cross examination. The issue, however, is mooted by the instant order.

The evidence on which the government chiefly relied consisted of documents, business [**20] records and testimony by co-conspirators -- representatives of other Japanese manufacturers it contended conspired to fix prices, employees of the trading companies who distributed the product between Japan and the United States, and within the States, who allegedly implemented the price plan.

NPI vigorously challenged the testimony under [F.R.E. Rule 801\(d\)\(2\)\(E\)](#), claiming that there was inadequate independent evidence to show that these were statements made by co-conspirators "during the course and in furtherance of the conspiracy." [HN6](#) While the Court could weigh the statements themselves in making threshold determinations under the Rule, see [Bourjaily v. United States, 483 U.S. 171, 180-81, 97 L. Ed. 2d 144, 107 S. Ct. 2775 \(1987\)](#), those statements alone are not sufficient, absent independent evidence. See [United States v. Sepulveda, 15 F.3d 1161, 1181-82 \(1st Cir. 1993\)](#); [United States v. Petrozziello, 548 F.2d 20 \(1st Cir. 1977\)](#). On a preliminary showing by the government, the statements were admitted *de bene*. See [United States v. Ciampaglia, 628 F.2d 632, 638 \(1st Cir. 1980\)](#).

The enterprise of making findings under [**21] [Petrozziello](#), as well as making findings under [Rule 29](#), was complicated by the cultural/language divide in this case. There were warring translations of documents and testimony, and warring views of the inferences that could reasonably be drawn from certain acts and statements. NPI attempted to show that acts that may appear nefarious to American eyes, had no such patina in Japan.¹⁵ [**22] Where the contested [*183] issues involved language, the translators were urged to resolve their differences; where they could not, the jury was given the evidence of both translations.¹⁶

Understanding full well the problem of bootstrapping - weighing too heavily the contested statements themselves, all the while trying to determine if they are admissible - as well as the problems raised by language, I nevertheless concluded that the statements had been appropriately admitted.¹⁷ But considering all of the evidence, co-conspirator hearsay and otherwise, the government's case faltered.

¹⁵ It is commonplace to talk about how fact finders are asked to draw reasonable inferences from the evidence based on their "shared perceptions" and their common understanding of the "habits, practices, and inclinations of human beings." [United States v. Ortiz, 966 F.2d 707, 712 \(1st Cir. 1992\)](#). Here American "shared perceptions" and the common understandings of the significance of particular acts may well be at odds with the meaning given those acts in Japan. To the extent that this was so, it was incumbent upon NPI to present evidence to that effect to the jury.

¹⁶ A government witness, Andy McCall of DaiEi, testified that in Japanese, "sentences often don't have a subject, but at the beginning [of the text] the subject is identified, and then in subsequent sentences . . . the subject would not be repeated." An interpreter would be obliged to infer who the subject is. Moreover, he noted that Japanese history is "longer than our history is. So there's some shared values that the Japanese have and are understood through history, culture and language." Sometimes those values are implied, "written between the lines," and can be difficult to understand for a non-native.

¹⁷ The defense insisted that the co-conspirators under the rule had to be either named in the indictment, or had to have qualified for that designation under the substantive law of conspiracy. Since the Japanese trading houses would not have qualified under [Monsanto Company v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#), NPI argues, the statements and faxes from these companies must be excluded.

The law with respect to co-conspirator hearsay, however, is not coterminous with the substantive criminal law. See [United States v. Carter 966 F. Supp. 336, 346 \(E.D. 1997\)](#). Under the circumstances, I found that there was sufficient evidence to meet the [Petrozziello](#) standard: Many of the documents which tended to prove the existence of a conspiracy had an independent non hearsay basis - records of regularly conducted activity under [F.R.E. Rule 803\(6\)](#), or statements against interest under [F.R.E. Rule 806\(b\)\(3\)](#). These included the critical memoranda with respect to the March 30, 1990, meeting of the alleged co-conspirators, as well as documents suggesting price increases to at least certain Jujo customers.

In addition, there was testimony concerning non-assertive conduct, notably the presence of a Jujo representative at crucial meetings in February and March, who, according to Mr. Hinoki, made no objections to what was being said. In some instances, the contested co-conspirator statement was not offered for its truth at all. In order to rebut NPI's claim that the prices charged in the United States were the product of independent negotiating between customers and trading houses, and trading houses and the manufacturers, rather than the manufacturers' orders, the government sought to introduce the fact that efforts to increase

[23] [*184] C. Failure to Present Sufficient Evidence of a Conspiracy Continuing Through November 15, 1990, of Which Jujo/NPI Was a Member**

1. Evidence of a March 1990 Conspiracy to Fix Prices

The government's most important evidence consists of a single document, a "Report on Thermal Paper Export Manufacturer's Meeting." The report was prepared by Mr. Funabashi of Honshu, a thermal fax paper manufacturer and one of the attendees of the March 30, 1990 meeting. Written the next morning, it described who attended: Honshu, KSK, MPM, Oji, and Jujo along with five other companies. According to the government's translation, the document states that "agreement and approval was obtained from each company to revise prices as given below." The new price for the North American market was to be \$ 20.00/100m², to be implemented in May 1990. This was the government's smoking gun.

The government buttressed the document through the testimony of other "downstream" witnesses -- the employees of Japanese and American trading companies "ordered" to implement a price increase, the telexes and faxes between those trading companies, and other message sent between manufacturers and the trading companies.

[24]** NPI responds that the government's evidence is insufficient for several reasons. First, Mr. Funabashi's report is squarely contradicted by the only testimony offered at trial of someone present at that meeting. Mr. Hinoki, also of Honshu, who was the government's star witness,¹⁸ denied that any of the manufacturers at that meeting agreed either to increase or to stabilize prices, and indeed, did not recall what if anything was said about price increases in the United States.¹⁹

[25]** Second, there is no evidence, according to NPI, that the meeting consisted of anything other than mid-to-lower level employees who discussed, without the authority to bind their respective companies, the threat of an anti-dumping action by competitors in the U.S. Indeed, Mr. Hinoki testified not only that there was no agreement, but that he himself lacked ultimate price authority to bind Honshu. NPI argues that there is no reason to think any of the other attendees had any more authority than he.

prices in some instances followed a communication with the manufacturer or Japanese trading house alerting the American trading companies to the March 30 agreement. Moreover, it was significant that these statements - offered de bene or for a non hearsay statement - corroborated each other as I noted: "Where there are 15 statements from independent co-conspirators[,] one argument is that the facial consistency of all the co-conspirators' statements is independent evidence." See [United States v. Garner, 837 F.2d 1404, 1415 \(7th Cir. 1987\)](#) ("The remarkable consistency with which payments were made [to inspectors] and the fact that the inspectors raised the standard fee almost simultaneously from \$ 10 to \$ 20 suggests that the inspectors were communicating with each other and encouraging each other to raise the fee.") In this regard, I am not specifically weighing the content of the statements -- only that they are consistent with each other.

Where the standard for proving the existence of a conspiracy and the defendant's participation in it is by a preponderance of the evidence, I concluded that the evidence was sufficient. Where the standard is more rigorous, and where the evidence concerns the continuation of that conspiracy into the fall of 1990, I have come to a different conclusion.

¹⁸ Hinoki's testimony was so important to the government that it sought to take his testimony via video teleconferencing. The testimony was taken each evening at 6:00 p.m. Boston time, and 7:00 a.m. Tokyo time. See Memorandum and Order, July 28, 1998.

¹⁹ The government improperly sought to impeach Mr. Hinoki, its own witness, by suggesting that he had earlier given the AUSAs and their paralegals different stories, more favorable to the government. The examination was entirely impermissible. The government refused to allow the defense to use its "rough notes" of its meeting with Mr. Hinoki to cross-examine, but it had no problem using them. The AUSA repeatedly asked Mr. Hinoki questions beginning with, "Didn't you tell me [such and such] when I met with you . . ." See [United States v. Shoupe, 548 F.2d 636, 643 \(6th Cir. 1977\)](#)(holding that "recitation by the prosecutor of the entire substance of a witness's disavowed, unsworn prior statements, which, if credited by the jury, would be sufficient to sustain a conviction, abridged defendants' right to a fair trial in violation of the [Due Process Clause of the 5th Amendment](#)."). See also [United States v. Zackson, 12 F.3d 1178, 1185 \(2d Cir. 1993\)](#), cert. denied **512 U.S. 1224 (1994)**(excluding testimony of a government witness where the government's proffer indicated that the witness would offer no probative testimony and was using the witness only as a conduit to get potentially prejudicial hearsay before the the jury.)

Third, NPI contests the translation of the word "Sando" in Mr. Funabashi's report of the March 30, 1990, meeting. According to the government, "Sando" means "agreement"; according to NPI, it means "concurrence." While NPI acknowledges that "agreeing" to revise prices at a certain level would be illegal, it argues that merely concurring with a suggested price [*185] is not. Indeed, it argues that the evidence shows only that someone proposed that a \$ 20.00/100m² price would be a good countermeasure to the threatened dumping charge; it claims that there is no evidence that any manufacturer actually agreed not to charge below that figure.²⁰ Indeed, many of the documents suggest that the manufacturers [**26] wanted to investigate the matter further before making a decision, consider the market trends, and gauge what other manufacturers were doing. Notwithstanding the tenor of Funabashi's account of the March 30, 1990, meeting, other documents suggested that the participating companies had not, in fact, made up their minds as to the pricing strategy.²¹

[**27] Fourth, NPI claims that the record suggests that the companies planned to answer the anti-dumping threat with a response individualized to each customer, rather than with the blanket, across-the-board price increase as alleged in the indictment. In a memorandum that Mr. Hinoki wrote to accompany his transmittal of Mr. Funabashi's report to Honshu's Seattle office, Mr. Hinoki clearly indicated that Honshu itself intended to respond to the dumping threat on a customer-by-customer basis: "Our company is thinking as its response, 'to cooperate with the industry without reducing the amount of orders received,' and [we] would like to plan our responses according to each customer." From this NPI infers that Honshu itself never intended to impose an across-the-board price increase or price stabilization strategy. And if Honshu did not intend either sort of price strategy, there is no reason to think that any others at the meeting did either.²² Indeed, NPI cross-examined virtually each and every trading house employee by showing that for the most part, prices continued to decline during the relevant period, culminating as I describe, infra, in a resumption of competition by mid [**28] 1990.

Finally, when the government's theory moved from price-fixing to price stabilization, the evidence was even more tenuous. Given the severe downward pressure on prices, if they stabilized at all during the period immediately following the March 30 meeting -- and as I describe there is reasonable doubt that they did for very long -- it was as likely or more likely to have been the result of the serious threat of Appleton's anti-dumping petition as any conspiracy to fix prices. A reasonable jury could not accept the latter version beyond a reasonable doubt.

The government responds first by trying to account for Mr. Hinoki's profound weakness as a witness. [**29] It points out that Mr. Hinoki had reason in 1998 to deny that an agreement was made because his company then faced potential civil antitrust exposure. It argues that since I may not assess the credibility of the witness, see United States v. Arache, 946 F.2d 129, 139 [*186] (1st Cir. 1991), and I am obliged to take the evidence in the light most favorable to the government, see United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984), I must accept the government's resolution of the conflict between Mr. Funabashi's report and Mr. Hinoki's testimony. The issue here is not just rejecting Mr. Hinoki's testimony on key points; the government would have me accept an alternative picture, which Mr. Hinoki did not paint. Nevertheless, it is a moot point. There is no question that, quite apart from Mr Hinoki's words, his actions in 1990 on behalf of Honshu, and the actions of others, along with other

²⁰ NPI tries to advance another legal argument in this context as well, namely that meeting to discuss how to respond to an anti-dumping suit is not illegal. However, NPI misreads the Noerr-Pennington doctrine, which only exempts joint efforts to influence political or judicial decision makers from anti-trust laws. See McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1558-59 (11th Cir. 1992). There is no evidence that the meeting on March 30, 1990, was aimed at formulating a litigation strategy or starting a political action campaign. The Funabashi report, according to the inferences the government would have a jury draw, deals only with a price-fixing strategy, and that is not allowed under the Noerr-Pennington doctrine.

²¹ In Mr. Funabashi's report of the March 30 meeting, the government translated one phrase as expressing Honshu's intent to "cooperate" with the industry. The defense offered an alternative - "to keep up with" or "to go along with." The witness conceded that the Japanese translation of that particular word was very ambiguous.

²² On cross-examination of the trading house representatives, NPI showed that the prices actually tended to fall when they were supposed to be rising or at least stabilizing. I deal with this primarily in the context of the general abandonment of the conspiracy, infra, but it could also serve as evidence of competition in what was a buyers' market.

evidence, is consistent with the inference that a price-fixing conspiracy was formed at the March 30 meeting. The corroborating evidence the government offers includes the following:

First, there is evidence of a meeting that predated and set the stage for the March **[**30]** 30 meeting. Mr. Tano of KSK wrote a report memorializing a "Meeting of Four Thermal Paper Companies" that occurred on February 1, 1990 at Jujo's "head office." The purpose of this meeting was reportedly "first, to put a stop [to price decreased], then announce price increases. If possible [the increases should be] 10% up from April production lot." During this meeting, arrangements were made for a follow-up meeting five days later, also to be held at Jujo's office, the purpose of which was to "disclose price levels for each market, [to] try to put a stop to price decreases [and to] prepare the foundation for launching price increases later on." The companies present at the February 1 meeting, Jujo, KSK, MPM, and Oji, all attended the March 30 meeting as well.

Mr. Tano also memorialized the follow-up meeting on February 6, 1990, at which ten thermal fax paper companies, including the four from the meeting on February 1, were in attendance. Again, the discussion indicated that the manufacturers "would like to establish the lowest price and then increase prices 10% from around April." The government plausibly argues that these two meetings "laid the groundwork" for obtaining **[**31]** an "agreement and approval" from each company "to revise prices."

The government also introduced evidence from after the March 30 meeting consistent with the inference that a conspiracy to fix prices was formed at that time. On the very same day as the meeting, Mr. Hinoki and Mr. Funabashi went to the offices of Mitsui-Tokyo, one of the Japanese trading houses that handled thermal fax paper sales for both Honshu and Jujo, and met with Mr. Sato of Mitsui to inform him about the agreement. Mr. Sato memorialized what they told him in a faxed report to Mitsui's offices in the United States. His report stated:

(1) [We] heard that a Japan thermal paper mills export maker meeting was held today, with Jujo as the group leader, and prices were discussed. (2) The result was to increase prices by 10 PCT from the May/90 production lot. That is, to set up a new price level as follows . . . Price: USD 20. 00 PER 100 M2 import duty paid and delivered [emphasis in the original].

Further, Mr. Hinoki twice transmitted, without qualification or correction, Mr. Funabashi's report describing what transpired at the March 30 meeting. First, on March 31, 1990, Mr. Hinoki **[**32]** and Mr. Funabashi gave a copy of the report to Mr. Hinoki's supervisor at Honshu, Mr. Onitsuka. Then, on April 2, 1990, Mr. Hinoki faxed a copy of the report to Mr. Takeyama in Honshu's Seattle office. Mr. Hinoki even attached a report of his own making (referred to above) which said that "[a] thermal paper export manufacturer conference was held, and it was decided to implement price increases from May." These acts of forwarding Mr. Funabashi's report to his boss and his colleague in the United States, along with his own attached report in the second instance, surely permit the inference that Mr. Hinoki thought in 1990 **[*187]** that an agreement to fix prices had been struck.²³

[33]** What was happening at Honshu immediately following the meeting was mirrored by what was happening at MPM. Mr. Oba of Mitsubishi Corporation ("MC"), the Japanese trading house responsible for sales of thermal fax paper manufactured by MPM, testified that he was summoned by Mr. Ishigaki of MPM to come to MPM's office so that Mr. Ishigaki could explain to Mr. Oba the details of a recent manufacturers' meeting. Mr. Ishigaki too was a named attendee at the February 1 meeting; MPM was also represented at the meetings on February 6 and March 30. Mr. Ishigaki related to Mr. Oba that the manufacturers had agreed at their recent meeting to increase prices for the sale of thermal fax paper to the United States and other markets. According to Mr. Oba, Mr. Ishigaki said that the manufacturers "fixed the price by territory." Mr. Ishigaki then instructed Mr. Oba to have MC implement the new price scheme starting from April or May of 1990.

²³ The government also cites a report generated on April 5, 1990, by Mr. Watanabe of "Mr. Fax," one of Honshu's customers. The report said that he was "suddenly" visited by three people, one of whom was Mr. Motoyama, the manager responsible for Oji's sales of thermal fax paper to the United States market. According to Mr. Watanabe, Mr. Motoyama stated that the "mills have decided [on a] new export price at [the] meetings of last week" and that "Oji has announced [a] new price by 10% increase." This report is particularly noteworthy given that Mr. Motoyama was a named attendee at the meeting on February 1, and that his firm, Oji, was represented at both the February 6 and March 30 meetings.

With regard to the claim that the representatives at the March 30 meeting did not have the authority to bind their respective corporations, the government responds that Mr. Hinoki's actions belie that claim as well. When Messrs. Hinoki and Funabashi visited Mr. [**34] Sato at Mitsui (Honshu's and Jujo's Japanese trading house), they told him not just that a price increase had been proposed, but that a decision had been reached, the result being "to increase prices by 10 PCT" [emphasis in the original]. Similarly, Mr. Funabashi's March 31 report stated not that Honshu and the other manufacturers were waiting on authorization from higher-ups before committing to the price-fixing agreement, but rather that "agreement and approval was obtained from each company." And shortly thereafter, Mr. Ishigaki of MPM summoned Mr. Oba of his Japanese trading house to confirm the manufacturer's agreement with him as well. As the government argues, "this picture of multiple manufacturer's representatives rushing . . . to advise trading houses and others of the newly-forged agreement eviscerates NPI's position that the representatives needed time after the March 30, 1990 meeting to obtain authority to bind their respective companies to the deal." Furthermore, looking at the March 30 meeting in context with the two meetings in February, it is a reasonable inference that the manufacturers would have sent representatives to the March 30 meeting who had authority [**35] to commit their respective companies.

With regard to the claim that Honshu, and presumably others, negotiated their prices according to each customer, rather than setting them across-the-board, the evidence is consistent with the government's price stabilization theory: Honshu was simply planning to be flexible in deciding how to try to raise or stabilize its prices. In other words, Honshu would negotiate distinct contracts with each different customer while simultaneously working on raising its average price 10% or to some other particular level.

Finally, with regard to the claim that prices did not in fact rise, the government notes that it need not prove that a price-fixing conspiracy was successfully implemented, only that the agreement was made and that some substantial steps were taken to try to implement it. In any [*188] event, as I have noted, by the end of the trial, the government changed its theory to address this issue. No longer was it claiming a conspiracy to raise prices; this case involved, they now suggested, a conspiracy to stabilize prices, to fix their fall, an equally impermissible goal.

Given the strictures of the [Rule 29](#) standard, I conclude that the government [**36] has established the existence of a conspiracy, at least as of March 30, 1990.

2. Evidence that Jujo Was a Member of a Price-Fixing Conspiracy

The evidence that Jujo joined the conspiracy is somewhat weaker, but still not so weak that a jury could not reasonably find beyond a reasonable doubt that NPI was guilty of having joined the conspiracy, at least at its inception.

The government starts its case referring to two observations in the report of Mr. Funabashi. First, he reports that Jujo was not only at the meeting of ten manufacturers on March 30, 1990, but at the preliminary meeting, held an hour before the main meeting, which Mr. Funabashi described as a meeting of "the five major companies." It would be odd for Jujo to be a "major company" and yet to play a passive or spectator's role. Second, Mr. Funabashi reports that all of the companies in attendance at the main meeting agreed to and approved the collective price revision scheme.²⁴

[**37] In addition, the government points out that Jujo was a host for the earlier February meetings, raising the inference that it had a leading role in the formation of the conspiracy. In addition, the government points to a memorandum from Mr. Sato of Mitsui's to Mitsui's offices in the United States, where Jujo's thermal fax paper was distributed, which describes Jujo, based on what Messrs. Hinoki and Funabashi told him, as "the group leader" of the March 30, 1990 meeting.

In a similar vein, the government cites a correspondence faxed by Mr. Ito of Mitsubishi International Corporation, MPM's American trading house in New York, to MC in Tokyo on April 9, 1990. In this document, Mr. Ito relates that

²⁴ As noted above, NPI contests the translation of "Sando" as "agreement." For purposes of this motion, I am obliged to accept the government's version.

he spoke with a representative of Mitsui-New York, the U.S. trading house responsible for sales of thermal fax paper for both Jujo and Honshu. Specifically, he says that "it seems that Jujo talked to [Mitsui-New York] regarding \$ 20.00 -- Jujo's deadline is the 15th, therefore no individual PRICE has been presented yet." This suggests according to the government, that Mr. Ito learned from the conversation with the representative from Mitsui-New York that Jujo had already advised Mitsui-New **[**38]** York, that a new \$ 20.00 price was in the works, even if not yet finalized.

The information that Mr. Ito relayed dovetails with what Mr. Sato of Mitsui-Japan said he would give to Mitsui. In his memorandum to Mitsui-New York, Mr. Sato wrote that "[we] will obtain [information] on the detailed situation separately from JUJO next week and let you know." This memorandum was written ten days before Mr. Ito confirmed that Mitsui-New York had received some preliminary confirmation from Jujo about the agreed-upon \$ 20.00 price level. Thus the government infers that Jujo "promptly started in the first week of April of 1990 to notify its trading houses of the agreed-upon price for purposes of implementing the agreement."

Finally, the government cites to a report sent by a representative of Japan Pulp and Paper's ("JPP") Tokyo office to JPP-New York detailing a pricing instruction recently given to JPP-Tokyo over the telephone by a person that seems clearly to be a Jujo representative, someone named Saito (JPP, along with Mitsui, distributed Jujo goods). The inference that Saito is a Jujo representative is grounded in the fact that the rest of the information conveyed by **[*189]** Saito relates **[**39]** to recent trends in Jujo's production, Jujo's research regarding intellectual property rights, and Jujo's starting to consult with attorneys. The report by the representative at JPP-Tokyo says that, as Saito "explained over the phone the other day, [we] are offering a \$ 20.00/100m² price with free delivered duty paid from May." This too indicates that Jujo had taken steps to effectuate the manufacturers' March 30, 1990 agreement.

NPI responds that this data establishes nothing more than guilt by association. The fact that Jujo attended the meetings in February and March does not imply that it joined in the conspiracy. Mr. Funabashi's report characterizes what happened -- that "agreement and approval was obtained from each company to revise prices" -- but it does not indicate that anyone from Jujo did anything in particularly to clearly or affirmatively agree to join the conspiracy. More specifically, NPI argues that the government was unable, throughout the trial, to provide any evidence regarding who from Jujo attended the meetings and whether that person had any binding authority with regard to Jujo's pricing decisions.

With regard to the argument that Jujo must have been a major **[**40]** player because Mr. Sato described it as the "group leader," NPI responds that being a "group leader" means nothing more than that Jujo was the chair or moderator of that meeting, in a system in which the chair rotated from company to company.²⁵ The document does not indicate that Jujo itself made any particular statements. Mr. Sato does indicate that he "will obtain [information] on the detailed situation separately from Jujo actually did or said anything that committed it to the conspiracy as of that date.

NPI also argues that none of the other documents mention any specific acts taken by Jujo which show that it was more than present when price-fixing was discussed. And, as it points out, "HNT" mere presence at the scene of a crime is insufficient to prove membership in a conspiracy," and even if "it is a fair inference that the defendant **[**41]** knew what was going on, . . . that is not enough to establish intent to conspire." *United States v. Ocampo, 964 F.2d 80, 82 (1st Cir. 1992).*

With regard to the fact that no company at the March 30 meeting spoke up and objected to KSK's \$ 20.00/100m² proposal, NPI argues that silence need not imply assent. Indeed, it offers another explanation for the silence, namely that any company that spoke out against KSK's proposal ran the risk of KSK passing that on to the American company that was threatening to bring the anti-dumping lawsuit.

²⁵ Initially, the government's translator suggested "group leader," while NPI's translator suggested "moderator." The government's translator then adopted the latter translation.

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Finally, NPI argues that there is no evidence that its prices actually rose at all. While the government argues that there is no requirement of showing that the price-fixing agreement was ever implemented, [HN8](#) plainly the failure of implementation suggests that there was no such agreement. See [Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.](#), 475 U.S. 574, 592, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). That evidence, while not dispositive during the immediate post-March 30 period, is compelling by the fall of 1990.

Viewing the evidence in the light most favorable to the United States, however, it is clear that a [**42](#) reasonable jury could find beyond a reasonable doubt that Jujo joined the conspiracy at or about March of 1990. Whether Jujo's participation continued into the limitations period and indeed, whether the conspiracy itself lasted, is another question.

3. Evidence that the Conspiracy Had Dissolved Before the Limitations Period

While the law on withdrawal from a conspiracy is fairly stringent, there is ample [\[*190\]](#) evidence to meet the [Rule 29](#) standard that the conspiracy had fallen apart well before November 15, 1990, and that, in any event, Jujo was no longer a member as of that date.

[HN9](#) The standard for withdrawal from a conspiracy requires more than "mere cessation of activity in furtherance of the conspiracy." [United States v. Juodakis](#), 834 F.2d 1099, 1102 (1st Cir. 1987). See also [United States v. Munoz](#), 36 F.3d 1229, 1234 (1st Cir. 1994). "In order to withdraw, a conspirator must act affirmatively either to defeat or disavow the purposes of the conspiracy." [Juodakis](#), 834 F.2d at 1102. "Typically, there must be evidence either of a full confession to authorities or a communication by the accused to his co-conspirators that he [**43](#) has abandoned the enterprise and its goals." *Id.*

But it would be a mistake to read the communication option too narrowly, as if Jujo could successfully withdraw from the conspiracy if, and only if, it made an announcement to all the other manufacturers that it was withdrawing from the conspiracy. In [United States v. Gypsum, Co.](#), 438 U.S. 422, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978), for example, the Supreme Court found that the trial judge erroneously instructed the jury that the only way to withdraw from a price-fixing conspiracy was for the defendant to "affirmatively notify each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence." [438 U.S. at 463-64](#). Rather, the Court held that [HN10](#) affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *Id. at 464-65*. The clear implication was that "resumption of competitive behavior, such as intensified price cutting or price [**44](#) wars," [id. at 464](#), would be sufficient to communicate withdrawal or general abandonment of a price-fixing conspiracy. See [United States v. Swiss Valley Farms Company, Inc.](#), 912 F. Supp. 401, 402 (C.D. Ill. 1995) (citing [Gypsum](#) for the proposition "that evidence showing a resumption of competitive bidding by Defendants is also admissible as affirmative action to defeat or disavow the purpose of the bid rigging conspiracy."). Indeed, as in the instant case, the defendants in [Gypsum](#) wanted to argue that vigorous competition had returned before the applicable five year statute of limitations period had started to run. [438 U.S. at 465 n.38](#).

The evidence that Jujo did not follow through as a member of the conspiracy, and surely had withdrawn by November 15, 1990, starts with another document written by Mr. Sato of Mitsui on May 7, 1990. He writes:

Today I obtained the following information from Mr. Takemoto of Jujo:

- 1) They currently are reviewing internally what the future pricing should be in response to the anti-dumping problem, and hope to prepare Jujo's policy and determine the direction for consultation with [Mitsui] [**45](#) within one or two days.
- 2) [He says] basically, the direction is for Jujo to respond with independent pricing, separately from the other makers including Oji, Taio, Mitsubishi and Honshu, as otherwise (because it is conceivable that offering similar price increases [as theirs] would only serve to deepen the problem).

Clearly, Jujo has communicated here to one of its trading houses, one that dealt also with another member of the alleged conspiracy, Honshu, that it was going to make its own independent judgments of how to handle the threat of

an anti-dumping suit, and that it was not, or was no longer going to coordinate any prices with other members of the conspiracy. Indeed, another document from Mitsui, recording conversations with two Jujo employees, shows that Jujo was consulting independently [*191] with counsel in Washington D.C. to determine how to respond with pricing to the anti-dumping threat.

Moreover, from the outset following the March 30 meeting, Jujo's response to the anti-dumping threat was clearly to engage in individualized, customer-by-customer price negotiations. Individualized, customer-by-customer price negotiations pave the way for a competitive market. [**46] Though, as indicated above, they are compatible with a flexible approach to price-fixing, a pattern of price stabilization, there is a point at which the pattern of pricing proves something totally different. If prices in fact consistently go down, as they did by May, June, and thereafter, individualized negotiations become the mechanism by which real competition takes place. In other words, they are the way in which former conspirators break ranks and start to engage in a price war to save their customer base. And a price war began.

Witness after witness testified that price data from Jujo and their competitors shows that while some prices went up initially to the \$ 18/100m² range, some did not change, and some fell. Indeed, by mid 1990, and later, a reasonable fact finder looking only at prices, would be obliged to conclude that the conspiracy had evaporated. Jujo's prices continued to fall. KSK's and Oji's prices dropped from \$ 19.00 in March 1990 to \$ 15.01 in December 1990, while Mitsubishi's prices to one customer dropped from \$ 18.30 in August, to \$ 16.68 in December. One government witness admitted that there was a "price war" among all the thermal paper manufacturers beginning [**47] July 20, 1990, and lasting through the fall. Another characterized the 1990 market as "wickedly competitive," prices were going "down, down, down." Indeed, by mid 1990, prices were so low that Appleton was still threatening the manufacturers -- including Jujo -- with an anti-dumping petition.²⁶ Oji, in particular, was regularly undercutting its competitors. Competitors knew what each other was charging, had customers in common from whom they obtained price information and were knowingly undercutting each other's prices.

By the fall of 1990, raising prices made no economic sense whatsoever, if it ever did, whatever the justification. Any movement towards raising prices, had precisely [**48] the same devastating effect on these manufacturers that an anti-dumping tariff would have had. The American manufacturers had captured so much of the business that the Japanese manufacturers were irrelevant. (See Section D infra on "substantial effects.")

To be sure, the government cites certain specific prices that Jujo charged certain specific customers that did not drop during 1990. But as NPI points out, this is explained by contractual price commitments to those customers. The prices between customers varied and tended to drop over the course of the year in a way that one would not expect in a non-competitive market. And the general pattern of falling prices is particularly impressive given that all the manufacturers were sensitive to the continued threat of an anti-dumping suit, and thus necessarily were wary about lowering their prices.

Finally, while there is a plethora of telexes and memoranda concerning a March 30 meeting ostensibly to "fix prices," there is no credible evidence of subsequent meetings in the fall of 1990 that had the same purpose or the same effect (even for a short time).²⁷

²⁶ KSK (the Japanese parent to KSP, the American company working with Appleton Paper) reported that based on the data it was analyzing, Jujo and the others were "dumping" paper in the American market in June of 1990 -- when Appleton wrote to the Ministry of International Trade and Industry of Japan, as well as in August of 1990.

²⁷ A telex sent from DaiEi Papers, New Jersey, to DaiEi, San Francisco, simply reports a thermal paper manufacturer's meeting at which MPM reported Appleton's threat to file an anti-dumping petition Oji and Daio. The tone of this report and its content is wholly different from the March 30 Funabashi memorandum. Likewise, a fax between Mitsui trading houses, confirms that what was happening was not the lock-step participation in a price-fixing conspiracy, but rather a company struggling to discount prices while avoiding dumping charges. The only evidence the government has for the fall of 1990 is that there was continued talk among manufacturers about a threatened anti-dumping petition, which is hardly illegal. Indeed, to the extent that those threats hung in the air, they suggested that there were no contrived price increase or price stabilization. For the threats to be credible, prices had to be quite low.

[**49] [*192] Taking into account all of the evidence presented at trial, even when viewing it in the light most favorable to the government, I conclude that it is clear that whatever agreement had existed in March, had dissolved by mid 1990. Jujo was striking out on its own by May 1990; any conspiracy to fix prices generally collapsed by the summer or early fall of the year. NPI has carried its burden of showing that it withdrew from the conspiracy to fix prices, and that the conspiracy was generally abandoned, before the limitations period. Accordingly, I hold that the government failed to establish the first two elements of Count 1 within the relevant limitations period.

D. Failure to Present Sufficient Evidence that Any Continuing Conspiracy Had Substantial Effects

As an alternative ground for acquittal, even assuming that the conspiracy was ongoing, and that Jujo was still a member of the conspiracy, I hold that the government failed to carry its burden of showing that the conspiracy had substantial effects in the United States after November 15, 1990.

In [§ 1](#) of the Sherman Act, the very same phrase conveys both a jurisdictional requirement and a merits requirement. [HN11](#) The phrase [**50] "in restraint of trade or commerce among the several states", [15 U.S.C. § 1](#), is "both an element of the offense and a vital prerequisite for federal court jurisdiction." [Montensen v. First Federal Savings and Loan Assoc.](#) [549 F.2d 884, 890-91 \(3d Cir. 1977\)](#).

Several questions follow: Is the standard for proving jurisdiction the same as the standard for proving effects on the merits? To what degree is the standard affected by the fact that a price-fixing conspiracy is involved which in a domestic setting is a per se restraint on trade.

Logic suggests that [HN12](#) the basic standard is the same for proving either jurisdiction and the third element of the offense on the merits. The language of [§ 1](#) is the same; the primary concerns of one mirror the concerns of the other -- whether the federal law can be applied to NPI's actions. While there may be additional concerns (such as concerns about international comity) that may be appropriate for the judge to consider in determining jurisdiction, the core question is, or should be, the same.

Moreover, this is particularly so where the factual determination necessary for one, overlaps with the factual determination [**51] necessary for the other. See [id. at 893](#) (quoting [McBeath v. Inter-American Citizens for Decency Committee](#), [374 F.2d 359](#) (5th Cir.) cert. denied, [389 U.S. 896, 19 L. Ed. 2d 214, 88 S. Ct. 216](#) (1967))("Where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits, for it is impossible to decide the one without the other.")

The requirement that the First Circuit reaffirmed in its decision in [Nippon](#), that the government prove "intended" as well as "substantial effects" on interstate commerce, reflects the special concerns attendant to prosecuting a wholly foreign conspiracy. As Judge Learned Hand wrote in his seminal opinion in [United States v. Aluminum Co. of America](#), [148 F.2d 416, 443 \(2d Cir. 1945\)](#), "we should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." [Hartford Fire](#) since stated the standard for civil suits of foreign defendants, saying that [HN13](#) it is well established [*193] by now that the Sherman Act applies to foreign conduct that was meant to produce and [**52] did in fact produce some substantial effect in the United States." [509 U.S. at 796](#). The First Circuit's opinion in [Nippon](#) extended that same standard to criminal defendants. [109 F.3d at 9](#).

[HN14](#) In a domestic price-fixing case, the third prong of [§ 1](#) imposes a minimal standard. Proof of the conspiracy and an overt act are per se proof of a substantial impact on the market. The question is whether the standard is any different when the government alleges that a foreign entity has engaged in price-fixing, when the concerns about price-fixing meet the concerns about extraterritorial prosecutions.

As I noted during the trial, [HN15](#) there are two general templates for evaluating jurisdictional issues involving restraints on trade: a per se test and a "rule of reason" test.

HN16 [+] The per se model is the traditional domestic price-fixing conspiracy in which courts have not required an appraisal of the actual magnitude of the impact in a domestic setting. Price-fixing is the paradigm of an act in violation of § 1 of the Sherman Act. As Areeda says, "price-fixing cartels are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable [**53] benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public." VII Phillip Areeda and Herbert Hovenkamp, Antitrust Law P 1509, at 412 (1997). In line with this, the Supreme Court held that "whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940).

HN17 [+] The "rule of reason" approach is typically applied to restraints of trade not involving price-fixing or claims of vertical conspiracies. In those cases, proof that a given set of acts took place did not necessarily mean that they had a "substantial effect" on the market. The specific impact had to be proved under a "rule of reason" analysis which considers multiple factors.

The activities of these foreign manufacturers could fit into the first or the second category, depending upon the [**54] circumstances. In the abstract, there may well be a foreign analog of a domestic price-fixing conspiracy, where the acts alleged were of such a nature that there was no doubt about the impact, where "the anticompetitive nature and effect" of the practice is "so apparent and so serious that the courts will not pause to assess them in the light of the rule of reason." United States v. Sealy, Inc., 388 U.S. 350, 18 L. Ed. 2d 1238, 87 S. Ct. 1847 (1967). Alternatively, there may well be the foreign analog of a vertical conspiracy, where the anti-competitive nature of the activity depends upon a number of factors, where the government's proof is less clear, where there is an issue about the relationship between the Japanese acts and the American effect.²⁸

[**55] NPI, expressly relying on Metro Industries v. Sammi Corp., 82 F.3d 839 (9th Cir. 1996), argues that an international price-fixing, unlike a domestic price-fixing, is subject to different rules in all cases -- i.e. a rule of reason test. The court in Metro Industries relied on the following quotation from Areeda to justify invoking the "rule of reason" analysis:

[*194] The conventional assumptions that courts make in appraising restraints in domestic markets are not necessarily applicable in foreign markets. A foreign joint venture among competitors, for example, might be more "reasonable" than a comparable domestic transaction in several respects: the actual or potential harms touching American commerce may be more remote; the parties' necessities may be greater in view of foreign market circumstances; and the alternatives may be fewer, more burdensome, or less helpful. The fact that foreign conduct would be a per se offense -- one that is condemned without proof of particular effects and with little regard for possible justifications in the particular case -- when entirely domestic does not call for a fundamentally different analysis. Domestic antitrust policy [**56] uses per se rules for conduct that, in most of its manifestations, is potentially very dangerous with little or no redeeming virtue. That rationale would be inapplicable to foreign restraints that, in many instances, either pose very little danger to American commerce or have more persuasive justifications than are likely in similar restraints at home. For example, price-fixing in a foreign country might have some but very little impact on United States commerce.

Metro Industries, 82 F.3d at 845 (quoting 1 Phillip Areeda & Donald F. Turner, Antitrust Law P 237 (1978)). Based on this quite reasonable awareness of the differences between domestic and foreign economic activity, the court in Metro Industries concluded that whenever "a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." Id.

²⁸ I warned the government that "it appears that the government is prepared to take its chances . . . that its proof would be . . . so clear that it necessarily produces substantial effects or it will be domestic enough that the jurisdiction issue will be beside the point. If the government wants to take its chances that's the nature of the proof, then I will reserve this issue until trial, until at the conclusion . . . on a directed verdict. . . ."

NPI, in turn, recommends the same reasoning to me. It argues that the government failed to show that there were substantial effects because it "failed to establish any other evidence as to how much, if any, of that market was affected by the alleged conspiracy. [**57] "

The problem with NPI's position is that the Metro Industries court was wrong to apply the rule of reason analysis to a price-fixing case just because the defendant is foreign. No such test was implied by Hartford Fire. Indeed, Areeda notes:

Metro Industries's use of the rule of reason treatment for all restraints abroad [] is squarely in conflict with the First Circuit's Nippon decision that a criminal indictment may issue for naked price-fixing occurring abroad but having the United States as its intended target. As a general matter, rule of reason offenses are not the product of criminal prosecutions. At least on the facts of the Nippon case, we are inclined to favor the First Circuit's conclusion over that of the Ninth Circuit.

IA Phillip Areeda and Herbert Hovenkamp, Antitrust Law P 273b, at 379 (1997).

More substantively, the reason the Metro Industries court was wrong is that it failed to appreciate both the context for the lengthy quotation taken from Areeda, and the underlying justification for use of a per se test in the case of price-fixing. The Areeda quotation concluded with the thought that "price-fixing in a foreign country [**58] might have some but very little impact on United States commerce." But this is consistent with the thought that if the conspiracy were intentionally directed at the United States, and if it had the capacity to have substantial effects on the United States, then it would be the sort of activity which would be a matter of serious concern to the United States.

Because price-fixing is the paradigm of a § 1 violation, Areeda is clear to distinguish it from other sorts of anti-competitive action which might be treated more leniently in a foreign country. Thus he says, "HN18[↑] to say that domestic per se rules are not necessarily and automatically applicable in the international context is not to say that an antitrust court needs to hesitate very long before condemning restraints with [*195] significant and obvious effects on United States commerce, and without any plausible purpose other than the suppression of competition with and in the United States." IA Antitrust Law P 273b, at 376 (1997).

HN19[↑] The correct approach to a foreign price-fixing conspiracy, therefore, is what the First Circuit announced, something akin to a "per se plus" test, adding to the traditional domestic analysis the requirement [**59] that the government show substantial effects by showing a substantial connection to the United States market.

I instructed the jury on this "per se plus" test by saying that substantial effects could be shown in any of the following ways:

- . whether the volume of commerce affected by the conspiracy was substantial;
- . whether the share of the market allegedly impacted by alleged conspiracy was substantial;
- . whether the conspiracy as a whole substantially lessened competition in the thermal fax paper market.

The government claims that it made sufficient proof of all three. I will acknowledge that the government carried its burden with regard to substantial effects on either of the first two prongs but only around the time the conspiracy allegedly was formed, i.e. around the end of March, 1990. It presented sufficient evidence that Jujo had approximately \$ 6 million in sales in the United States at the start of the alleged conspiracy, and that the Japanese thermal fax paper manufacturers as a whole had approximately thirty percent of the market at the time.²⁹

²⁹ NPI claims that "Japanese manufacturers lacked sufficient market power, as a matter of law, to cause a substantial effect on United States commerce." In support of this claim, it offers the following quote from Areeda: "Most recent cases dismiss cases as a matter of law where the defendant's market share is less than 50 percent." This quote is taken from P 801, but P 801 deals with § 2 of the Sherman Act, not § 1. Its concern with "substantial" market share is with what it takes to be a monopoly. This has no bearing on what is required to have a substantial share of the market under the per se plus test for foreign price-fixing.

[**60] The problem with the government's position is that the evidence indicates that the Japanese share of the market collapsed during 1990. Witness after witness testified to the fact that any company that did raise its prices lost market share at a precipitous rate. The pattern of prices suggested that by mid 1990, most abandoned the enterprise. Even so, document after document suggested that the market for Japanese thermal fax paper, not too robust at the beginning of 1990, was virtually extinguished by the end of the year. McCall of DaiEi reports that Japanese competitors had become an "insignificant" force in the market place. Appleton and KSP, the American companies continued to aggressively compete with one another, and, although they had captured so much of the market, continued to threaten anti-dumping petitions in order to drive out any of the remaining Japanese manufacturers left standing. The American companies plainly had the capacity to supply the entire demand for thermal fax paper by the fall of 1990. The Japanese conspiracy -- if anything remained by November of 1990 -- could hardly have had a "substantial effect" on American commerce.

It should be emphasized that HN20 [+] a substantial [**61] effect on United States commerce cannot simply be assumed to continue because it once existed. There is no reason to treat having substantial effects on United States commerce like being a member of a conspiracy, which, as discussed above, is held to continue until its goals or membership have been affirmatively abandoned. See *Juodakis*, 834 F.2d at 1102. Rather, because it is a matter of objective fact, rather than subjective intent (to agree), the government must prove that the test is met at the relevant time. Because the government failed to introduce any evidence on this point for the relevant time [*196] period, and has not rebutted the testimony of almost all the witnesses whose conclusions were adverse to the government, it cannot claim to have carried its burden of showing that the alleged conspiratorial conduct produced substantial effects in the United States.

V. CONCLUSION

For the reasons detailed above, I find that the government has failed to carry its burden of proof on any of the three elements of the price-fixing conspiracy on which NPI charged. That is, the government failed to show that as of November 15, 1990 -- the date marking the start [**62] of the period covered by the statute of limitations -- there was a conspiracy to fix prices, that Jujo, NPI's predecessor, was a member of such a conspiracy, or that such a conspiracy had intended and substantial effects on United States commerce. Accordingly, NPI's renewed motion for acquittal (docket # 260) is **GRANTED**.

SO ORDERED.

Dated: July 16, 1999

NANCY GERTNER, U.S.D.J.



CDC Techs., Inc. v. IDEXX Lab., Inc.

United States Court of Appeals for the Second Circuit

April 14, 1999, Argued ; July 21, 1999, Decided

Docket No. 98-7626

Reporter

186 F.3d 74 *; 1999 U.S. App. LEXIS 16785 **; 1999-2 Trade Cas. (CCH) P72,594

CDC TECHNOLOGIES, INC., a Connecticut corporation, Plaintiff-Appellant, v. IDEXX LABORATORIES, INC., a Delaware corporation, Defendant-Appellee.

Prior History: **[**1]** Appeal from an order and judgment of the United States District Court for the District of Connecticut (Arterton, J.) granting summary judgment and dismissing antitrust complaint.

Disposition: Affirmed.

Core Terms

distributors, machine, Sherman Act, Clayton Act, selling, magistrate judge, sales, anti-competitive, veterinarians, competitors', customers, sales contract, market power, district court, rule of reason, termination, hematology, leads

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN1 [down arrow] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

See [15 U.S.C.S. § 14](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

HN2 [down arrow] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Clayton Act § 3, [15 U.S.C.S. § 14](#), prohibits only specified "sales" or "contracts for sale." A cognizable transaction is therefore one with both a "seller" and a "purchaser."

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

[**HN3**](#) Antitrust & Trade Law, Sherman Act

The conclusion that a contract does not violate § 3 of the Clayton Act, [15 U.S.C.S. § 14](#), ordinarily implies the conclusion that the contract does not violate the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

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

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

[**HN4**](#) Antitrust & Trade Law, Sherman Act

[Section 1](#) of the Sherman Act proscribes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." [15 U.S.C.S. § 1](#). A handful of practices that are deemed particularly anti-competitive are adjudged illegal "per se." [Section 1](#) claims involving economic practices other than those in the narrow "per se" category are subjected to the "rule of reason."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

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

[**HN5**](#) Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Exclusive distributorship arrangements are presumptively legal. Only "manifestly anticompetitive" conduct is appropriately designed per se illegal. The majority of allegedly anticompetitive conduct continues to be examined under the rule of reason.

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

Under the rule of reason, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited. As an initial matter, the plaintiff must demonstrate that the practice it challenges has had an actual adverse effect on competition as a whole in the relevant market.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[HN7](#) [down arrow] Regulated Practices, Price Fixing & Restraints of Trade

A plaintiff that fails to demonstrate adverse effects on competition may nevertheless satisfy its preliminary burden by establishing that the defendant possesses the requisite market power and thus the capacity to inhibit competition market wide. "Market power" is "the ability to raise price significantly above the competitive level without losing all of one's business."

Counsel: MICHAEL R. BORASKY, Fort Lauderdale, FL (Joseph M. Ramirez, Heather E. Rennie, Pittsburgh, PA, Robert A. Sherman, Boston, MA, Eckert Seamans Cherin & Mellott, LLC; Edward R. Scofield, Zeldes, Needle & Cooper, Bridgeport, CT, on the brief) for Plaintiff-Appellant.

DAVID H. ERICHSEN, Boston, MA (James C. Burling, Vinita Chopra, Hale and Dorr LLP, on the brief), for Defendant-Appellee.

Judges: Before: VAN GRAAFEILAND, JACOBS, and STRAUB, Circuit Judges.

Opinion by: JACOBS

Opinion

[*75] JACOBS, *Circuit Judge*:

In this antitrust case, plaintiff-appellant CDC Technologies, Inc. ("CDC"), which sells blood analysis machines to veterinarians, alleged that its competitor, defendant-appellee IDEXX Laboratories, Inc. ("IDEXX"), illegally entered into exclusive dealing arrangements with CDC's distributors. The distributors had provided CDC with the names of veterinarians potentially interested in purchasing the product. IDEXX, a later entrant in the market (though the leading player in the market for in-clinic [*2] veterinary diagnostic equipment generally) signed up CDC's distributors to play the same role in furnishing the names of likely veterinarians. This is an appeal from a judgment of the United States District Court for the District of Connecticut (Arterton, J.) granting summary judgment to IDEXX, and dismissing the complaint. See *CDC Technologies, Inc. v. IDEXX Laboratories, Inc.*, 7 F. Supp. 2d 119 (D. Conn. 1998).

CDC asserted claims under the Clayton Act and the Sherman Act, with corresponding and derivative state law claims. In dismissing, the district court concluded that CDC could not prove that the exclusive dealing arrangements had anti-competitive effects because: (i) the role of the distributors was so limited; (ii) CDC had successfully used other techniques to reach end-users; and (iii) the exclusive dealing arrangements were of short duration and easily terminable. See *id.* at 121-22.

As to the claim asserted under § 3 of the Clayton Act, [15 U.S.C. § 14 \(1994\)](#), we affirm on the threshold ground that the [*76] Act does not regulate an arrangement with a distributor or middleman unless it involves actual sales, and it is [*3] undisputed here that IDEXX's distributors never purchased the machines or resold them.

As to CDC's claim under [§ 1](#) of the Sherman Act, [15 U.S.C. § 1 \(1994\)](#), we affirm on the ground that CDC failed to demonstrate that there is a triable issue on the anti-competitive effects of the exclusive dealing arrangements.

As to CDC's remaining federal and state claims, we affirm for substantially the reasons stated by the district court.

BACKGROUND

CDC, a Connecticut-based start-up company, manufactures and sells machines that allow veterinarians to analyze animal blood. IDEXX, a firm based in Maine that sells a wide array of products to veterinarians, sells a competing machine.

CDC entered this market first, and sold its hematology machines both through direct marketing and through relationships it established in 1992 and 1993 with four veterinary product distributors. The distributors did not actually sell the machine; in fact, their sales representatives did not even demonstrate it for prospective customers. Their role was limited to providing "qualified leads"--meaning that they passed along to CDC the names of veterinarians who had expressed an interest **[**4]** in the product, and received in exchange from CDC a finder's fee if the lead produced a sale.

In addition CDC employed its own direct sales force to market its product (a method that was more profitable than selling with the assistance of the distributors), as well as "telemarketing, direct mail campaigns, customer lists, advertising, and participation in trade shows." *CDC Technologies*, 7 F. Supp. 2d at 123. By late 1993, half of CDC's equipment sales were catalyzed by distributors.

IDEXX began selling animal-blood analysis machines in 1993, when IDEXX agreed with an existing manufacturer, Becton Dickinson, to use IDEXX's sales and distribution network to resell Becton Dickinson's "Autoread" model. In internal memoranda, IDEXX employees gloated about competitors' having "poor distribution" and about IDEXX's plans to "block [competitors' products] at [the] distribution channel[s]." Other documents referenced plans to "erect barriers to entry" and to "create an environment hostile to competitive entry."

IDEXX had a longstanding unwritten exclusive dealing policy that no IDEXX distributor could market a competing product. When IDEXX began selling Autoread in **[**5]** 1994, the distributors that had been providing qualified leads to CDC ended their relationship with that firm and instead opted to market the Autoread for IDEXX. Their arrangement with IDEXX was the same as their arrangement with CDC: they did not buy the Autoread machine, or sell it; they only provided "qualified leads" to IDEXX. Also in 1994, IDEXX put its exclusive dealing policy in writing. It covered all IDEXX products, including Autoread; its term was one year; but a distributor could pull out of the agreement on 60 days notice, with or without cause. At the time discovery closed in September 1996, IDEXX had approximately half of the "distributor market" sewn up with such agreements.

After some interval, CDC sought out new distributors. By November 1995, it had signed up distributors covering most of the country; by April 1996, CDC's machine was sold through eight (non-IDEXX) distributors. At the same time, CDC greatly increased its direct sales force and its spending on other marketing mechanisms. During the relevant time period, CDC's sales through "third-parties" (including distributors) stayed nearly level (55 machines in 1992-93; 56 in 1994-95), while its direct sales increased **[**6]** dramatically (52 to 402, same years).

[*77] Nonetheless, CDC remained a minor player in the market. IDEXX, on the other hand, had achieved an 80 percent market share by the time discovery closed in this case (September 1996)--approximately a 50 percent increase over the market share of Becton Dickinson at the time IDEXX began reselling Autoread.

Since IDEXX's entry into the market, another company, ZynoCyte, has introduced a machine in competition with those sold by IDEXX and CDC. It has nationwide distribution.

B. Procedural History

In February 1995, CDC sued IDEXX alleging: (i) unlawful exclusive dealing in violation of the Clayton Act and Connecticut statutes; (ii) unlawful restraint of trade under both federal and state antitrust statutes; (iii) monopolization, conspiracy to monopolize, and attempt to monopolize under the Sherman Act and state statutes; (iv) unfair trade practices in violation of state law; (v) civil conspiracy; and (vi) tortious interference with business relations.

IDEXX moved for summary judgment, and on March 2, 1998, Magistrate Judge Garfinkel recommended that the motion be granted. The magistrate judge first concluded that there was a genuine issue [**7] of material fact as to the "relevant market": IDEXX defined it broadly to include all chemical and hematological methods for analyzing blood; CDC defined it narrowly as "in-clinic hematology analyzers for use by veterinarians." See *id.* at 126. The magistrate judge next assumed for the purposes of the summary judgment motion that the relevant area of competition was the United States (as CDC contended), not (as IDEXX contended) the world. See *id.* at 127.

The magistrate judge concluded that, even if both those issues were decided in CDC's favor, CDC failed to raise a genuine issue of material fact as to whether "IDEXX's exclusive dealing contract foreclosed a substantial share of the . . . market." *Id.* at 128 (citing [Tampa Electric v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 628, 5 L. Ed. 2d 580 \(1961\)](#)). The market foreclosure analysis required consideration of "the percentage 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." *Id.* (citation omitted). The magistrate [**8] judge concluded that there was only "scant evidence" that IDEXX's exclusive arrangements with distributors hindered CDC's "ability to reach the ultimate customers" of its machine:

- . CDC's distributors had played a quite "limited role" (even before IDEXX's entry into the market), providing qualified leads, but not selling the machine or even demonstrating it.

- . CDC had successfully utilized other avenues to reach customers, and its sales *increased* after IDEXX entered the market.

- . Despite IDEXX's exclusive dealing agreements with its distributors, CDC had been able to sign up eight new distributors, and thereby achieve coverage throughout most of the country.

- . The one-year term of IDEXX's exclusive dealing agreements, and their 60-day termination provision, meant that any distributor that preferred to market CDC's product could do so with relative ease.¹

[*78] .Since IDEXX's 1994 market entry, a third company, ZynoCyte had begun selling a competing machine and had established nationwide distribution.

See 7 F. Supp. 2d at 128-30.

[**9]

The magistrate judge decided that CDC's inability to establish the required elements of the Clayton Act claim defeated a *a fortiori* the more demanding claims under the Sherman Act, and that in any event, those Sherman Act claims were fatally defective. See *id.* at 130-31. The state civil conspiracy claim failed because it required the establishment of a separate cause of action, and CDC had none. Finally, the magistrate judge summarily rejected CDC's claims for tortious interference and unfair competition. See *id.* at 131-32.

Judge Arterton adopted the magistrate judge's recommendation in all respects. See *id.* at 120-22.

DISCUSSION

A. Clayton Act Claim

We affirm the district court's dismissal of CDC's Clayton Act claim, but do so on a threshold question.

[HN1](#) [↑] Section 3 of the Clayton Act reads (in relevant part):

It shall be unlawful for any person . . . to . . . *make a sale or contract for sale* of goods . . . on the condition, agreement, or understanding that the . . . *purchaser* thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . *seller*, where the effect of such . [**10] . . . sale, or contract for sale or

¹ The exclusivity was product-limited, meaning that a distributor could agree to sell a competitor's product in one product line while promoting IDEXX product in other lines. According to CDC, distributors feared that IDEXX would retaliate against a CDC distributor by withholding a broad range of other products; but the magistrate judge found "no admissible evidence in the record which would support such a proposition." *CDC Technologies, 7 F. Supp. 2d at 129*.

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 (emphasis added).

HN2[] Section 3 thus prohibits only (specified) "sales" or "contracts for sale." ² [**11] A cognizable transaction is therefore one with both a "seller" and a "purchaser." CDC's Clayton Act claim, based as it is on the exclusive dealing relationship between IDEXX and its distributors, fails because these distributors are not "purchasers." Cf. McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 337 (4th Cir. 1959) ("While Congress was aware of other business practices which might also be harmful to the economy, it was attempting to outlaw only those with which the section expressly dealt.") The IDEXX distributors do no more than provide "qualified leads"; they do not buy the hematology machines from IDEXX; and they do not sell them to customers.³

The Supreme Court's last word on this subject is that § 3 by its terms requires a "sale." See Federal Trade Comm'n v. Curtis Publ'g Co., 260 U.S. 568, 581, 43 S. Ct. 210, 213, 67 L. Ed. 408 (1923). In *Curtis*, a publisher barred its dealers and distributors from dealing in its competitors' magazines. See id. at 574, 43 S. Ct. at 211. [**12] The critical feature of the arrangement was that the publisher "consigned" magazines to each agent, retaining title until sale. Id. at 576, 43 S. Ct. at 212. Section 3 was not violated because the contracts thus were "ones of agency, not of sale upon condition, and the record reveals no surrounding circumstances sufficient [*79] to give it a different character." Id. at 581, 43 S. Ct. at 213.

Curtis remains good law and has been cited in those few cases in which exclusive dealing arrangements that involve no sale to the dealer have been asserted under the Clayton Act. See C.B.S. Bus. Equip. Corp. v. Underwood Corp., 240 F. Supp. 413, 424 (S.D.N.Y. 1964) ("If, as the Court finds, the Sales Agreement is an agency contract, and not a contract of sale upon condition, this would appear to dispose of the charge of illegality under Section 3 of the Clayton Act.") (citing *Curtis*); Preformed Line Prods. Co. v. Fanner Mfg. Co., 225 F. Supp. 762, 789 (N.D. Ohio 1960) ("The Condon Company is not a dealer or distributor. It does not buy and re-sell plaintiff's products. Its relationship to plaintiff is that of sales representative. [**13] The selection of an exclusive representative is not within the ban of the antitrust laws. . . .") (citing *Curtis*), aff'd, 328 F.2d 265 (6th Cir. 1964); see also Grand Union Co. v. FTC, 300 F.2d 92, 97 n.14 (2d Cir. 1962) ("In *Curtis*, the agency agreement created a set of relationships and responsibilities unlike that which would have resulted from contracts of sale. Under the antitrust laws the difference between a 'sale' and an agency relationship is not simply one of form, but may be 'outcome-determinative.'") (dicta); 11 Herbert Hovenkamp, Antitrust Law P1800d, at 21 (1998).

Since we dispose of CDC's Clayton Act claim on this threshold ground, we need not reach the question, decided by the district court, of whether the arrangements have anti-competitive effects of the kind and to the degree proscribed by the Clayton Act.

B. Sherman Act Claims

HN3[] The conclusion that a contract does not violate § 3 of the Clayton Act ordinarily implies the conclusion that the contract does not violate the Sherman Act:

² In a portion of the statute not excerpted here, it also proscribes certain leases. See 15 U.S.C. § 14.

³ The distributors do resell IDEXX "consumables," which are the chemical reagents used with each test and proprietary to a given machine. But CDC is not basing its exclusive dealing claim on the sale of these consumables. See CDC Technologies, 7 F. Supp. 2d at 126 ("CDC claims that the product-market definition should be comprised solely of *in-clinic hematology analyzers* for use by veterinarians." (emphasis added)). In any event, CDC concedes that the market for consumables is completely derivative of the analyzer market, see Brief for Plaintiff-Appellant at 15 n.15 (describing "razor and razor blade concept"), and IDEXX did not require its distributors to stop selling CDC's consumables, only its machines.

We need not discuss the respondents' further contention that the contract also violates [§ 1](#) and § 2 of the Sherman Act, [\[**14\]](#) for if it does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden by those of the former.

[Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 335, 81 S. Ct. 623, 632, 5 L. Ed. 2d 580 \(1961\)](#) (citing [Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 608-609, 73 S. Ct. 872, 880, 97 L. Ed. 1277 \(1953\)](#)). The Supreme Court's reference in *Tampa Electric* to the "broader proscription" of the Clayton Act, read in context, references the requisite degree of market foreclosure. See *id.*; see also [Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1304 n.9 \(9th Cir. 1982\)](#) ("[A] greater showing of anticompetitive effect is required to establish a Sherman Act violation than a section 3 Clayton Act violation in exclusive-dealing cases." (citation omitted)). The ordinary rule does not decide the Sherman Act claims in this case, however, because CDC's Clayton Act claim fails for lack of sale or contract of sale, and there seems to be no such requirement in the relevant portions of the Sherman Act. See 11 Hovenkamp P 1800d, at 21 ("Most courts interpreting [\[**15\]](#) the Sherman Act conclude that whether the underlying distribution arrangement is one of sale/resale or of agency has nothing to do with the legality of exclusive dealing.").

1. Sherman Act § [HN4](#) [↑] 1

[Section 1](#) of the Sherman Act proscribes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." [15 U.S.C. § 1](#). A handful of practices that are deemed particularly anti-competitive are adjudged illegal "per se." [Section 1](#) claims involving economic practices other than those in the narrow "per se" category are subjected to the "rule of reason." See [FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 457-58, 106 S. Ct. 2009, 2017, 90 L. Ed. 2d 445 \(1986\)](#); [Bogan v. Hodgkins, 166 F.3d 509, 513-14 \(2d Cir. 1999\)](#).

[\[*80\]](#) a. *"Per Se"* Violation. CDC alleges that IDEXX and the distributors agreed that the distributors would stop selling CDC's machine and that such concerted action was a "per se" illegal "refusal to deal."

CDC's argument is meritless. We have said that "[HN5](#) [↑] exclusive distributorship arrangements are presumptively legal." [Electronics Communications Corp. v. Toshiba America Consumer Prods., Inc., 129 F.3d 240, 245 \(2d Cir. 1997\)](#). [\[**16\]](#) CDC offers no persuasive reason why the exclusive distributorship arrangements in this case should be deemed illegal per se. We will therefore examine the arrangements under the "rule of reason." See [Bogan, 166 F.3d at 514](#) ("Only 'manifestly anticompetitive' conduct . . . is appropriately designed *per se* illegal. The majority of allegedly anticompetitive conduct continues to be examined under the rule of reason." (quoting [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)](#) (internal citation omitted)); see also [Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 735-36, 108 S. Ct. 1515, 1525, 99 L. Ed. 2d 808 \(1988\)](#) ("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.").

b. Rule of Reason. [HN6](#) [↑] Under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited." [K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 \(2d Cir. 1995\)](#) [\[**17\]](#) (quoting [Continental T.V., 433 U.S. at 49, 97 S. Ct. at 2557](#)). As an initial matter, the plaintiff must demonstrate that the practice it challenges has had "an actual adverse effect on competition as a whole in the relevant market." [Id. at 127](#) (quoting [Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 \(2d Cir. 1993\)](#)) (internal quotation marks omitted).⁴

⁴ Assuming the plaintiff succeeds in making this showing, the defendant must establish the "pro-competitive redeeming virtues" of the practice. See [K.M.B. Warehouse, 61 F.3d at 127](#) (internal quotation marks omitted). If the defendant is successful, the plaintiff must then demonstrate "that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition." *Id.* Because we conclude that CDC fails to establish a genuine issue of material fact on its initial showing, we do not reach the second and third steps of the analysis.

[**18]

CDC has failed to make that initial showing:

. CDC has not shown that there are significant barriers to entry into this market. See *CDC Technologies*, 7 F. Supp. 2d at 129.

. CDC's effort to cast its claim as one involving "outlet foreclosure" is defeated by the fact that the distributors, which do not buy or sell the machines, are not outlets. We agree with the Ninth Circuit's conclusion that "if competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether [exclusive dealing arrangements with distributors] foreclose from competition *any* part of the relevant market." *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997), cert. denied, 525 U.S. 812, 142 L. Ed. 2d 36, 119 S. Ct. 46 (1998); see also *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1383-84 (5th Cir. 1994); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1234-35 (8th Cir. 1987).

. The distributors have never been critical to CDC's sales strategy. CDC has successfully reached customers by a variety of marketing [**19] techniques; after losing its existing distributors to IDEXX, CDC delayed serious pursuit of other available distributors; it eventually achieved distributor coverage almost nationwide [*81] despite the IDEXX exclusive dealing arrangements; indeed, CDC's sales increased after IDEXX entered the market. See *CDC Technologies*, 7 F. Supp. 2d at 128-29.

. Also highly significant is that the IDEXX exclusive dealing contracts were easily terminable on short notice; any distributor that preferred to promote CDC's machine could switch allegiance with ease.⁵ See *id.* at 129; see also *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994) (noting that exclusive dealing arrangements with reasonable termination provisions "may actually encourage, rather than discourage competition"); *Omega Envtl.*, 127 F.3d at 1163-64; 11 Hovenkamp P 1802g, at 85.

[**20]

In short, "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." *CDC Technologies*, 7 F. Supp. 2d at 128.

HNT A plaintiff that fails to demonstrate adverse effects on competition may nevertheless satisfy its preliminary burden by establishing that the defendant "possesses the requisite market power and thus the capacity to inhibit competition market-wide." *K.M.B. Warehouse*, 61 F.3d at 129 (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 546 (2d Cir. 1993)) (internal quotation marks omitted). "Market power" is "the ability to raise price significantly above the competitive level without losing all of one's business." *Id.* (quoting *Graphic Prods. Distrib. v. Itek Corp.*, 717 F.2d 1560, 1570 (11th Cir. 1983)).

CDC offers no direct evidence of market power. Instead, it invokes the rule that "market share may be used as a proxy for market power." *K.M.B. Warehouse*, 61 F.3d at 129. However, even assuming that CDC's market share evidence were sufficient [**21] to create a triable issue as to market power, CDC's claim could not withstand summary judgment. "[A] showing of market power, while necessary to show adverse effect indirectly, is not sufficient. There must be other grounds to believe that the defendant's behavior will harm competition market-wide . . ." *K.M.B. Warehouse*, 61 F.3d at 129; see also *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 59 (2d Cir. 1997). For the reasons discussed above, CDC has failed to create a genuine issue of material fact on its claim that the exclusive dealing agreements "harm competition market-wide." *K.M.B. Warehouse*, 61 F.3d at 129.

⁵ CDC claims that distributors considering a switch to CDC would be intimidated by fear that IDEXX would cut them off from other IDEXX products (e.g., not just hematology analyzers). The magistrate judge concluded that CDC adduced no admissible evidence on this point, see *CDC Technologies*, 7 F. Supp. 2d at 129, a conclusion that CDC does not challenge on appeal.

2. *Sherman Act § 2*

We affirm the dismissal of CDC's claims under § 2 of the Sherman Act for substantially the reasons stated by Magistrate Judge Garfinkel. See *CDC Technologies*, 7 F. Supp. 2d at 130-31.⁶

[**22]

C. *State Law Claims*

We affirm the dismissal of CDC's state claims for substantially the reasons stated by the magistrate judge and Judge Arterton. [*82] See *id.* at 122, 125 n.5, 130 n.10, 131-32.

CONCLUSION

For these reasons, the judgment of the district court is affirmed.

End of Document

⁶The magistrate judge initially noted that CDC's § 2 claim fails a *a fortiori* because CDC could not establish the less demanding Clayton Act cause of action. See *id. at 130* (citing *Tampa Elec.*, 365 U.S. at 335, 81 S. Ct. at 632). As noted previously, we do not rely on that rule. Notwithstanding the invocation of the *Tampa Electric* short-cut, however, the magistrate judge went on to provide independent analysis of the § 2 claims. See 7 F. Supp. 2d at 130-31. It is on that portion of the opinion that we affirm.



American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.

United States Court of Appeals for the Sixth Circuit

December 17, 1998, Argued ; July 22, 1999, Decided ; July 22, 1999, Filed

Nos. 96-2529/96-2530

Reporter

185 F.3d 606 *; 1999 U.S. App. LEXIS 16861 **; 1999 FED App. 0264P (6th Cir.) ***; 51 U.S.P.Q.2D (BNA) 1481 ****; 1999-2 Trade Cas. (CCH) P72,592

American Council of Certified Podiatric Physicians and Surgeons, Plaintiff-Appellant (96-2529/2530)/ Cross-Appellee, v. American Board of Podiatric Surgery, Inc., Defendant-Appellee; Defendant-Appellant (97-1224), American Podiatric Medical Association, Defendant-Appellee/ Cross-Appellant (97-1223).

Subsequent History: Subsequent appeal at [Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 2003 U.S. App. LEXIS 4158 \(6th Cir.\)](#) (6th Cir. Mich., 2003)

Prior History: [**1] ; 97-1223/1224 Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 93-72995. Bernard A. Friedman, District Judge.

Disposition: Granted plaintiff's motion to strike portions of the ABPS's brief. Affirmed district court's grant of ABPS's renewed motion for judgment as a matter of law, the district court's denial of plaintiff's motion for injunctive relief, the district court's denial of the ABPS's motion for attorney's fees, and the district court's denial of the APMA's motion for [Rule 11](#) sanctions. Reversed in part and affirmed in part the district court's grant of summary judgment.

Core Terms

consumers, district court, actual deception, certification, podiatric, monopoly power, Lanham Act, podiatrists, boards, misleading, deceived, certifying, plaintiff's claim, monopolization, deception, literally, conspire, matter of law, ambiguous, injunctive relief, attorney's fees, conspiracy, sanctions, market share, diplomates, mailing, summary judgment motion, present evidence, advertisement, surgery

LexisNexis® Headnotes

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

[HN1](#) [down arrow] Standards of Review, Substantial Evidence

In considering whether sufficient evidence was presented to a jury to support a verdict, a court may not consider evidence not before the jury.

185 F.3d 606, *606 U.S. App. LEXIS 16861, **1 U.S.P.Q.2D (BNA) 1481, ****1481

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

HN2 [down] **False Designation of Origin, Elements of False Designation of Origin**

See [15 U.S.C.S. § 1125\(a\)\(1\) & \(a\)\(1\)\(B\) \(1994\)](#).

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

HN3 [down] **False Advertising, Lanham Act**

To state a cause of action for misleading advertisement under the Lanham Act, [15 U.S.C.S. § 1125\(a\)\(1\)\(B\)](#), a plaintiff must establish the following: 1) the defendant has made false or misleading statements of fact concerning his own product or another's; 2) the statement actually or tends to deceive a substantial portion of the intended audience; 3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; 4) the advertisements were introduced into interstate commerce; and 5) there is some causal link between the challenged statements and harm to the plaintiff. The third and fifth elements -- deception and injury -- are both components of causation generally. The deception element asks whether the defendant's misstatements caused the consumer to be deceived. The injury element asks whether the defendant's deception of the consumer caused harm to the plaintiff. The sort of proof of these elements a plaintiff must show varies depending upon whether damages or injunctive relief is sought.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Civil Procedure > Remedies > Damages > Monetary Damages

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview

185 F.3d 606, *606 U.S. App. LEXIS 16861, **1 U.S.P.Q.2D (BNA) 1481, ****1481

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Remedies

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN4 [down] **False Advertising, Lanham Act**

When a plaintiff seeks an award of monetary damages for false or misleading advertisement under the Lanham Act, [15 U.S.C.S. § 1125\(a\)\(1\)\(B\)](#), he may show either that the defendant's advertisement is literally false or that it is true yet misleading or confusing. Where statements are literally false, a violation may be established without evidence that the statements actually misled consumers. Where statements are literally true, yet deceptive, or too ambiguous to support a finding of literal falsity, a violation can only be established by proof of actual deception, that is, evidence that individual consumers perceived the advertisement in a way that misled them about the plaintiff's product. A plaintiff relying upon statements that are literally true yet misleading cannot obtain relief by arguing how consumers could react; it must show how consumers actually do react. In addition, a Lanham Act claim must be based upon a statement of fact, not of opinion.

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN5 [down] **Standards of Review, De Novo Review**

Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find on that issue. [Fed. R. Civ. P. 50\(a\)\(1\)](#). The court reviews de novo the motions with the identical standard used by the district court, and the court must view the evidence in the light most favorable to the nonmoving party.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

HN6 [down] **False Advertising, Elements of False Advertising**

One of the key elements of a cause of action for misleading advertising under the Lanham Act, [15 U.S.C.S. § 1125\(a\)\(1\)\(B\)](#), is that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience.

185 F.3d 606, *606 U.S. App. LEXIS 16861, **1 U.S.P.Q.2D (BNA) 1481, ****1481

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

[HN7](#) Consumer Protection, False Advertising

Proof of actual deception requires demonstrating that consumers were actually deceived by the defendant's ambiguous or true-but-misleading statements. Successful plaintiffs usually present evidence of the public's reaction through consumer surveys. There must be evidence that a "significant portion" of the consumer population was deceived.

Civil Procedure > Remedies > Injunctions > General Overview

Trademark Law > ... > Remedies > Equitable Relief > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

[HN8](#) Remedies, Injunctions

Injunctive relief may be obtained by showing only that the defendant's representations about its product have a tendency to deceive consumers while recovery of damages requires proof of actual consumer deception. Although plaintiff need not present consumer surveys or testimony demonstrating actual deception, it must present evidence of some sort demonstrating that consumers were misled.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

[HN9](#) Standards of Review, Abuse of Discretion

The court reviews a challenge to the grant or denial of a request for permanent injunction under an abuse of discretion standard.

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

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

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

[**HN10**](#) [L] **Summary Judgment, Motions for Summary Judgment**

The court reviews de novo the district court's grant of a motion for summary judgment. A court ruling on a motion for summary judgment must consider all the facts in the light most favorable to the nonmovant and must give the nonmovant the benefit of every reasonable inference. A grant of a motion for summary judgment is appropriate only if this court determines 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\(c\)](#).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > 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

[**HN11**](#) [L] **Regulated Practices, Price Fixing & Restraints of Trade**

[§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), prohibits agreements that result in an unreasonable restraint of trade, while [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#) prohibits the willful acquisition of monopoly power.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN12**](#) [L] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1 \(1994\)](#).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN13**](#) [L] **Regulated Practices, Price Fixing & Restraints of Trade**

In order to have a violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), there must be an agreement, as [§ 1](#) does not encompass unilateral conduct, no matter how anticompetitive. [§ 1](#) does not prohibit every restraint on trade, but only those agreements that unreasonably restrain trade.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

185 F.3d 606, *606 U.S. App. LEXIS 16861, **1 U.S. App. LEXIS 16861, ***Cir. 1481, ****1481
 (BNA) 1481, ****1481

[**HN14**](#) [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

The plaintiff in a [§ 1](#) Sherman Act, [15 U.S.C.S. § 1](#), case must present evidence excluding the possibility that the defendants acted independently of one another; it is not enough to show actions consistent with either independent or conspiratorial action.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

[**HN15**](#) [blue icon] Antitrust & Trade Law, Sherman Act

[§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), is concerned only with concerted action among competitors and not the coordinated activities that occur within a single firm.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > 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 > Elements

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 > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

[**HN16**](#) [blue icon] Conspiracy to Monopolize, Elements

[§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), makes it unlawful 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. To establish a [§ 2](#) violation, a plaintiff must demonstrate (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.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN17**](#) [blue icon] Regulated Practices, Market Definition

185 F.3d 606, *606 U.S. App. LEXIS 16861, **1 U.S.P.Q.2D (BNA) 1481, ****1481

The relevant market includes those products or services that are reasonably interchangeable with, as well as identical to, defendant's product.

[Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

HN18 [blue icon] **Regulated Practices, Monopolies & Monopolization**

Monopoly power is the power to control prices and exclude competition. Because a true determination of whether a firm possesses monopoly power hinges upon an analysis of complicated economic factors, courts often look to market share as a proxy for monopoly power.

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities](#)

HN19 [blue icon] **Regulated Practices, Market Definition**

Market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share.

[Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine](#)

HN20 [blue icon] **Federal & State Interrelationships, Erie Doctrine**

When considering claims based upon state law, a federal court must apply the law of that state.

[Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview](#)

[Torts > ... > Prospective Advantage > Intentional Interference > Elements](#)

[Torts > Business Torts > General Overview](#)

[Torts > ... > Commercial Interference > Prospective Advantage > General Overview](#)

HN21 [blue icon] **Regulated Practices, Monopolies & Monopolization**

To establish a claim of interference with prospective economic advantage in Michigan, a plaintiff must show: (1) the existence of a valid business relation, not necessarily evidenced by an enforceable contract, or expectancy; (2) that the defendant knew of the business relationship or expectancy; (3) that the defendant intentionally interfered by improperly inducing or causing a breach or termination of the relationship or expectancy; and (4) that the defendant's improper or unjustified interference resulted in injury to the plaintiff. The third component of this tort requires the plaintiff to demonstrate illegal or unethical conduct on the part of the defendant. An antitrust violation such as illegal monopolization would seem to satisfy this requirement.

185 F.3d 606, *606 U.S. App. LEXIS 16861, **1 U.S.P.Q.2D (BNA) 1481, ****1481

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

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

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

Torts > Business Torts > General Overview

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

Torts > Business Torts > Unfair Business Practices > General Overview

HN22 [] Trials, Judgment as Matter of Law

The tort of intentional interference with business relations does not require proof of actual deception. It is enough to show that the defendant's conduct interfered with the plaintiff's business expectancy.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Trademark Law > ... > Infringement Actions > Standards of Review > Abuse of Discretion

HN23 [] Costs & Attorney Fees, Clayton Act

Under [15 U.S.C.S. § 1117\(a\)](#), prevailing Lanham Act defendants are entitled to an award of attorney's fees in "exceptional" cases. The court reviews a district court's grant or denial of attorney's fees under the Lanham Act for an abuse of discretion.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN24 [] Consumer Protection, False Advertising

Where a plaintiff sues under a colorable, yet ultimately losing, argument, an award of attorney's fees is inappropriate.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

185 F.3d 606, *606LÁ999 U.S. App. LEXIS 16861, **1LÁ999 FED App. 0264P (6th Cir.), ***Cir.)LÁ51 U.S.P.Q.2D (BNA) 1481, ****1481

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN25 [blue icon] Standards of Review, Abuse of Discretion

The court reviews a denial of a motion for imposition of [Fed. R. Civ. P. 11](#) sanctions for an abuse of discretion.

Counsel: ARGUED: Alan M. Sandals, SANDALS, LANGER & TAYLOR, Philadelphia, Pennsylvania, for Appellant.

Philip J. Kessler, BUTZEL LONG, Detroit, Michigan, Thomas M. Hitch, McGINTY, JAKUBIAK, FRANKLAND, HITCH & HENDERSON, East Lansing, Michigan, for Appellees.

ON BRIEF: Patricia D. Gugin, BERGER & MONTAGUE, Philadelphia, Pennsylvania, for Appellant.

Philip J. Kessler, Laurie J. Michelson, BUTZEL LONG, Detroit, Michigan, Thomas M. Hitch, McGINTY, JAKUBIAK, FRANKLAND, HITCH & HENDERSON, East Lansing, Michigan, Gordon J. Walker, BUTZEL LONG, Birmingham, Michigan, **[**2]** for Appellees.

Judges: Before: MERRITT, NORRIS, and GILMAN, Circuit Judges.

Opinion by: ALAN E. NORRIS

Opinion

[**1482] [**2] [*611] OPINION**

ALAN E. NORRIS, Circuit Judge. Plaintiff American Council of Certified Podiatric Physicians and Surgeons ("ACCPSS") brought claims under the Sherman Act, the Michigan Antitrust Reform Act, the Lanham Act, and the common law prohibition against intentional interference with prospective economic advantage against the American Board of Podiatric Surgery, Inc., ("ABPS") and the American Podiatric Medical Association ("APMA"). Plaintiff appeals the district court's partial grant of defendants' motion for summary judgment, the grant of the ABPS's renewed motion for judgment as a matter of law following a jury verdict for plaintiff, and the denial of its request for injunctive relief. The ABPS cross-appeals the district court's denial of its **[***3]** motion for attorney's fees. The APMA cross-appeals the denial of its motion for sanctions pursuant to [Fed. R. Civ. P. 11](#). Subsequent to the filing of the briefs in this case, plaintiff filed a motion to strike portions of the ABPS's brief.

I. BACKGROUND

A. Factual Background.

i. The parties.

The APMA **[**3]** is the oldest and largest organization of podiatrists in the United States. Of the 12,500-13,000 podiatrists in the United States, over 10,000 are members of the APMA. The Council on Podiatric Medical Education ("CPME") is the educational arm of the APMA. The United States Department of Education recognizes the CPME to accredit podiatric colleges, and the CPME accredits the seven colleges of podiatric medicine. The APMA has authorized the CPME to recognize organizations which provide board certification for podiatrists, but the CPME gets no board-recognition authority from the federal government.

The ABPS, which has its origins in the APMA, is the oldest and largest podiatrist certification board in the United States. The CPME has approved the ABPS as a certifying board of podiatric surgeons. Over 4,000 podiatrists are currently certified by the ABPS.

Plaintiff, younger and smaller than the ABPS, also certifies podiatric surgeons. It was created by and is recognized by the American Association of Podiatric Physicians and Surgeons ("AAPPS"). A third board, the American Podiatric Medical Specialties Board ("APMSB"), also certifies podiatrists, but it is not a party to this litigation. [**4] The parties spend much time debating which is the more reputable and professional board, but the merits of their positions are irrelevant to this appeal.

[4] ii. The challenged conduct.**

Plaintiff bases all of its claims on allegedly false or misleading statements made by the ABPS and the APMA. The ABPS sent out three mass mailings over several years to sectors of the health care community. In 1988, the ABPS sent a letter to between 7,000 and 8,000 hospitals and insurance companies concerning podiatrist certification boards. In the fall of 1991, the ABPS sent a second mass mailing to approximately 6,000 hospitals. A third mailing was sent in October, 1992, to insurance carriers and managed care organizations. Along with these letters, the ABPS included informational brochures. In addition to these ABPS mailings, the APMA allegedly sent out materials of its own which disparaged plaintiff and supported the ABPS. The content of these mailings is discussed in more detail later in this opinion.

[*612] Plaintiff claims that the ABPS and the APMA conspired to issue the challenged statements and thereby to reduce plaintiff's presence as a competitor in the market for podiatrist certification. [**5] Not only did the APMA conspire with the ABPS, plaintiff claims, but also it conspired with its own members to falsely disparage plaintiff and [****1483] undermine its reputation as a certifying board. According to plaintiff, before the mass mailings it was a rising competitor in the market for podiatrist certification, but after the mailings, its market share dwindled, benefitting the ABPS.

iii. The ABPS's share of the market.

Plaintiff has provided the following undisputed data concerning the market shares of the three certifying boards.

[5]**

Year	Total # of applicants	ABPS	ACCPS	APMSB
1987-88	762	420 (55.1%)	141	201
1988-89	685	368 (53.7%)	210	107
1989-90	565	429 (75.9%)	103	33
1990-91	660	474 (71.8%)	94	92
1991-92	500	339 (67.6%)	95	67
1992-93	564	433 (76.7%)	59	72
1993-94	739	558 (75.5%)	98	83
1994-95	790	600 (75.9%)	111	79

Plaintiff claims that in apparent contradiction to having such a large market share, the ABPS charges approximately twice as much for podiatrists to take its exam than does plaintiff.

B. Prior Proceedings.

In 1991, plaintiff sued the APMA for violations of the Lanham Act and for intentional interference with business relationships. The parties settled, and plaintiff's claims were dismissed with prejudice on April 17, 1992. In July, 1993, plaintiff filed a six-count complaint against the ABPS and the APMA. Plaintiff alleged violations of the Lanham Act, § 1 of the Sherman Act (agreement in restraint of trade), [**6] § 2 of the Sherman Act (illegal monopolization, attempted monopolization, and conspiracy to monopolize), corresponding violations of the Michigan Antitrust

Reform Act, and the common law tort of intentional interference with prospective economic advantage. Defendants moved for summary judgment on all counts, and the district court granted the motion with regard to all claims except the Lanham Act claim against the ABPS. The Lanham Act claim was dismissed against the APMA because, according to the district court, all the events on which the APMA's Lanham Act liability was based occurred before April 17, 1992, and the dismissal of the plaintiff's earlier Lanham Act claims against the APMA precluded the later suit. After being dismissed from the case, the APMA filed a motion for sanctions against the plaintiff, pursuant to [Fed. R. Civ. P. 11](#).

[**6] The remaining parties proceeded to trial on the Lanham Act claims. After the jury returned a verdict for plaintiff, plaintiff requested injunctive relief prohibiting the ABPS from making any further misstatements. Not only did the district court deny plaintiff's request, the court granted the ABPS's renewed motion for judgment as a matter [**7] of law. In a separate opinion, the district court denied the APMA's request for sanctions. The ABPS subsequently sought attorney's fees, a request that was also denied.

Plaintiff appeals the partial grant of the motion for summary judgment, the grant of the renewed motion for judgment as a matter of law, and the denial of injunctive relief. The APMA cross-appeals the district court's refusal to impose sanctions on plaintiff, and the ABPS cross-appeals the denial of its motion for attorney's fees. Finally, plaintiff asks this court to strike portions of the ABPS's appellate brief.

II. DISCUSSION

A. Plaintiff's motion to strike portions of the ABPS's brief.

Plaintiff complains that, when arguing that the district judge correctly granted the ABPS's motion for judgment as a matter of law, the ABPS cites in its brief affidavits that were not before the jury. [HN1](#)[] In considering whether sufficient evidence was presented to a jury to support [*613] a verdict, a court may not consider evidence not before the jury. See [United States v. Bonds](#), 12 F.3d 540, 552 (6th Cir. 1993) ("A party may not by-pass the fact-finding process of the lower court and introduce new facts [**8] in its brief on appeal.") (citation and internal quotation marks omitted). The ABPS quotes from the affidavit of a Dr. Coles, and cites to three other affidavits, although those materials were not presented to the jury in any manner.

The ABPS relies upon the affidavits in an impermissible manner. Two of the primary issues on this appeal are whether plaintiff [****1484] presented sufficient evidence that health care professionals, such as Dr. Coles, were actually deceived by [***7] the alleged misrepresentations of the ABPS, and whether such deception of health care professionals caused injury to plaintiff. These affidavits are cited to persuade this court that there was no such deception and that the challenged statements did not adversely affect plaintiff. The ABPS attempts to justify its reference to these materials by arguing that they were submitted in support of its motion for attorney's fees. The portion of the brief in which the affidavits are cited is clearly directed at proving the insufficiency of the evidence presented to the jury, not the frivolousness of plaintiff's case. Because they were not considered by the jury, we have ignored the references to them in this appeal.

B. [**9] The district court's rulings on the Lanham Act claims.

Plaintiff appeals the district court's grant of the ABPS's renewed motion for judgment as a matter of law on the Lanham Act false advertising claim and the denial of its motion for injunctive relief.¹ The Lanham Act provides, in relevant part:

(a)(1). Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

...

¹ Plaintiff does not appeal the dismissal, by summary judgment, of its the Lanham Act claims against the APMA.

(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,

[***8]

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

HN2 [↑] [15 U.S.C. § 1125\(a\)\(1\)](#) & [\(a\)\(1\)\(B\) \(1994\)](#). [15 U.S.C. § 1125\(a\)\(1\)\(B\)](#) thus creates a cause of action for false or misleading advertisement.

[**10] [HN3](#) [↑]

To state a cause of action for misleading advertisement under the Lanham Act, a plaintiff must establish the following: 1) the defendant has made false or misleading statements of fact concerning his own product or another's; 2) the statement actually or tends to deceive a substantial portion of the intended audience; 3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; 4) the advertisements were introduced into interstate commerce; and 5) there is some causal link between the challenged statements and harm to the plaintiff. See [U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia](#), 898 F.2d 914, 922-23 (3d Cir. 1990); [ALPO Petfoods, Inc. v. Ralston Purina Co.](#), 286 U.S. App. D.C. 192, 913 F.2d 958, 964 (D.C. Cir. 1990). The third and fifth elements -- deception and injury -- are both components of causation generally. The deception element asks whether the defendant's misstatements caused the consumer to be deceived. The injury element asks whether [*614] the defendant's deception of the consumer caused harm to the plaintiff. The sort of proof of these elements a plaintiff must show varies [**11] depending upon whether damages or injunctive relief is sought.

i. The grant of the ABPS's renewed motion for judgment as a matter of law.

HN4 [↑] When a plaintiff seeks an award of monetary damages for false or misleading advertisement under the Lanham Act, he may show either that the defendant's advertisement is literally false or that it is true yet misleading or confusing. See, e.g., [Castrol, Inc. v. Pennzoil Co.](#), 987 F.2d 939, 943 (3d Cir. 1993). Where statements are literally false, a violation may [***9] be established without evidence that the statements actually misled consumers. See, e.g., [Johnson & Johnson, Inc. v. GAC Int'l, Inc.](#), 862 F.2d 975, 977 (2d Cir. 1988); [PPX Enters., Inc. v. Audiofidelity Enters., Inc.](#), 818 F.2d 266, 272 (2nd Cir. 1987). Actual deception is presumed. See [U-Haul Int'l, Inc. v. Jartran, Inc.](#), 793 F.2d 1034, 1040 (9th Cir. 1986). Where statements are literally true, yet deceptive, or too ambiguous to support a finding of literal falsity, a violation can only be established by proof of actual deception (i.e., evidence that individual consumers perceived the advertisement [**12] in a way that misled them about the plaintiff's product). A plaintiff relying upon statements that are literally true yet misleading "cannot obtain relief by arguing how consumers could react; it must show how consumers actually do react." [Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.](#), 902 F.2d 222, 229 (3d Cir. 1990). In addition, a Lanham Act claim must be based upon a statement of fact, not of opinion. [****1485] [Groden v. Random House, Inc.](#), 61 F.3d 1045, 1052 (2d Cir. 1995); [Gillette Co. v. Norelco Consumer Prods. Co.](#), 946 F. Supp. 115, 136 (D. Mass. 1996).

The district court ruled that all of plaintiff's claims were based upon statements that were either ambiguous or literally true yet misleading and that plaintiff had failed to introduce sufficient evidence of actual deception. Consequently, plaintiff had not introduced sufficient evidence for a reasonable juror to find in favor of plaintiff to justify an award of damages.

HN5 [↑] Judgment as a matter of law is appropriate where "there is no legally sufficient evidentiary basis for a reasonable jury to find on that issue." [Fed. R. Civ. P. 50\(a\)\(1\)](#). We review de novo these motions with [**13] the identical standard used by the district court, and we must view the evidence in the light most favorable to the nonmoving party. [Monday v. Oullette](#), 118 F.3d 1099, 1101-02 (6th Cir. 1997). [***10]

1. Literally false v. true-but-misleading or ambiguous statements.

185 F.3d 606, *614-1999 U.S. App. LEXIS 16861, **13L-1999 FED App. 0264P (6th Cir.), ***10L-51 U.S.P.Q.2D (BNA) 1481, ****1485

Plaintiff bases its Lanham Act claim against the ABPS on seven statements. Two of them are found in mass mailings sent in May, 1988, and October, 1992, where the ABPS wrote:

Recently, the American Board of Podiatric Surgery has received a number of inquiries from hospitals regarding podiatrists presenting credentials from organizations purporting to be certifying boards.

The AMERICAN BOARD OF PODIATRIC SURGERY . . . is the **ONLY** approved certifying board for podiatric surgery. The American Board of Podiatric Surgery is approved by the Council on Podiatric Medical Education, which is part of the American Podiatric Medical Association (formerly the American Podiatry Association).

First, plaintiff claims the word "purporting" implies that other organizations, such as plaintiff, are not certifying boards, when in fact plaintiff is a certifying board, and thus the statement [**14] is literally false. The district court reasoned that because anything "purports" to be what it says it is, the statement was true although misleading, and therefore plaintiff had to [*615] prove actual deception.² To the contrary, we [***11] find that when read in context, the word "purported" means nothing other than "falsely claiming to be." "Purport" carries this connotation on its own, and when coupled with the other sentences in the letter, there can be no doubt that anyone reading the message would believe the ABPS to be saying that these other organizations were not certifying boards. While this is true, however, the statement in context is more a statement of opinion than a statement of fact. The ABPS seems to say that only boards approved by the CPME are truly certifying boards, and only the ABPS is approved by the CPME. As noted previously, such a statement is an inactionable statement of opinion.

[**15] Second, plaintiff claims that the statement that the ABPS is "the **ONLY** approved certifying board for podiatric surgery" is literally false. This statement is either ambiguous or true but misleading. It is wholly unclear what it means to be an "approved" board, and so plaintiff must demonstrate that the statement actually deceived consumers into believing something untrue. Alternatively, considering the statement in context, it may mean that only the ABPS is approved by the CPME, which is true. Thus, whether ambiguous or true but misleading, plaintiff must introduce evidence of actual deception to recover damages.

Third, in a mailing to insurance carriers on October 1, 1992, the ABPS stated that it "is the **only** professionally recognized certifying board for podiatric surgery, being recognized by the" CPME. Like "approved" in the previously discussed passage, the phrase "professionally recognized" is ambiguous. [****1486] [***12] To be "professionally recognized," must the ABPS be recognized by most podiatrists? Most people in the medical profession? Some podiatrists? Taken as a whole, the sentence may mean that only boards recognized by the CPME are professionally recognized boards, [**16] which is a statement of opinion. Thus, the statement is either opinion or ambiguous, and plaintiff must introduce evidence of actual deception to survive summary judgment.

Fourth, in another mailing to hospitals, the ABPS stated that "there has been a proliferation of 'self-designated' organizations purporting to have the authority to recognize and certify in podiatric surgery." Plaintiff complains that the term "self-designated" is disparaging. It may be disparaging, but it is also ambiguous. At trial, evidence suggested that to those in the medical community, "self-designated" could refer to boards not recognized by the CPME, which would be all boards other than the ABPS. In context, the most reasonable interpretation of "self-designated" is "not approved by another body." Plaintiff may or may not be approved by another body, depending upon how one looks at its relationship with the AAPPS. The AAPPS created and approved plaintiff, and being

² Plaintiff points to evidence in the record where a witness testified that purported meant "not genuine," and the gist of plaintiff's argument is that there was sufficient evidence for a jury to find that the statement was literally false. Whether or not a statement is ambiguous would seem to be a question of law, as it is in contract interpretation. See, e.g., *Astor v. International Bus. Mach. Corp.*, 7 F.3d 533, 539-40 (6th Cir. 1993) (under Ohio law, determination of whether a contractual term is ambiguous is a question of law, not fact). On the other hand, the Second Circuit has held that whether or not a statement is facially false is a question of fact. *Johnson & Johnson, Inc. v. GAC Int'l, Inc.*, 862 F.2d 975, 979 (2d Cir. 1988). These two rules do not conflict because determining what meaning(s) words facially convey requires no weighing of evidence, while determining whether facts exist so as to make a statement true does require weighing evidence. Thus, the initial determination concerning whether a statement is ambiguous is a matter of law, while the determination as to whether facts exist so as to justify the statement is a question of fact. The testimony plaintiff points to concerns the initial determination of ambiguity and is therefore irrelevant to the question of whether "purporting" is ambiguous, a question of law.

185 F.3d 606, *615LÁ1999 U.S. App. LEXIS 16861, **16LÁ1999 FED App. 0264P (6th Cir.), ***12LÁ51 U.S.P.Q.2D (BNA) 1481, ****1486

approved by the very body that created it might be considered self-designation. [*616] In any event, "self-designated" is ambiguous, and therefore plaintiff must show actual deception to prevail.

Fifth, plaintiff points to the language found in the [**17] mass mailings stating that the "CPME is the accrediting agency for podiatric medicine. . . ." Plaintiff claims this is a false statement. However, the statement is too ambiguous to be literally false because it does not say what the CPME accredits. The CPME does, in fact, accredit all of the colleges of podiatric medicine, and it is the only organization that accredits these colleges. Thus, in a sense the statement is true. At worst it is misleading, and plaintiff must present evidence of actual deception.

[***13] Sixth, plaintiff challenges the ABPS's statement that "the CPME is the accrediting agency for podiatric medicine, recognized by the U.S. Department of Education and the Council on Postsecondary Accreditation." Plaintiff interprets this passage to mean that the federal government has approved the CPME for recognizing certification boards, which is false. However, this statement does not necessarily stretch as broadly as the plaintiff would have it. The U.S. Department of Education does, in fact, recognize the CPME for the accreditation of postsecondary schools. Thus, the statement is, at worst, true but misleading, and plaintiff must demonstrate actual deception.

Finally, [**18] plaintiff complains about the ABPS's statement that the "APMA recognizes only the ABPS for certification in podiatric surgery." Unfortunately, it points to no place in the record where this statement may be found. We have found instances where the ABPS has claimed that it is the only board approved by the CPME, which is a true statement. While it may be that this statement implies that there is some sort of process whereby other boards can apply for CPME approval and that the ABPS is the only board to gain such approval, the statement itself is literally true. Thus, at worst it is true yet misleading, and plaintiff must demonstrate actual deception.

In considering all the above-challenged statements, we have to keep in mind that [HN6](#) one of the key elements of a cause of action for misleading advertising under the Lanham Act is "that there is actual deception or at least a tendency to deceive a **substantial portion of the intended audience.**" See [U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 922 \(3d Cir. 1990\)](#) (internal citations and quotation marks omitted) (emphasis added). Here, the intended audience is comprised of hospital administrators, [**19] insurance companies, and managed care organizations, a sophisticated group of professionals who presumably have familiarity with the issues involved in board certification. Because we conclude that this intended audience would find all of the [**14] challenged statements to be, at worst, either ambiguous or true but misleading, the district court correctly reasoned that plaintiff had to present evidence of actual deception in order to survive the ABPS's renewed motion for judgment as a matter of law and collect damages.

2. Evidence of actual deception.

[HN7](#) Proof of actual deception requires demonstrating that consumers were actually deceived by the defendant's ambiguous or true-but-misleading statements. Successful plaintiffs usually present evidence of the public's reaction through consumer surveys. [Johnson & Johnson-Merck Consumer Pharmas. Co. v. Rhone-Poulenc Rorer Pharmas., Inc., 19 F.3d 125, 129-30 \(3d Cir. 1994\)](#). There must be evidence that a "significant portion" of the consumer population was deceived. See, e.g., [William H. Morris Co. v. Group W, Inc., 66 F.3d 255, 258 \[****1487\] \(9th Cir. 1995\)](#).³ [*617] Plaintiff presented no consumer survey or [**20] other market

³One of the initial difficulties with plaintiff's case is that the persons allegedly deceived by defendants' statements are not consumers of any podiatrist certification board. The persons who purchase the services of plaintiff and the ABPS are podiatrists, yet plaintiff alleges that hospitals, health care providers, and insurance companies were misled. Plaintiff's focus upon these other entities is logical because how they perceive the plaintiff will have an effect on its ability to attract podiatrists seeking certification. The less respect these entities have for plaintiff's certification, the less likely it will be that podiatrists will seek plaintiff's certification. Because we affirm the district court's grant of the ABPS's renewed motion for judgment as a matter of law on other grounds, we need not decide whether Lanham Act "consumers" may be entities that do not actually purchase plaintiff's product. We will assume, for purposes of argument, that plaintiff has correctly alleged that hospital administrators and insurance companies are its Lanham Act consumers.

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research demonstrating that consumers were deceived by any ambiguous or true-but-misleading statement made by the ABPS.

[**21] The most compelling direct evidence of actual [****1488] deception plaintiff sets forth is found in a letter sent to the ABPS by a [***15] Dr. Coles, who was Vice-President of Medical Affairs at a hospital. Coles wrote: "From what you say, we should not give much, if any, credence to the ACCPPS? I will certainly appreciate any further information you can give us." While this letter may demonstrate some confusion by Coles, it does not show that he was tricked into believing an untruth about plaintiff. And even if Coles were deceived, this one letter is a far cry from demonstrating that a "significant portion" of the consumer population was deceived.

Plaintiff argues it presented sufficient evidence of consumer deception in forms other than consumer surveys, market research, or direct evidence that individual consumers were deceived. Plaintiff draws attention to the following evidence:

The CPME sent the ABPS a letter telling it not to tell others that the CPME was recognized by the U.S. Department of Education.

In 1993, the CPME distributed a brochure clarifying its functions and its relation to the federal government.

Evidence was presented suggesting that a member of [**22] the California medical licensing board thought that governmental recognition of the CPME extended to regulation of certifying boards.

At most, this evidence indicates concern by the CPME and confusion in the California medical licensing board about the ABPS's representation of the CPME's relationship with the U.S. Department of Education, and thus it speaks to only one of the challenged statements. Even as it relates to this one statement, however, plaintiff has not presented sufficient evidence of actual deception to support a finding that a significant portion of the consumers were deceived. None of this evidence demonstrates that those parties plaintiff labels as its consumers -- hospitals, health care providers, and insurance companies -- were deceived. [***16]

Plaintiff points to cases which indicate that common sense and personal experience can enter into determining whether consumers were deceived. However, none of these cases stand for the proposition that common sense or personal experience alone will suffice for plaintiff to establish actual deception. The court in McNeilab, Inc. v. American Home Prods. Corp., 501 F. Supp. 517, 525 (S.D.N.Y. 1980), [**23] reasoned that a court as factfinder may use "experience and understanding of human nature" in determining whether market researchers and expert witnesses have established actual deception, but the case cannot be read for the proposition that common sense can substitute for direct evidence. Rather, in **McNeilab**, common sense acts as a check on evidence tending to establish actual deception, not a substitute for such evidence. Plaintiff relies upon Getty Petroleum Corp. v. Island Transp. Corp., 878 F.2d 650, 656-57 (2d Cir. 1989), for the proposition that common sense may guide the jury's determination without any consumer witnesses or market surveys, but [*618] that was a case concerning literal falsity, not ambiguous or true-but-misleading statements. When statements are literally false, the potential for actual deception is naturally greater. Thus, **Getty Petroleum** merely reaffirms the general rule that in cases of literally false statements, evidence of actual deception is not required. See also Federal Trade Comm'n v. Brown & Williamson Tobacco Corp., 250 U.S. App. D.C. 162, 778 F.2d 35, 40-42 (D.C. Cir. 1985) (construing the "false advertising" [**24] section of the Federal Trade Commission Act and holding that where deception is self-evident, consumer surveys are not required).

The district court also ruled that plaintiff had failed to present evidence sufficient for a reasonable jury to find that the alleged deception of consumers had caused it injury. Because we hold that plaintiff failed to present sufficient evidence of actual deception to support an award of damages, we need not consider the second causation issue. [***17]

ii. The district court's denial of injunctive relief.

Plaintiff appeals the district court's denial of its motion for injunctive relief. As noted above, the evidence of causation a plaintiff must introduce to establish a Lanham Act claim varies depending upon the relief sought.

185 F.3d 606, *618 U.S. App. LEXIS 16861, **24 U.S. App. LEXIS 1999 FED App. 0264P (6th Cir.), ***17 U.S.P.Q.2D (BNA) 1481, ****1488

Regarding deception, "[HN8](#)[↑] injunctive relief may be obtained by showing only that the defendant's representations about its product have a tendency to deceive consumers while recovery of damages requires proof of actual consumer deception." *Max Daetwyler Corp. v. Input Graphics, Inc.*, 608 F. Supp. 1549, 1551 (E.D. Penn. 1985); see also *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746, 753-54 (8th Cir. 1980). [**25] This lower standard has arisen because when an injunction is sought, courts may protect the consumer without fear of bestowing an undeserved windfall on the plaintiff. See *Black Hills Jewelry*, 633 F.2d at 753 n.7; J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* 27:31, at 27-50 (1998). Although plaintiff need not present consumer surveys or testimony demonstrating actual deception, it must present evidence of some sort demonstrating that consumers were misled.

[HN9](#)[↑] This court reviews a challenge to the grant or denial of a request for permanent injunction under an abuse of discretion standard. *In re Dublin Sec., Inc.*, 133 F.3d 377, 380 (1997). Applying this deferential standard of review, we are unable to say that the district court abused its discretion in denying plaintiff's motion for injunctive relief. Plaintiff's strongest evidence regarding deception involves the ABPS's statements regarding the CPME's relationship with the Department of Education. The CPME directed the ABPS, "In order to avoid the possibility of any confusion in the future . . . the Council requests that the Board discontinue referencing in the ABPS correspondence [**26] and other public documents the recognition of the Council on Podiatric Medical Education by the . . . U.S. Department of Education." In addition, as noted previously, plaintiff presented evidence suggesting that members of the California medical licensing board were confused concerning [***18] the CPME's relationship with the federal government. Although this is some evidence of deception generally, it does little to prove that hospitals, insurance companies, and health care providers -- the entities plaintiff claims are its Lanham Act consumers -- were deceived by the ABPS's statements. The aforementioned letter of Dr. Coles, while perhaps indicating some confusion, is little evidence that consumers were deceived. With such scant evidence of deception, we are unable to say that the district court abused its discretion in denying plaintiff's motion for injunctive relief. Because plaintiff presented insufficient evidence of deception, we do not address the other elements of its Lanham Act claim for injunctive relief.

[*619] C. The grant of summary judgment in favor of defendants.

Plaintiff brought four antitrust claims, alleging violations of §§ 1 and 2 of the Sherman Act and their [**27] respective Michigan counterparts.⁴ The district court dismissed these claims on defendants' motion for summary judgment, and plaintiff appeals. [HN10](#)[↑] This court reviews de novo the district court's grant of a motion for summary judgment. *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 101 (6th Cir. 1995). A court ruling on a motion for summary judgment must consider all the facts in the light most favorable to the nonmovant and must give the nonmovant the benefit of every reasonable inference. *Allen v. Michigan Dept. of Corrections*, 165 F.3d 405, 409 (6th Cir. 1999). A grant of a motion for summary judgment is appropriate only if this court determines 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)*.

[**28] [***19] [Section 1](#) of the Sherman Act prohibits agreements that result in an unreasonable restraint of trade, while [§ 2](#) of the Sherman Act prohibits the willful acquisition of monopoly power. We review the district court's ruling regarding each of these causes of action in turn.

i. Agreement resulting in an unreasonable restraint of trade.

⁴ Because Michigan [antitrust law](#) follows federal precedents, our reasoning regarding the federal antitrust claims applies equally to the state antitrust claims. See *Mich. Comp. Laws Ann. § 445.784(2)* (1998) ("It is the intent of the legislature that in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes . . .").

185 F.3d 606, *619 U.S. App. LEXIS 16861, **28 U.S. App. LEXIS 1999 FED App. 0264P (6th Cir.), ***19 U.S.P.Q.2D (BNA) 1481, ****1488

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 [****1489] States, or with foreign nations, is thereby declared to be illegal." [HN12](#) [↑] [15 U.S.C. § 1 \(1994\)](#). [HN13](#) [↑] In order to have a § 1 violation, there must be an agreement, as § 1 does not encompass unilateral conduct, no matter how anticompetitive. See [Nurse Midwifery Assocs. v. Hibbett](#), 918 F.2d 605, 611 (6th Cir. 1990). Section 1 does not prohibit every restraint on trade, but only those agreements which unreasonably restrain trade. See, e.g., [Northwest Wholesale Stationers, Inc., v. Pacific Stationery and Printing Co.](#), 472 U.S. 284, 289, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985).

Plaintiff urges two violations of § 1. First, [**29] it argues that the ABPS and the APMA engaged in anticompetitive behavior in the form of a group boycott and conspiracy to exclude plaintiff from the health care market. Second, plaintiff argues that the ABPS conspired with its member diplomates to get hospitals and insurance companies to require or prefer ABPS certification over the certification of other boards such as plaintiff. The district court ruled that there was no triable issue of material fact concerning the existence of an agreement between either the ABPS and the APMA or the ABPS and its member diplomates.⁵

[***20] 1. Evidence of an agreement between the APMA and the ABPS.

Despite the over-4,000 pages in the parties' Joint Appendix, plaintiff points to virtually no [**30] evidence of collusion between the APMA and the ABPS. [HN14](#) [↑] The plaintiff in a § 1 case must present evidence excluding the possibility that the defendants acted independently of one another; it is not enough to show actions consistent with either independent or conspiratorial action. [Riverview Invs., Inc. v. Ottawa Community Improvement Corp.](#), 899 F.2d 474, 484-85 (6th Cir. 1990). Here, [*620] both the APMA and the ABPS benefit when the ABPS's credibility within the medical community is strengthened. Thus, it is natural that each organization independently would take steps to promote the ABPS.

Plaintiff has failed to carry its burden of presenting evidence that tends to exclude the possibility of independent action. Plaintiff points to evidence in the record tending to establish the following: (1) the APMA determined that it should issue statements warning the public about unrecognized certifying boards; (2) the CPME and the ABPS were on friendly terms; (3) the APMA reviewed some of the ABPS's literature before it was sent out and did not criticize the literature; (4) in a June, 1993, meeting, the APMA agreed to coordinate the text of one of its mass mailings with the ABPS; [**31] and (5) in an October, 1993, mailing, the APMA referred negatively to boards not recognized by the APMA. None of this evidence is sufficient to raise a genuine issue of whether the ABPS and the APMA colluded. These facts indicate that the ABPS and APMA had similar goals concerning non-ABPS boards, but the actions of both entities are as consistent with independent action as with collusive action. Even if it is assumed that the October mailing is the [***21] result of the June agreement, plaintiff does not indicate in what way the mailing was anticompetitive.⁶

⁵ The district court did not reach the question of whether the alleged agreements, if proved, violated the antitrust laws, as it ruled that there was insufficient evidence of such agreements to generate a genuine issue of material fact. We also do not reach this question.

⁶ Some of plaintiff's allegations are unsupported by the cited evidence in the record.

According to plaintiff, in August, 1987, the ABPS and the APMA met to discuss a joint mass mailing targeting competing certifying boards. At this alleged meeting, the APMA agreed to assist the ABPS by providing a letter reaffirming the monopoly status of the ABPS, a letter which the ABPS could use in its mailings to hospitals and insurance companies. Also, plaintiff alleges that after the October, 1993, mailing, the ABPS complained to the APMA that the October mailing did not demonstrate sufficiently ardent support for the ABPS. After a consultation, the APMA reached an agreement with the ABPS and in December, 1993, sent a second letter. To further satisfy the ABPS, the APMA included in the second mass mailing a new CPME brochure, also coordinated with the ABPS, which highlighted the ABPS and two other APMA-approved non-surgical boards.

Most of these allegations are unsupported by the parts of the record cited by plaintiff. Plaintiff indicates neither evidence of a 1987 meeting where the ABPS and APMA met to discuss a joint mailing nor of a letter confirming the monopoly status of the ABPS. Likewise, plaintiff indicates no evidence of a 1993 complaint by the ABPS, consultation between the ABPS and the

185 F.3d 606, *620 U.S. App. LEXIS 16861, **31 U.S. Fed. App. 0264P (6th Cir.), ***21 U.S.P.Q.2D (BNA) 1481, ****1489

[**32] We affirm the district court's ruling that plaintiff presented no triable issue of fact concerning an agreement between the ABPS and the APMA.

2. Evidence of an agreement between the ABPS and its member diplomates. [****1490]

Plaintiff also alleges that the ABPS conspired with its member diplomates to suppress competition. However, the intracorporate conspiracy doctrine prevents the ABPS from conspiring with its members as a matter of law, because the diplomates and the ABPS are not independent legal entities for purposes of this antitrust claim. In [Nurse Midwifery](#) [**221] [Assocs. v. Hibbett](#), 918 F.2d 605, 614 (6th Cir. 1990), this court wrote, "[HN15](#) ↑ Section 1 of the Sherman Act is concerned only with concerted action among competitors and not the coordinated activities that occur within a single firm." **Nurse Midwifery** dealt with whether members of a hospital's medical staff could conspire with the hospital itself when making employment decisions regarding persons in competition with members of the medical staff. We held that because the staff members were not competitors of the hospital, they could not conspire with the hospital for antitrust purposes. **Id.** [**33] Here, the ABPS does not compete with its member diplomates, therefore antitrust concerns are not [*621] raised.⁷ While the ABPS members may conspire amongst themselves -- a possibility not alleged by plaintiff -- the diplomates cannot conspire with the ABPS.⁸

[**34] [**23] The district court ruled that there was no genuine issue of material fact with regard to a conspiracy between the ABPS and its members. Plaintiff claims that many ABPS diplomates saw plaintiff's mailings and complained about them to John Bennett. In 1992, the ABPS distributed information packets which urged its members to inform the appropriate persons about various aspects of the ABPS. Evidence suggested that the ABPS's goal in distributing these materials was to encourage hospitals to require ABPS certification in their by-laws. All this may be true, but it presents insufficient evidence of conspiracy between the ABPS and any of its members.

In [Monsanto Co. v. Spray-Rite Serv. Corp.](#), 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984), the Supreme Court considered a resale price maintenance case. In resale price maintenance, a distributor and merchants selling the distributor's product agree that the merchants will not sell the product below a certain price. At issue in **Monsanto** was whether the plaintiff had presented sufficient evidence of conspiracy between the distributor and the merchants. The Court wrote that where there was only [**35] evidence of complaints by merchants to a distributor concerning low-pricing by a maverick merchant, and then a subsequent refusal by the distributor to do business with the maverick, the evidence was insufficient to sustain a finding of agreement between the distributor and the complaining merchants. [465 U.S. at 764](#). If the rule were otherwise, distributors would be prevented from legally refusing to do business with a particular merchant whenever other merchants had complained about the low-pricing practices of that merchant. **Id.**

APMA, or efforts to placate the ABPS. Apparently ABPS executive director John Bennet reviewed the brochure, but nothing indicates that Bennet had any control over its final publication. Plaintiff gives this court no reason to think the brochure was not sent on the APMA's own initiative.

⁷ Plaintiff relies upon [Federal Trade Comm'n v. Indiana Fed'n of Dentists](#), 476 U.S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986), in which the Supreme Court considered a Federal Trade Commission ruling that the Indiana Federation of Dentists had conspired with its own members in violation of the antitrust laws. The Court did not consider whether the Federation could conspire with its own members, but stated that the conspiracy it examined was one amongst the members of the Federation. 476 U.S. at 455.

⁸ Some courts employ the independent personal stake exception to the intracorporate conspiracy doctrine, thereby allowing members of professional organization to conspire with that organization. See [Poindexter v. American Bd. of Surgery, Inc.](#), 911 F. Supp. 1510 (N.D. Ga. 1994) (applying the rule that where the organization's agents have a personal stake in the principal's anticompetitive acts, the agents may be considered separate legal entities and may conspire with the organization). This court declined to adopt the independent personal stake exception in [Nurse Midwifery](#). 918 F.2d at 615 ("We are not convinced that an agent acting with anticompetitive motives due to some independent personal stake raises sufficient antitrust concerns to warrant abandoning the traditional rule that a principal cannot conspire with one of its agents."). Because the ABPS is controlled by its members and presumably acts in their interests, there is little reason to recognize the ABPS as a legal entity separate from its members for antitrust purposes.

185 F.3d 606, *621-1999 U.S. App. LEXIS 16861, **35-1999 FED App. 0264P (6th Cir.), ***23L51 U.S.P.Q.2D (BNA) 1481, ****1490

Here, plaintiff can demonstrate only complaints by ABPS members and action arguably in conformity with those complaints. As in **Monsanto**, the action taken by the ABPS is as much in its interest as it is in the interest of its members individually, and plaintiff has not introduced evidence tending to exclude the possibility that the ABPS acted independently and not in concert with its members. See *id. at 764* (requiring [**24] proof tending to exclude the possibility of independent action). Thus, even if the ABPS could conspire with its members, the district court's grant of summary judgment on the section 1 claims [**36] must be affirmed because plaintiff has not generated a genuine issue of material fact regarding conspiracy between the ABPS and its member diplomats.

[*622] In sum, we hold that plaintiff has failed to create a genuine issue of material fact as to whether the ABPS conspired with either the APMA or its member diplomats. Also, we [****1491] hold that the ABPS cannot, as a matter of law, conspire with its member diplomats.

ii. Abuse of monopoly power.

HN16 [↑] Section 2 of the Sherman Act makes it unlawful 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. To establish a § 2 violation, a plaintiff must demonstrate "(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." Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (internal quotation marks omitted) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)). [**37] The district court ruled that there was no triable issue of fact as to whether defendant had monopoly power and therefore granted defendant's summary judgment motion, without reaching the question of whether the alleged misstatements violated section 2, if defendant did have monopoly power.

HN17 [↑] The relevant market includes those products or services that are reasonably interchangeable with, as well as identical to, defendant's product. White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983). The ABPS produces podiatrist certifications, and plaintiff directly [**25] competes with the ABPS in this market, as does a third certification board. Thus, the relevant market is that for the sale of podiatrist certification services. The district court, relying upon a report prepared by the ABPS's expert, ruled that the relevant market must take into consideration the ABPS's influence over the health care market as well as the percentage of podiatrists who are certified by the ABPS every year. This is because plaintiff and the ABPS not only compete for exam takers, according to the court, but also for recognition within the health care community. [**38] Plaintiff introduced evidence demonstrating that the ABPS may have a monopoly with regard to the number of exam takers (an average of 69% of all candidates taking an exam for certification in podiatric surgery took the ABPS exam from 1987-1995), but according to the district court, plaintiff would have to produce evidence of the ABPS's monopolization of recognition within the health care community as well. Plaintiff introduced no such evidence, and so the district court granted defendant's summary judgment motion.

The district court's reasoning is not persuasive. According to its reasoning, if the ABPS certified 100% of all podiatrists, yet the health care community did not require ABPS certification, the ABPS would not have a sufficient market share to justify a finding of monopoly power. Recognition by the health care community will affect the ABPS's ability to gain monopoly power, as the greater its reputation in that community, the more podiatrists will seek certification by the ABPS. However, recognition within the health care community is not the market within which podiatrist certification boards compete; rather, it is an indicator by which the existing market steers its demand.

[**39] **HN18** [↑] Monopoly power is the power to control prices and exclude competition. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 393, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). Because a true determination of whether a firm possesses monopoly power hinges upon an analysis of complicated economic factors, courts often look to market share as a proxy for monopoly power. Tarrant ***261 Serv. Agency, Inc. v. American Standard, Inc., 12 F.3d 609, 615 (6th Cir. 1993). Plaintiff produced evidence [*623] demonstrating that the ABPS's share of the number of persons taking podiatrist certification exams ranged from 55.1% in 1987, to a high of 76.7%

185 F.3d 606, *623 U.S. App. LEXIS 16861, **39 U.S. App. FED. App. 0264P (6th Cir.), ***26 U.S.P.Q.2D (BNA) 1481, ****1491

in 1992, with only a slight decrease to 75.9% in 1994. Monopoly power has been found in cases where defendant firm controlled similar portions of the market. See [Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1443 \(6th Cir. 1990\)](#) (when coupled with other evidence of monopoly power, firm with around 60% of the market share can have monopoly power); [Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 129 \(2d Cir. 1981\)](#) (firm with market share [**40] between 50% and 70% can sometimes have monopoly power, while a share above 70% is strong evidence of monopoly power).

Although the ABPS has a sufficient market share to support a finding of monopoly power, [HN19](#)[] market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share. [Byars v. Bluff City News Co., 609 F.2d 843, 850-51 \(6th Cir. 1979\)](#). Plaintiff also claims that the ABPS charges substantially more for its exam than does plaintiff. Although the ABPS may provide more services with its exam (for example, the cost of sending notice of certification to hospitals and insurance carriers) than plaintiff, thereby justifying the higher price, the ABPS does not make this argument. The price difference, coupled [***1492] with the larger market share, supports plaintiff's claim of monopoly power by ABPS.

The APMA argues that because the barriers to entry into the market for certification are low, the ABPS does not have monopoly power. The difficulty of entry into the market is relevant because if entry is easy, even a firm holding a commanding percentage [**41] of the market cannot charge a price above the competitive price, for once it does, competitors will enter the market and undercut the firm's price. See [United J***27 States v. Syufy Enters., 903 F.2d 659, 667 \(9th Cir. 1990\)](#) (where barriers to entry into the market are low, it is unlikely that a firm may attain monopoly power). The APMA points to the report of Dr. McCarthy, an economist hired by defendants, for the proposition that entry into the podiatrist-certification market is fluid. Dr. McCarthy wrote in his report that "entry and success are both possible, if credibility can be established." However, establishing credibility naturally seems to be a significant barrier to entry, particularly for an enterprise that depends heavily upon reputation, such as certification of medical specialists.

Based upon these factors, we reverse the grant of summary judgment on the issue of monopoly power. Although the ABPS may ultimately establish that it does not have monopoly power, considering the evidence in the light most favorable to plaintiff and drawing all inferences in its favor, dismissal of plaintiff's [section 2](#) claim at the summary judgment stage is inappropriate. [**42] The district court did not reach the issue of whether the alleged misstatements by the ABPS could serve as a basis for an illegal monopolization claim, and so we need not reach this question either. The district court also granted defendant's summary judgment motion on plaintiff's claim of attempted monopolization. For the same reasons that the monopolization claim survives summary judgment with respect to the monopoly power element, the attempted monopolization claim should survive as well.

In addition, plaintiff appeals the district court's grant of summary judgment regarding its claim that the ABPS and APMA conspired to monopolize. Plaintiff points to no evidence to substantiate this claim. Assuming that plaintiff intends the previously discussed evidence of conspiracy to restrain trade to serve as evidence of a conspiracy to monopolize, for the reasons set forth in the section concerning the alleged conspiracy to restrain trade, plaintiff's evidence is [***28] insufficient. The district [*624] court's grant of summary judgment regarding the conspiracy to monopolize claim is affirmed.⁹

[43] iii. Intentional interference with prospective economic advantage.**

The district court granted defendants' motion for summary judgment regarding plaintiff's claim of intentional interference with economic advantage. [HN20](#)[] When considering claims based upon state law, a federal court must apply the law of that state. [Monette v. Am-7-7 Baking Co., 929 F.2d 276, 280 \(6th Cir. 1991\)](#). [HN21](#)[] To establish a claim of interference with prospective economic advantage in Michigan, a plaintiff must show: (1) the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; (2) that

⁹ Plaintiff's claims of illegal monopolization and attempted monopolization under the Michigan Antitrust Reform Act must likewise survive summary judgment, while the state conspiracy to monopolize claims must fail.

185 F.3d 606, *624L^A1999 U.S. App. LEXIS 16861, **43L^A1999 FED App. 0264P (6th Cir.), ***28L^A51 U.S.P.Q.2D (BNA) 1481, ***1492

the defendant knew of the business relationship or expectancy; (3) that the defendant intentionally interfered by improperly inducing or causing a breach or termination of the relationship or expectancy; and (4) that the defendant's improper or unjustified interference resulted in injury to the plaintiff. *Id. at 281* (citation omitted). The third component of this tort requires the plaintiff to demonstrate illegal or unethical conduct on the part of the defendant. See, e.g., *Hutton v. Roberts*, 182 Mich. App. 153, 159, 451 N.W.2d 536, 539 (Mich. Ct. App. 1989); [**44] *Kerasotes Mich. Theatres, Inc. v. National Amusements, Inc.*, 658 F. Supp. 1514, 1522 (E.D. Mich. 1987), rev'd on other grounds, 854 F.2d 135 (6th Cir. 1988). An antitrust violation such as illegal monopolization would seem to satisfy this requirement. *Kerasotes*, 658 F. Supp. at 1522.

Plaintiff claims that the ABPS interfered in its relationship with podiatrists interested in board certification. The district court ruled that summary judgment was appropriate because, [***29] although plaintiff presented evidence of damage to its reputation caused by the ABPS's mailings, plaintiff presented no evidence of an interference with its relationship with podiatrists. However, the evidence discussed in the sections above concerning the Lanham Act claim is sufficient to create a genuine issue of material fact as to whether the ABPS induced hospital administrators and insurance companies not to recognize plaintiff's certification, which in turn decreased the number of podiatrists seeking plaintiff's certification. Although we held [****1493] above that the district court did not err in granting the ABPS's renewed motion for judgment as a matter [**45] of law on the Lanham Act claims, *HN22*[↑] the tort of intentional interference with business relations does not require proof of actual deception. It is enough to show that "the [ABPS's] conduct interfered with the plaintiff's business expectancy . . ." *Monette*, 929 F.2d 276 at 282. Thus, we reverse the district court's grant of summary judgment on this claim because plaintiff presented evidence sufficient to raise an issue of material fact as to whether the ABPS interfered with plaintiff's business relations with podiatrists seeking certification. We do not consider whether plaintiff presented sufficient evidence on the other elements of its claim of intentional interference with business relations.

III.

A. Denial of attorney's fees to ABPS.

After the district court granted the ABPS's renewed motion for judgment as a matter of law, the ABPS made a motion for an award of attorney's fees pursuant to *15 U.S.C. § 1117(a)*. The district court denied this motion. *HN23*[↑] Under *15 U.S.C. § 1117(a)*, prevailing Lanham Act defendants are entitled to an award of attorney's fees in "exceptional" cases. We review a district court's [**46] grant or denial of attorney's fees under the Lanham Act for [*625] an abuse of discretion. *Johnson v. Jones*, 149 F.3d 494, 503 (6th Cir. 1998). [***30]

The ABPS's primary argument is that plaintiff began this litigation knowing that it could not establish the causation issues of actual deception and injury. However, plaintiff had a colorable argument that the challenged statements were literally false and that plaintiff therefore did not have to prove actual deception. *HN24*[↑] Where a plaintiff sues under a colorable, yet ultimately losing, argument, an award of attorney's fees is inappropriate. See *Stephen W. Boney, Inc. v. Boney Servs., Inc.*, 127 F.3d 821, 827 (9th Cir. 1997) (where plaintiff raised debatable issues of law and fact, the case was not "exceptional" so as to justify an award of attorney's fees). Accordingly, we are unable to say that the district court abused its discretion in denying the ABPS's motion for attorney's fees.

B. Denial of the APMA's motion for *Rule 11* sanctions.

After the APMA was dismissed from the case on summary judgment, it made a motion to impose sanctions against plaintiff pursuant to *Fed. R. Civ. P. 11*. *Rule 11*, [**47] at the time the complaint was filed, provided for the imposition of sanctions against a party unless the filing before the court "is well grounded in fact." The district court denied the motion. *HN25*[↑] We review a denial of a motion for imposition of *Rule 11* sanctions for an abuse of discretion. *Danvers v. Danvers*, 959 F.2d 601, 605 (6th Cir. 1992). The APMA argues that plaintiff could bring no claim against it based upon actions that occurred prior to the date the consent decree in the earlier case was entered, April 17, 1992. It contends that all of the allegations against it either concerned events occurring prior to

185 F.3d 606, *625LÁ1999 U.S. App. LEXIS 16861, **47LÁ1999 FED App. 0264P (6th Cir.), ***30LÁ51 U.S.P.Q.2D (BNA) 1481, ****1493

April 17, 1992, or lack any evidentiary basis. In either case, the APMA asserts, the allegations are frivolous and an imposition of sanctions is required.

We affirm the district court's denial of [Rule 11](#) sanctions. While plaintiff is precluded by the 1992 consent decree from seeking damages for injuries caused by any Lanham Act violations prior to this date, it may bring suit for any later violations by the APMA. Plaintiff does not seek reversal of [***31] the district court's dismissal of the Lanham Act claim against the APMA, thereby indicating the [**48] weakness of this claim, but it points to some post-consent-decree statements by the APMA that it claims could support a Lanham Act action. While the statements it points to constitute slim evidence of a Lanham Act violation, we are unable to say that the district court abused its discretion in denying the motion for [Rule 11](#) sanctions.

IV.

For all the reasons stated above, we **grant** plaintiff's motion to strike portions of the ABPS's brief. We **affirm** the district court's grant of ABPS's renewed motion for judgment as a matter of law, the district court's denial of plaintiff's motion for injunctive relief, the district court's denial of the ABPS's motion for attorney's fees, and the district court's denial of the APMA's motion for [Rule 11](#) sanctions. We **reverse** in part and **affirm** in part the district court's grant of summary judgment.

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Sheet Metal Div. v. Local Union 38 of the Sheet Metal Workers Int'l Ass'n

United States District Court for the Northern District of New York

July 22, 1999, Decided ; July 23, 1999, Filed

98-CV-1023

Reporter

63 F. Supp. 2d 211 *; 1999 U.S. Dist. LEXIS 19035 **

SHEET METAL DIVISION OF CAPITOL DISTRICT SHEET METAL, ROOFING & AIR CONDITIONING CONTRACTORS ASSOCIATION, INC.; ASSOCIATED SHEET METAL AND ROOFING CONTRACTORS OF CONNECTICUT; and SHEET METAL CONTRACTORS ASSOCIATION OF NORTHERN NEW JERSEY, Plaintiffs, -against- LOCAL UNION 38 OF THE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION and SHEET METAL & ROOFING EMPLOYERS ASSOCIATION OF SOUTHEASTERN NEW YORK, INC., Defendants.

Disposition: [**1] Plaintiffs' motion for attorney's fees pursuant to [15 U.S.C. §§ 15](#) and [26](#) granted.

Core Terms

attorney's fees, plaintiffs', hourly rate, calculation, antitrust, award of attorney's fees, lodestar figure, prevailing, paralegal, lodestar, damages

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

[HN1](#) [down arrow] Private Actions, Costs & Attorney Fees

See [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

[HN2](#) [down arrow] Costs & Attorney Fees, Clayton Act

[15 U.S.C.S. § 15](#) makes it clear that an injury is required for an award of attorney fees.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

63 F. Supp. 2d 211, *211 (1999 U.S. Dist. LEXIS 19035, **1

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

[**HN3**](#) Costs & Attorney Fees, Clayton Act

[15 U.S.C.S. § 26](#) provides that if a plaintiff substantially prevails in obtaining injunctive relief for threatened violations of the antitrust laws, then the court shall award the cost of suit, including a reasonable attorney fee, to such plaintiff.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

[**HN4**](#) Private Actions, Costs & Attorney Fees

A party may be awarded attorney fees where it has received at least some relief on the merits of its claim by judicial determination.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

[**HN5**](#) Private Actions, Costs & Attorney Fees

The process of determining a reasonable fee ordinarily begins with the court's calculation of a so-called lodestar figure, which is arrived at by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. The lodestar figure is to be based upon current, prevailing market rates. The amount figured into the lodestar includes the number of hours claimed by plaintiffs' attorneys that are supported by time records, that are not excessive or duplicative, and that do not reflect work done only in connection with unrelated claims on which plaintiffs did not succeed. There is a strong presumption that this lodestar figure represents a reasonable fee.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

[**HN6**](#) Private Actions, Costs & Attorney Fees

Once the lodestar figure is calculated, the court may adjust the lodestar, taking into consideration several factors. If the court excludes claimed hours from the calculation of the lodestar figure or augments or reduces that figure it must state its reasons for doing so as specifically as possible.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

[**HN7**](#) Private Actions, Costs & Attorney Fees

Courts are empowered with broad discretion to independently determine the reasonableness of an award for attorney fees.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

[**HN8**](#) Private Actions, Costs & Attorney Fees

An attorney's applicable hourly rate depends on an attorney's professional experience.

Counsel: For Plaintiffs: James J. Barriere, Esq., Leslie F. Couch, Esq., Joel M. Howard, III, Esq., COUCH, WHITE, BRENNER, HOWARD & FIEGENBAUM, LLP, Albany, New York.

Thomas W. Hylands, Esq., Fred N. Knopf, Esq., WILSON, ELSEY, MOSKOWITZ, EDELMAN & DICKER LLP, New York, New York.

For Sheet Metal & Roofing Employers Association of Southeastern New York, Inc., Defendant: Anthony A. Asher, Esq., SULLIVAN, WARD, BONE, TYLER & ASHER, P.C., Southfield, Michigan.

For Local Union 38, Defendant: Jeffrey S. Dubin, Esq., OFFICE OF JEFFREY S. DUBIN, Garden City, NY.

Judges: Hon. Thomas J. McAvoy, Chief U.S. District Judge.

Opinion by: Thomas J. McAvoy

Opinion

[*212] MEMORANDUM-DECISION & ORDER

McAvoy, Chief Judge:

By Memorandum - Decision & Order dated March 24, 1999, familiarity with which is assumed, this Court granted plaintiffs' motion for a declaratory judgment and declared Article II, Section 1 of the defendants' collective bargaining agreement dated May 18, 1998 void and unenforceable.¹ Presently before the Court is plaintiffs' motion for attorney's fees pursuant to [15 U.S.C. §§ 15](#) [*2] and [26](#).

I. Discussion

A. Attorney's Fees Under [15 U.S.C. § 15](#)

[HN1](#) [↑] [Section 15 of Title 15 of the United States Code](#) provides, in part, that:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws [*213] may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[HN2](#) [↑] This section makes it clear that an injury is required for an award of attorney's fees. See [United States Football League v. National Football League](#), [887 F.2d 408, 411 \(2d Cir. 1989\)](#), cert. denied, [493 U.S. 1071, 107 L.Ed. 2d 1022, 110 S. Ct. 1116 \(1990\)](#) [*2] ("USFL"); see also [MCA Television Ltd. v. Public Interest Corp.](#), [171 F.3d 1265, 1281 n.21 \(11th Cir. 1999\)](#); [Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic](#), [152 F.3d 588, 595 \(7th Cir. 1998\)](#), cert. denied, [525 U.S. 1071, 119 S. Ct. 804, 142 L. Ed. 2d 665 \(1999\)](#); [Gulfstream III Assocs. Inc. v. Gulfstream Aerospace Corp.](#), [995 F.2d 414, 418 \(3d Cir. 1993\)](#); [Sciambra v. Graham News](#), [892 F.2d 411, 415-16 \(5th Cir. 1990\)](#).

¹ Specifically, the Court found that the challenged provision violated section 8(e) of the National Labor Relations Act, [29 U.S.C. §§ 158\(b\)\(4\), \(e\)](#), and sections 1 and 2 of the Sherman Antitrust Act, [15 U.S.C. § 1 et seq.](#) See Memorandum-Decision & Order at 26, 30.

Here, plaintiffs have not demonstrated any injury to their business or property by reason of anything forbidden in the antitrust laws. Indeed, plaintiffs essentially admit that they suffered no injury when they state in their memorandum of law that "plaintiffs seek recovery of attorney fees under [15 U.S.C. § 15] based on the injury they sustained by having to retain attorneys and commence a costly action against defendants to enforce their right to freely conduct business." Pl. Mem. of Law at 3. Although plaintiffs correctly state that an award of attorney's fees is not tied to the amount of damages recovered, see USFL, 887 F.2d at 411, [**4] a showing of an injury is, however, required. See id. Moreover, legal fees are not the type of damages contemplated by the antitrust statutes. See *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 130 n.12* (9th Cir.) ("In antitrust suits, allowance of attorneys' fees is limited to that proportion of the fee attributable to a successful suit for damages. If only equitable relief is sought or obtained, counsel fees are generally not awarded to a successful plaintiff."), cert. denied sub nom., *Morgan v. Automobile Mfrs. Ass'n, Inc.*, 414 U.S. 1045, 38 L. Ed. 2d 336, 94 S. Ct. 551 (1973); *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054, 1057 (S.D.N.Y. 1977), aff'd, 578 F.2d 1368 (2d Cir. 1978) ("In calculating an award under Section 4 of the Clayton Act, only work devoted to the successful recovery of treble damages may be compensated."); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 482 (S.D.N.Y. 1970). Because plaintiffs did not successfully obtain an award of damages pursuant to 15 U.S.C. § 15, they are not entitled to an award of attorney's [**5] fees under that same section.

B. Attorney's Fees Under [15 U.S.C. § 26](#)

Plaintiffs next seek attorney's fees pursuant to [15 U.S.C. § 26](#). Specifically, [HN3](#)[] [15 U.S.C. § 26](#) provides that if a plaintiff substantially prevails in obtaining injunctive relief for threatened violations of the antitrust laws, then "the court shall award the cost of suit, including a reasonable attorney fee, to such plaintiff." Although this Court did not explicitly grant plaintiffs the requested injunctive relief because the Court declared the challenged provisions of the collective bargaining agreement to be void and unenforceable, plaintiffs substantially prevailed in their action seeking injunctive relief. See *City of Chanute, Kan. v. Williams Natural Gas Co.*, 31 F.3d 1041, 1047 (10th Cir. 1994) [HN4](#)[] ("[A] party may be awarded attorneys' fees where it has received 'at least some relief on the merits of [its] claim' by judicial determination.") (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791, 103 L. Ed. 2d 866, 109 S. Ct. 1486 (1989)), cert. denied, 513 U.S. 1191 (1995); [**6] *Royal Crown Cola Co. v. Coca-Cola Co.*, 887 F.2d 1480, 1485 (11th Cir. 1989), cert. denied, 497 U.S. 1011, 111 L. Ed. 2d 767, 110 S. Ct. 3258 (1990). The granting of the declaratory judgment declaring the relevant provision of the collective bargaining agreement to be void and unenforceable had the same [*214] practical effect of restoring competition in the marketplace by permanently enjoining defendants from enforcing that provision.

C. Determining Reasonable Attorney's Fees

The Court must now determine what amount of fees is reasonable under the circumstances of this case. [HN5](#)[] "The process of determining a reasonable fee ordinarily begins with the court's calculation of a so-called 'lodestar' figure, which is arrived at by multiplying 'the number of hours reasonably expended on the litigation. . . by a reasonable hourly rate.'" *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763-64 (2d Cir. 1998) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)); see also USFL, 887 F.2d at 413. The lodestar figure is to be based upon current, prevailing market rates. See *LeBlanc-Sternberg*, 143 F.3d at 764. [**7] The amount figured into the lodestar includes "the number of hours claimed by plaintiffs' attorneys that are supported by time records, that are not excessive or duplicative, and that do not reflect work done only in connection with unrelated claims on which plaintiffs did not succeed." Id. There is a strong presumption that this lodestar figure represents a reasonable fee. See id.; see also USFL, 887 F.2d at 413.

[HN6](#)[] Once the lodestar figure has been calculated, the Court may adjust the lodestar, taking into consideration several factors. See *Hensley*, 461 U.S. at 434 n.9 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-18 (5th Cir. 1974)). "If the court excludes claimed hours from the calculation of the lodestar figure or augments or reduces that figure it must state its reasons for doing so as specifically as possible." *LeBlanc-Sternberg*, 143 F.3d at 764 (internal quotations and citations omitted).

HN7 Courts are empowered with broad discretion to independently determine the reasonableness of an award for attorney's fees. See *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983), [**8] cert. denied, 466 U.S. 944, 80 L. Ed. 2d 474, 104 S. Ct. 1929 (1984); *McCann v. Coughlin*, 698 F.2d 112, 131 (2d Cir. 1983) ("When a party seeks an award of attorney fees. . . he must provide the court with contemporaneous time sheets or other documentation which will enable it to make an *independent* evaluation of the fee request.") (emphasis added). Thus, this Court will make an independent assessment of the reasonableness of the hourly rates and the number of hours billed by plaintiffs' counsel.

1. Reasonable Rates

Plaintiffs seek attorney's fees of \$ 70,211.75 for a total of 486.15 hours, representing 123.9 hours of partner time, 244.5 hours of experienced associate time, and 117.75 hours of paralegal time.² In their computations, plaintiffs use hourly rates ranging up to \$ 225.00 per hour for partners, \$ 150.00 for experienced associates, and \$ 65.00 for paralegals.

[**9] As this Court recently discussed in *TM Park Ave. Assocs. v. Pataki*, 44 F. Supp. 2d 158, 167 (1999), **HN8** the applicable hourly rate depends on an attorney's professional experience. Thus, as a general rule, attorneys with significant experience and numerous years of practice are entitled to reimbursement at the hourly rate of \$ 175.00; attorneys with four or more years of experience at the hourly rate of \$ 125.00; and newly-admitted attorneys at the rate of \$ 100.00 per hour. See *TM Park Ave. Assocs.*, 44 F. Supp. 2d at 167; *Carroll v. Debuono*, 48 F. Supp. 2d 191, 1999 WL 288593, at *1-*2 (N.D.N.Y. 1999). Although *TM Park* awarded paralegal time at \$ 50.00 per hour based on the fact that plaintiff failed to substantiate that a higher rate was appropriate, [*215] see *TM Park Ave. Assocs.*, 44 F. Supp. 2d at 167, this Court finds that \$ 65.00 per hour is the prevailing rate for paralegal work in this district. Accordingly, the Court will apply these rates in calculating plaintiffs' award of attorney's fees.

2. Reasonable Hours

Defendants claim, with little specificity, that the total number of hours billed [**10] by plaintiffs' attorneys is excessive. While defendants generally challenge the time incurred by plaintiffs' counsel with respect to legal research and drafting the Complaint and moving papers, the Court will nonetheless independently review the reasonableness of plaintiffs' counsel's time records.

In the area of legal research, the Court estimates that plaintiffs' counsel expended approximately 120 hours for legal research. Based upon the existing precedent in the areas of labor and **antitrust law** at issue in the case, and plaintiffs' counsel's considerable expertise in these areas, the Court finds that 120 hours of research is excessive and that a reduction of hours billed for research by 20%, or 24 hours, is warranted. This reduction should be spread equally between the total partner and associate time. The Court finds, however, that the remaining time incurred by plaintiffs' counsel, including, but not limited to drafting the Complaint and moving papers, is reasonable under the circumstances. Accordingly, total partner hours are reduced to 111.9 hours, and total associate hours are reduced to 232.5 hours.

3. Lodestar Calculation

Applying the prevailing hourly rates [**11] for this district and adjusting for total billable hours as discussed above, the lodestar calculation is as follows:

Partners:	111.9 hours * \$ 175.00/hour =	\$ 19,582.50
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²The Court notes that attorney Barriere was an experienced associate prior to January 1, 1999, at which time he became a partner.

63 F. Supp. 2d 211, *215 (1999 U.S. Dist. LEXIS 19035, **11

Experienced		
Associates:	232.5 hours * \$ 125.00/hour =	\$ 29,062.50
Paralegals:	117.75 hours * 65.00/hour =	\$ 7,653.75
Total Lodestar Amount:		\$ 56,298.75

II. Conclusion

In summary, the Court awards plaintiffs attorney's fees in the amount of \$ 56,298.75 against defendants Local Union 38 of the Sheet Metal Workers International Association and Sheet Metal & Roofing Employers Association of Southeastern New York, Inc.

IT IS SO ORDERED

July 22, 1999

Watertown, New York

Hon. Thomas J. McAvoy

Chief U.S. District Judge

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Granite Partners, L.P. v. Bear, Stearns & Co.

United States District Court for the Southern District of New York

July 26, 1999, Decided ; July 29, 1999, Filed

96 Civ. 7874 (RWS)

Reporter

58 F. Supp. 2d 228 *; 1999 U.S. Dist. LEXIS 11523 **; 1999-2 Trade Cas. (CCH) P72,604

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, marks, letters, markups, allegations, terms, contracts, pleadings, prices, liquidation, portfolios, holdings, parties, motion to dismiss, obligations, collusive, statute of frauds, Sherman Act, contractual, bidding, relevant market, antitrust, purchases, advisory, revised, shingle, sales, valuations, papers

LexisNexis® Headnotes

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

HN1 Motions to Dismiss, Failure to State Claim

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.

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

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > General Overview

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

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 to assay the weight of the evidence which might be offered in support thereof. Thus, where it is beyond doubt

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that plaintiff can prove no set of facts in support of his or her claim that would warrant relief, a motion to dismiss must be granted. Additionally, 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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

[HN3](#) 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. 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.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > 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, [15 U.S.C.S. § 15\(a\) \(1997\)](#), provides that any person who is injured in his business or property by reason of anything forbidden in the antitrust laws may sue and may recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[HN5](#) Antitrust & Trade Law, Sherman Act

Sherman Act [§ 1, 15 U.S.C.S. § 1 \(1997\)](#), 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. Every person who makes any contract or engages in any combination or conspiracy hereby declared to be illegal is deemed guilty of a felony.

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

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[**HN6**](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

While the Sherman Act, [*15 U.S.C.S. § 1 et seq.*](#), by its terms, prohibits any agreement or combination "in restraint of trade or commerce," it has long been recognized that the Act was only intended to outlaw unreasonable restraints. As a result, most antitrust claims are evaluated 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 conditions before and after the restraint was imposed, and the restraint's history, nature, and effect.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN7**](#) Regulated Practices, Market Definition

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 economic effect of the alleged violation is to restrain trade in the relevant market and that no reasonable alternate source is available to consumers in that market. The economic impact in the relevant market must be specified, and the plaintiff must show that the alleged restraint on trade tends or is reasonably calculated to prejudice the public interest.

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

Because certain types of restraints have both a predictable and pernicious effect on competition, they are deemed unlawful per se.

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

Abbreviated rule-of-reason analysis is only appropriate where the great likelihood of anti-competitive effects can easily be ascertained, and an observer with even a rudimentary understanding of economics can conclude that the arrangements in question would have an anti-competitive effect on customers and markets

Antitrust & Trade Law > Sherman Act > General Overview

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

[**HN10**](#) Antitrust & Trade Law, Sherman Act

To withstand a motion to dismiss, a plaintiff making a Sherman Act, [*15 U.S.C.S. § 1 et seq.*](#), conspiracy claim must allege a concerted action by two or more persons that unreasonably restrain interstate or foreign trade or commerce. The plaintiff must do more than merely allege that a conspiracy exists, it must provide some factual basis for that allegation. For example, the plaintiff must identify the relevant product market, the co-conspirators,

and describe the nature and effects of the alleged conspiracy. While dismissal prior to giving a plaintiff ample opportunity for discovery should be granted sparingly in antitrust cases, 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 > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

[**HN11**](#) [] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Establishing an unreasonable restraint of trade under the rule of reason involves three basic steps. Plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. If the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect can be achieved through an alternate means that is less restrictive of competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN12**](#) [] **Regulated Practices, Market Definition**

To meet its initial burden, a plaintiff bringing suit under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), must show more than just that he was harmed by defendants' conduct. Rather, a plaintiff must show that the alleged restraint of trade had an actual adverse effect on competition as a whole in the relevant market. This is so because the ultimate aim of the Sherman Act is to protect competition, as opposed to competitors.

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 > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

[**HN13**](#) [] **Clayton Act, Claims**

A private plaintiff may not recover damages under Clayton Act § 4, [15 U.S.C.S. § 15\(a\) \(1997\)](#), merely by showing injury causally linked to an illegal presence in the market. Rather, a private plaintiff must demonstrate the existence of 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. Even injuries with a causal connection to antitrust violations will not qualify as antitrust injuries unless they are attributable to an anticompetitive aspect of the practice under scrutiny.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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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 > ... > 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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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 > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN14 [] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The per se rule is a method of determining whether Sherman Act [§ 1, 15 U.S.C.S. § 1](#), has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and, thus, whether he may recover damages under Clayton Act § 4, [15 U.S.C.S. § 15\(a\) \(1997\)](#). Per se and rule-of-reason analysis are but two methods of determining whether a restraint is unreasonable, that is, whether its anti-competitive effects outweigh its pro-competitive effects. The purpose of the antitrust injury requirement is different. It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief.

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

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

HN15 [] **Clayton Act, Claims**

An antitrust plaintiff's own injuries must be causally linked to the antitrust violation(s). The statutory requirement of the Clayton Act § 4, [15 U.S.C.S. § 15\(a\) \(1997\)](#), that treble damage suits be based on injuries which occur "by reason of" antitrust violations expressly restricts the right to sue under this section. There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a material cause of or a substantial factor in the occurrence of damage. And this connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation is clearly intended to protect.

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

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

[**HN16**](#) [] **Private Actions, Standing**

When a court concludes that no violation has occurred, it has no occasion to consider antitrust standing.

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

[**HN17**](#) [] **Private Actions, Remedies**

Antitrust law is not intended to be as available as an over-the-counter cold remedy because were its heavy power brought into play too readily, it would not safeguard competition, but it would destroy it.

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

Torts > Business Torts > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN18**](#) [] **Private Actions, Remedies**

The cornerstone of **antitrust law** is competition. Congress's intent in passing the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), was not to subject all business and commercial torts to the scrutiny of federal **antitrust law**. The Sherman Act is neither a lowest-responsible-bidder statute nor a panacea for all business affronts which seem to fit nowhere else.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[**HN19**](#) [] **Public Enforcement, State Civil Actions**

New York's **antitrust law**, the Donnelly Act, [N.Y. Gen. Bus. Law § 340](#) (1996), is modeled on the Sherman Act, [15 U.S.C.S. § 1 et seq. \(1997\)](#), and should be construed in light of federal precedent.

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Contracts & Conveyances > Enforcement & Execution

Business & Corporate Law > ... > Authority to Act > Contracts & Conveyances > Formation & Negotiation

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > General Overview

[**HN20**](#) [] **Causes of Action & Remedies, Breach of Contract**

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While under New York law only a party to a contract can typically bring suit to recover for its breach, one can certainly enforce a contract entered by an authorized agent. It is elementary that one may sue upon a contract made for him by his agent.

[Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement](#)

[Contracts Law > Third Parties > Beneficiaries > General Overview](#)

[Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > General Overview](#)

[Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Intended Beneficiaries](#)

[HN21](#) [blue icon] [Beneficiaries, Claims & Enforcement](#)

Under New York law a third party is allowed to enforce a contract if that party is an intended beneficiary of the contract. The general test for third-party beneficiary status is as follows: unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties, and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary, or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefits of the promised performance.

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

[Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement](#)

[Contracts Law > Third Parties > Beneficiaries > General Overview](#)

[HN22](#) [blue icon] [Sales \(Article 2\), Form, Formation & Readjustment](#)

When determining the intentions of the contracting parties, the intention of the promisee is of primary importance. Where the obligation to perform to the third-party beneficiary is not expressly stated in the contract at issue, a court may look to surrounding circumstances to determine whether the contracting parties intended to benefit a third party.

[Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim](#)

[HN23](#) [blue icon] [Motions to Dismiss, Failure to State Claim](#)

Federal pleading is by statement of claim, not by legal theory.

[Business & Corporate Compliance > ... > Contract Formation > Acceptance > General Overview](#)

[HN24](#) [blue icon] [Contract Formation, Acceptance](#)

An offeror may, by the terms of its offer, dictate the manner of an offeree's acceptance. This includes requirements that the acceptance be communicated in writing.

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Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Execution & Delivery

Contracts Law > Statute of Frauds > General Overview

Securities Law > Blue Sky Laws > Offers & Sales

HN25 [] **Contract Formation, Execution & Delivery**

Under New York law, neither contracts incapable of being performed within a year nor contracts for the sale of securities entered prior to October 10, 1997, may be entered orally.

Contracts Law > Statute of Frauds > Requirements > General Overview

Contracts Law > Statute of Frauds > General Overview

HN26 [] **Statute of Frauds, Requirements**

The Statute of Frauds does not mandate delivery, so it does not matter that defendant never returned the signed contract to plaintiff.

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

Contracts Law > Statute of Frauds > Requirements > General Overview

Contracts Law > Statute of Frauds > General Overview

HN27 [] **Motions to Dismiss, Failure to State Claim**

As to a defendant's argument that the Statute of Frauds bars plaintiff's action, dismissal should not result for that reason unless it can be said that no significant dispute exists as to the sufficiency of the memoranda that satisfies the Statute of Frauds.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Sufficient Consideration

HN28 [] **Consideration, Sufficient Consideration**

Under New York law, a contract unsupported by consideration is generally invalid. If the promisor loses nothing, and the promisee acquires nothing by an arrangement, then there is no valid consideration. Sufficient consideration, however, may be provided either by a benefit to a promisor or a detriment to the promisee. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Adequate Consideration

Business & Corporate Compliance > ... > Contract Formation > Consideration > Sufficient Consideration

HN29 [] **Consideration, Adequate Consideration**

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Under traditional principles of contract law, the parties to a contract are entitled to make their own bargain, even if the consideration exchanged is grossly unequal or of dubious value. Far from consideration needing to be coextensive or even proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee. However, neither a promise to do that which the promisor is already bound to do, nor the performance of an existing legal obligation constitutes valid consideration.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Sufficient Consideration

[HN30](#) [blue icon] Consideration, Sufficient Consideration

Under New York law, a written, signed agreement to discharge or modify an existing obligation is not rendered invalid because of the absence of consideration.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Sufficient Consideration

Labor & Employment Law > Wrongful Termination > Breach of Contract > Employment Contract Formation

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

[HN31](#) [blue icon] Consideration, Sufficient Consideration

Consideration for a contract may be supplied by actual forbearance from exercising one's rights to unilaterally cancel a contract terminable at will, even though there was no obligation to continue the at-will relationship in the first instance.

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

[HN32](#) [blue icon] Consideration, Enforcement of Promises

It is consideration that is required to form a contract under New York law, not rigorous reciprocity or mutuality.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Sufficient Consideration

[HN33](#) [blue icon] Consideration, Sufficient Consideration

A promise may be lacking, and yet the whole writing may be instinct with an obligation, imperfectly expressed.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Sufficient Consideration

[HN34](#) [blue icon] Consideration, Sufficient Consideration

As a general rule, even a contract unenforceable at its inception because of lack of consideration or mutuality may nevertheless become valid and binding to the extent that it has been performed.

Contracts Law > Contract Formation > Offers > General Overview

[**HN35**](#) [blue icon] **Contract Formation, Offers**

The actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon. Certain terms of a contract may be supplied by the parties' prior course of dealings.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN36**](#) [blue icon] **Pleadings, Heightened Pleading Requirements**

There are five basic 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, a plaintiff must comply with the heightened pleading standard of [Fed. R. Civ. P. 9\(b\)](#).

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN37**](#) [blue icon] **Pleadings, Heightened Pleading Requirements**

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.

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

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN38**](#) [blue icon] **Motions to Dismiss, Failure to State Claim**

Under New York law, 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. Whether a plaintiff has adequately pleaded justifiable reliance can be a proper subject for a motion to dismiss.

Governments > Fiduciaries

Torts > Business Torts > Fraud & Misrepresentation > General Overview

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

Torts > ... > Duty > Affirmative Duty to Act > General Overview

[**HN39**](#) [blue document icon] **Governments, Fiduciaries**

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. 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. Reasonable reliance may be found wanting where the plaintiff failed to conduct its own diligent research into the risks or benefits of a particular transaction. Sophisticated parties may well be under a duty to make affirmative efforts to protect themselves from misrepresentations, and cannot be heard to complain when they fail to make diligent inquiries.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

[**HN40**](#) [blue document icon] **Pleadings, Amendment of Pleadings**

Because an amended pleading supersedes the original pleading, facts not incorporated in the amended pleading are generally considered *functus officio*.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN41**](#) [blue document icon] **Business Torts, Fraud & Misrepresentation**

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.

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview

Securities Law > ... > Civil Liability > Fraudulent Interstate Transactions > General Overview

Securities Law > Blue Sky Laws > Offers & Sales

Securities Law > Investment Advisers > Adviser, Broker & Dealer Liability > General Overview

[**HN42**](#) [blue document icon] **Criminal Offenses, Fraud**

Under the shingle theory, a broker-dealer who sells a security without disclosing that the price at which he is selling is not reasonably related to the current fair market price of the security violates the anti-fraud provisions of the federal securities laws.

Governments > Fiduciaries

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN43**](#) [blue document icon] **Governments, Fiduciaries**

New York law allows recovery for frauds based upon omissions, conduct, or speech that are tantamount to false representations. New York recognizes a duty by a party to a business transaction to speak in three situations: first, where the party has made a partial or ambiguous statement, on the theory that once a party has undertaken to mention a relevant fact to the other party it cannot give only half of the truth; second, when the parties stand in a

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fiduciary or confidential relationship with each other, and third, where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge.

Governments > Fiduciaries

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[HN44](#) [] Governments, Fiduciaries

Under ordinary circumstances a broker owes no fiduciary duties to a purchaser of securities, except those duties necessarily attendant to the narrow task of consummating the transaction requested.

Securities Law > ... > Civil Liability > Fraudulent Interstate Transactions > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Securities Law > Blue Sky Laws > Offers & Sales

[HN45](#) [] Civil Liability, Fraudulent Interstate Transactions

The shingle theory has not developed as a generic theory of fraud liability based upon omissions, but rather a specific theory of recovery under the federal securities laws.

Contracts Law > Breach > General Overview

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

[HN46](#) [] Contracts Law, Breach

In order for the plaintiff to have a cause of action for tortious interference of contract, it is axiomatic that there must be a breach of that contract by the other party.

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

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

[HN47](#) [] Intentional Interference, Elements

To maintain a claim for tortious interference with contracts, a plaintiff must allege that the defendant intended to interfere with a contract.

Counsel: For Plaintiffs: ERIC SEILER, ESQ., ROBERT J. LACK, ESQ., KATHERINE L. PRINGLE, ESQ., LEE D. SOSSEN, ESQ., Of Counsel, FRIEDMAN KAPLAN & SEILER, New York, NY.

For Plaintiffs: STEVEN E. GREENBAUM, ESQ., EDWARD S. WEISFELNER, ESQ., SCOTT M. BERMAN, ESQ., Of Counsel, BERLACK, ISRAELS & LIBERMAN, New York, NY.

For Bear Stearns & Co. Inc., Bear Stearns Capital Markets Inc., Howard Rubin, Defendants: DAVID M. MORRIS, ESQ., ALBERT SHEMMY MISHAAN, ESQ., MICHAEL B. deLEEUW, ESQ., DOUGLAS J. CARDONI, ESQ., Of Counsel, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, New York, NY.

For Donaldson, Lufkin & Jenrette Securities Corp., Elizabeth Comerford, Defendants: GARY G. STAAB, ESQ., CATHERINE A. LUDDEN, ESQ., SCOTT S. BALBER, ESQ., Of Counsel, MORGAN, LEWIS & BOCKIUS, New York, NY.

For Merrill Lynch, Pierce, Fenner & Smith Inc., Defendants: A. ROBERT PIETRZAK, ESQ., ANDREW W. STERN, ESQ., MADELEINE J. DOWLING, ESQ., JONATHAN J. BRENNAN, ESQ., Of Counsel, BROWN & WOOD, New York, NY.

Judges: ROBERT W. SWEET, U.S.D.J.

Opinion by: ROBERT W. SWEET

Opinion

[*232] OPINION

Sweet, D.J.

Defendants Donaldson, [*232] Lufkin & Jenrette Securities Corporation ("DLJ"), Elizabeth Comerford ("Comerford"), Bear, [*233] 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, Comerford, Bear Stearns, and Rubin, the "Brokers") have moved for partial dismissal of the Second Amended Complaint ("Complaint") in this action 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: (1) breach of contract (Count III); (2) common law fraud (Counts IV and V); (3) violations of the Sherman and Donnelly Acts (Counts VI and VII); and (7) tortious interference with contracts (Counts XI and XII).

The Brokers have also moved to dismiss Counts XIII through XXI of the Second Amended Complaint, which have been reasserted merely for the purposes of plaintiffs' contemplated appeal. Plaintiffs have agreed, both in their papers and in correspondence to the Court, (see Letter from Seiler to Judge [*3] Sweet of 10/16/98, at 2), that these counts are deficient under the logic of [Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp. 2d 275 \(S.D.N.Y. 1998\)](#) ("Granite I"), and that they should therefore be summarily dismissed.

For the reasons set forth below, the Brokers' motions 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-related securities on behalf of offshore investors and domestic tax-exempt entities, including foundations and pension funds.

Plaintiff Quartz Hedge Fund ("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 [**4] 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.

Comerford, a resident of New York, was at all relevant times a senior vice president of DLJ.

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

David J. Askin ("Askin") is a resident of New Jersey.

At all times relevant to this action, nonparty Askin Capital Management, L.P. ("ACM"), a Delaware limited partnership, was a registered investment advisor, whose principal place of business was New York City. ACM was formed in January 1993 by Askin. Askin also served as ACM'S president, chief executive officer, [**5] and chief financial officer. ACM became the investment advisor to both Granite Corp. and Granite Partners (and Granite Partners' sole general partner) on or about [*234] January 26, 1993. ACM has been the investment advisor to Quartz since its formation.

Prior Proceedings

The facts and prior proceedings in this action are set forth in prior opinions of this Court, familiarity with which is assumed. See [Granite II, 17 F. Supp. 2d at 275](#); [Granite Partners v. Bear, Stearns & Co., 184 F.R.D. 49 \(S.D.N.Y. 1999\)](#).

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 [**6] action has been pursued by the LAB, appointed pursuant to the Liquidation Plan.

The LAB filed its First Amended Complaint in this action on August 4, 1997, naming, in addition to Bear Stearns, Rubin, DLJ, Comerford, and Merrill Lynch as defendants.

In its First Amended Complaint, the LAB asserted 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.

On August 25, 1998, the lion's share of the LAB's claims were dismissed in [Granite II, 17 F. Supp. 2d at 275](#). That decision granted the LAB leave to replead.

On October 16, 1998, the LAB filed the Complaint that is the subject of the Brokers' current motions to dismiss. Oral argument was heard on the instant motions on April 29, 1999, at which time the motions were deemed fully submitted. Additional materials were received from the parties through [**7] June 2, 1999.

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. See *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), modified by, 793 F.2d 457 (2d Cir. 1986). 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 motions.

Though the LAB's Complaint differs in significant respects from its First Amended Complaint, the basic facts remain the same. As was explained in more detail in *Granite II*, this case arises out of the collapse in early 1994 of the Funds that were managed by Askin and ACM. The Funds invested primarily in collateralized mortgage obligations ("CMOs") created by the Brokers and other broker-dealers. As the Complaint states, "CMOs are securities created from and [**8] collateralized by mortgage-backed securities formed from pools of residential mortgages or securities backed by such mortgages." Compl. P 26. ACM, through its president, Askin, purchased the securities for the Funds. The advisory and fiduciary relationships between ACM, or its predecessors, and the Funds were governed by investment advisory agreements. Because CMOs of the type purchased by the Funds vary in their sensitivity to interest rate fluctuations, and [*235] the Funds themselves had distinct investment strategies, ACM's selection of the Funds' securities was critical.

Askin and ACM, the Funds' investment advisor, had fiduciary and contractual obligations to the Funds to make investments with due care and in accordance with the Funds' stated investment objectives. Askin and ACM, however, did not fulfil those obligations, and repeatedly breached their fiduciary and contractual duties. As a result, the Funds acquired portfolios that were full of bullish CMOs, esoteric and highly "toxic" CMOs, and otherwise inappropriate securities. When short-term interest rates rose in early 1994, these securities radically eroded in value.

The Complaint alleges that the Brokers took advantage of [**9] ACM and Askin's shortcomings by recommending and selling to the Funds inappropriate and, at times, highly toxic CMOs. The Complaint also alleges that the Brokers deliberately supplied ACM and the Funds with erroneous "marks" purportedly representing the Brokers' own valuations of the Funds holdings -- a claim not explicitly made in the First Amended Complaint -- despite contracts between the Funds and the Brokers requiring the provision of accurate and timely Broker marks. In their sales of securities to the Funds, the Brokers recouped significant profits -- in part due to the Brokers' charging of excessive markups. The LAB's claims concerning the Brokers' charging of excessive markups were also not explicitly made in the First Amended Complaint.

The Funds obtained the majority of their CMOs 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. After the Funds' value began to erode in early 1994, the Funds' holdings were liquidated pursuant to Public Securities Association Master Repurchase Agreements ("PSA Agreements") between the Funds and the Brokers. Under these agreements, [**10] the Brokers were allowed to make margin calls on the Funds if the value of the securities held on "repo" fell below the amount that the Funds had borrowed, plus an agreed-upon "haircut." ¹ Unable to meet margin calls issued by the Brokers, the Funds' portfolios were liquidated.

The Complaint alleges that the Brokers once again took advantage of the Funds during these liquidations. In particular, the Brokers are alleged to have liquidated the Funds' holdings by "deeming" sales of the Funds'

¹ As the Complaint explains, the "haircut" is a discount that represents "an amount calculated to protect the buyer/lender against adverse market movements should the security have to be liquidated to cover the seller/borrower's obligation to repurchase the security." Compl. P 55.

securities to themselves at unreasonable, below-market prices. The Brokers allegedly colluded with each other to exchange sham bids, thus facilitating this bad-faith liquidation. Having obtained the Funds' securities at artificially low prices, **[**11]** the Brokers then proceeded to sell those same securities on the open market -- recovering profits far in excess of those they would have obtained had they liquidated the Funds' portfolios in a non-collusive manner.

The Brokers have moved to dismiss several repledged claims that were present in the First Amended Complaint, as well as a few that were not. The Complaint realleges antitrust claims under the Sherman and Donnelly Acts that were dismissed in *Granite II* (Counts VI and VII). The Complaint also includes claims of common law fraud (Count IV) and breach of contract (Count III), not present in the LAB's First Amended Complaint, based upon the Brokers' provision of erroneous marks, as well as a common law fraud claim premised upon the Brokers' failures to disclose the excessive markups they charged the Funds for securities (Count V). Finally, the Complaint realleges claims for tortious interference with contracts similar to those **[*236]** that were dismissed in *Granite II* (Counts XI and XII). The Brokers have moved to dismiss these claims, but not several others that are not the subject of the instant opinion.

Discussion

I. Legal Standards

A. Rule [12] 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 to assay the weight of the evidence which might be offered in support thereof." *Ryder Energy Distribution Corp. 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 that would warrant relief, a motion to dismiss must be granted. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50, 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); *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

Additionally, 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 **[**13]** either in plaintiff[s] possession or of which plaintiff[] had knowledge and relied on in bringing suit." *Brass v. American Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (citing *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991)); *Bissell v. Merrill Lynch & Co.*, 937 F. Supp. 237, 239 (S.D.N.Y. 1996), aff'd, *157 F.3d 138* (2d Cir. 1998), cert. denied, 119 S. Ct. 1039 (1999).

The parties have submitted numerous exhibits, including deposition transcripts, that could not appropriately be considered on a motion to dismiss. Despite the voluminous nature of these exhibits, and the alacrity with which the parties have interwoven quarrels based upon these materials with contentions based upon the LAB's actual pleadings, these exhibits have been ignored. However, certain documents not attached to the Complaint or explicitly incorporated by reference have been consulted where appropriate under the above standard.

B. Rule 9(b)

HN3 Federal Rules of Civil Procedure 9(b) requires that in all allegations of fraud, the circumstances constituting the fraud must be stated with **[**14]** 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, 445 (2d Cir. 1971). 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. See *McLaughlin v. Anderson*, 962 F.2d 187, 191 (2d Cir. 1992); *Cosmas*, 886 F.2d at 11.

II. The LAB Has Not Adequately Pleaded Violations of the Sherman and Donnelly Acts (Counts VI and VII)

The LAB has brought suit against Bear Stearns, Rubin, DLJ, and Merrill Lynch pursuant to [HN4](#) [↑] section 4 of the Clayton Act, which provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[**15] [*237] [15 U.S.C. § 15\(a\) \(1997\)](#). According to the LAB, the Brokers committed underlying violations of [section 1](#) of the Sherman Act, [15 U.S.C. § 1 \(1997\)](#), by engaging in a conspiracy to exchange "lowball," accommodation bids during the initial liquidation of the Funds' holdings. These bids were then used by the Brokers to justify deeming sales of those holdings to themselves at below-market prices. The LAB alleges that by agreeing to forestall a competitive auction the Brokers engaged in a conspiracy in violation of the Sherman Act. The LAB also asserts that the Brokers' collusive bidding scheme was illegal under New York's Donnelly Act, [N.Y. Gen. Bus. Law § 340](#) (McKinney's 1996).

[HN5](#) [↑] [Section 1](#) of the Sherman Act reads, 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. 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.](#)

[HN6](#) [↑] While the Sherman [**16] Act, by its terms, prohibits any agreement or combination "in restraint of trade or commerce," *id.*, it has long been recognized that the Act was only intended to outlaw unreasonable restraints. See [Bogan v. Hodgkins, 166 F.3d 509, 513 \(2d Cir. 1999\)](#) ("The Supreme Court has read the Act to forbid only 'unreasonable' restraints, as a literal reading would absurdly bar all contracts. In particular not all cooperative conduct has a deleterious effect on competition; indeed, some cooperative arrangements foster rather than harm competition.") (citations omitted). As a result, most antitrust claims are evaluated 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 conditions before and after the restraint was imposed, and the restraint's history, nature, and effect." [State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 279, 139 L. Ed. 2d 199 \(1997\)](#); see [Bogan, 166 F.3d at 513 n.4.](#) [HN7](#) [↑] To allege unreasonable restraint of trade, something more than a private dispute [**17] must be alleged. The relevant product market must be identified, and the plaintiff must "allege how the net economic effect of the alleged violation is to restrain trade in the relevant market, and that no reasonable alternate source is available' to consumers in that market." [International Television Productions Ltd. v. Twentieth Century-Fox Television, 622 F. Supp. 1532, 1534 \(S.D.N.Y. 1985\)](#) (quoting [Gianna Enters. v. Miss World \(Jersey\) 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 on 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 \(5th Cir. 1979\)](#).

However, [HN8](#) [↑] because certain types of restraints have both a predictable and pernicious effect on competition, they are deemed unlawful *per se*. In the motions considered in *Granite II*, the Broker defendants maintained that the LAB had only alleged injury to the [**18] Funds themselves, not injury to the relevant market, and that this failure to plead restraint of trade required dismissal of the LAB's antitrust claims. By contrast, the LAB sought to neutralize the inadequacy of its pleadings by urging that the Brokers' alleged bid-rigging conspiracy be considered a *per se* violation of the antitrust laws. More specifically, the LAB suggested that because a horizontal bid-rigging scheme had been alleged, it was entitled to *per se* treatment and the LAB need not meet the demands of rule-of-reason analysis. As [*238] was explained in *Granite II*, however, because of the novel and complex nature of the market

and instruments at issue in this case, the collusion alleged by the LAB did not constitute a *per se* violation of the Sherman Act. See [17 F. Supp. 2d at 297](#).

In its papers, the LAB has once again attempted to navigate a shortcut around rule-of-reason analysis, pressing that the so-called "quick look" rule of reason should be applied to its antitrust claims. The LAB's entreaties notwithstanding, "quick look" rule-of-reason analysis would not be appropriate in this case. [HN9](#)[↑] Abbreviated rule-of-reason analysis, as the Supreme Court [\[*19\]](#) has recently had occasion to observe, is only appropriate where "the great likelihood of anticompetitive effects can easily be ascertained," and "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." [California Dental Assoc. v. FTC, 526 U.S. 756, 143 L. Ed. 2d 935, 119 S. Ct. 1604, 1612-13 \(1999\)](#). It was emphatically the holding of *Granite II* that the anticompetitive impact of the Brokers' alleged bidding conspiracy was neither obvious nor easily ascertainable, and that therefore the LAB could not maintain its antitrust claims against the Brokers merely by alleging *per se* violations of the Sherman Act. As *California Dental* indicates, "quick look" rule-of-reason analysis is inappropriate for similar reasons. See *id.* The LAB's request that the Court merely engage in yet another form of truncated antitrust analysis is thus meritless.

[HN10](#)[↑] To withstand a motion to dismiss, a plaintiff making 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 \(S.D.N.Y. 1995\)](#); [\[*20\] 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 \(2d Cir. 1987\)](#). 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 & 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 market, the co-conspirators, and describe the nature and effects of the alleged conspiracy. See [In re Nasdaq, 894 F. Supp. at 710-11](#); [International Television Productions, 622 F. Supp. at 1537](#). While dismissal prior to giving a plaintiff ample opportunity for discovery should be granted sparingly in antitrust [\[*21\]](#) cases, see [Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 \(1976\)](#),² "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." [George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 \(2d Cir. 1998\)](#) (quoting [Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#)).

As the Second Circuit has held, [HN11](#)[↑] establishing an unreasonable restraint [\[*22\]](#) of trade under the rule of reason involves three basic steps:

[\[*239\]](#) "Plaintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market. . ." [Capital Imaging Assocs. P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 543](#) (2d Cir.), cert. denied, 510 U.S. 947, 114 S. Ct. 388, 126 L. Ed. 2d 337 (1993). If the plaintiff succeeds, the burden shifts to the defendant to establish the "pro-competitive 'redeeming virtues'" of the action. *Id.* Should the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect could be achieved through an alternate means. that is less restrictive of competition. *Id.*; [Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413](#) (9th-Cir.), cert. denied, 502 U.S. 994, 112 S. Ct. 617, 116 L. Ed. 2d 639 (1991).

² It is worth noting that, as of this opinion's issuance, the LAB will already have had access to a significant amount of discovery material in this action and related actions. While discovery may not be complete, and this opportunity to conduct discovery does not change the Court's analysis of the LAB's claims, the LAB has already had access to a vast quantity of information from which it could prepare coherent claims.

[K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 \(2d Cir. 1995\). HN12](#) [↑] To meet its initial burden a plaintiff bringing suit under the Sherman Act must "show more than just that he was harmed by defendants' conduct. [**23]" *Id.* Rather, a plaintiff must show that the alleged restraint of trade had an actual adverse effect on competition as a whole in the relevant market. See *id.*; see also [Jefferson Parish Dist. No. 2 v. Hyde, 466 U.S. 2, 31, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#) ("Without a showing of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws"). This is so because the ultimate aim of the Sherman Act is to protect competition, as opposed to competitors. See [Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#). As another Second Circuit decision, [Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537 \(2d Cir. 1993\)](#), has explained:

Under [the rule of reason test] ... plaintiff bears the initial burden of showing 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. Insisting on proof of harm to the whole market fulfills the broad purpose of the antitrust law that was enacted to ensure competition in general, not narrowly focused to protect individual competitors. [**24]

[Id. at 543.](#)

Additionally, it is well-settled that "[HN13][↑] 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 Co., 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 \(1977\)](#)). Rather, a private plaintiff must demonstrate the existence of "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." [Brunswick, 429 U.S. at 489](#); see [George Haug, 148 F.3d at 139](#) ("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.'") (quoting [Capital Imaging, 996 F.2d at 543](#); [Florida Seed Co. v. Monsanto Co., 105 F.3d 1372, 1375](#) (11th Cir.) ("In many instances, those [**25] displaced by a merger suffer an economic loss. However, this loss is not an antitrust injury because it does not flow from that which makes a merger unlawful. Injuries like that suffered by Florida Seed do not 'coincide[] with the public detriment tending to result from the alleged violation.'") (quoting [Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1450 \(11th Cir. 1991\)](#)), cert. denied, 118 S. Ct. 693 (1998). Even injuries with a causal connection to antitrust violations will not qualify as "antitrust injuries" unless they are "attributable to an anticompetitive aspect of the practice under [*240] scrutiny." ³ ARCO, 495 U.S. at 334; see generally 2 Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#) P 362a, at 209-16 (rev. ed. 1995) (discussing antitrust injury requirements). As the ARCO Court noted, this antitrust injury requirement is conceptually distinct from the demands of the rule of reason or *per se* rule utilized by courts to determine whether a Sherman Act violation has occurred in the first instance:

³ As the Second Circuit recognized some time ago, [HN15](#) [↑] an antitrust plaintiff's own injuries must be causally linked to the antitrust violation(s):

The statutory requirement [of section 4 of the Clayton Act] that treble damage suits be based on injuries which occur "by reason of" antitrust violations expressly restricts the right to sue under this section. There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a "material cause" of or a "substantial factor" in the occurrence of damage. And this connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect.

HN14[] The per se rule is a method of determining whether [§ 1](#) of the Sherman Act has been violated, but it does [**26] not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act. Per se and rule-of-reason analysis are but two methods of determining whether a restraint is "unreasonable," i.e., whether its anticompetitive effects outweigh its procompetitive effects.

...

The purpose of the antitrust injury requirement is different. It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief.

[495 U.S. at 342.](#)

[**27] While the Lab's Complaint contains allegations concerning market impact that were conspicuously absent from the First Amended Complaint,⁴ it fails to plead adequately the anti-competitive effect that is a necessary predicate to all antitrust violations. Moreover, even construing its allegations in favor of the LAB, the Complaint fails to allege antitrust, as opposed to individual, injury -- as is required in order to bring suit as a private attorney general under the Clayton Act.⁵

[**28] [*241] The gravamen of the LAB's Sherman Act claim is that the Brokers engaged in a collusive scheme to offer each other "lowball" bids, thus affording the Brokers the opportunity to liquidate the Funds' holdings by "deeming" various sales to themselves at artificially low prices. According to the LAB, because these deemed sales

⁴In its First Amended Complaint, the LAB alleged only that "nationwide competition and trade were injured, unreasonably restrained, and eliminated in relevant markets under the Sherman Act," First Amend. Compl. P 214, and that the Brokers' acts "restrained competition within the State of New York." [Id. 221.](#)

⁵As the Ninth Circuit has observed, a plaintiff's failure to establish anticompetitive effect constitutes a failure to establish any violation of the antitrust laws whatsoever, and thus renders superfluous any discussion of antitrust standing or injury under section 4 of the Clayton Act:

We need not decide whether appellants have met the requirements for antitrust standing, because they have failed to establish any violation of the antitrust laws.

...

As Professors Areeda and Hovenkamp have observed:

HN16[]

When a court concludes that no violation has occurred, it has no occasion to consider [antitrust] standing . . . An increasing number of courts, unfortunately, deny standing when they really mean that no violation has occurred. In particular, the antitrust injury element of standing demands that the plaintiff's alleged injury result from the threat to competition that underlies the alleged violation. A court seeing no threat to competition in a rule-of-reason case may then deny that the plaintiff has suffered antitrust injury and dismiss the suit for lack of standing. Such a ruling would be erroneous, for the absence of any threat to competition means that no violation has occurred and that even suit by the government -- which enjoys automatic standing -- must be dismissed.

2 Phillip E. Areeda & Herbert Hovenkamp, [**Antitrust Law**](#) P 360f, at 202-03 (rev. ed. 1995) . . . The Sherman Act requires, at a minimum, that appellants prove that the PAC-10's actions had an anticompetitive effect. It is on this showing that appellants' claim fails, and accordingly we decide this case on the merits.

Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996).

While the LAB's failure to adequately plead the anticompetitive effects of the Brokers' bidding conspiracy renders any discussion of antitrust injury under section 4 of the Clayton act unnecessary, the LAB's failure to plead antitrust injury is nevertheless noteworthy as an alternate basis for decision.

were at a price significantly below the actual value of the Funds' liquidated holdings, the Brokers were able to recover significant profits when they later resold those same securities in the secondary market. Had the initial liquidations occurred at market prices, the LAB contends, the Brokers would not have been able to recover those profits.

Manifold market injuries have now been alleged in the Complaint. The LAB asserts that, "having colluded to obtain the Funds' securities at below-market prices, on information and belief, the secondary traders employed by the Brokers were instructed to sell the securities as quickly as possible, so long as they realized, on a hedge adjusted basis, as least as much as they paid for them in the deemed sales." Compl. P 208. The LAB contends that, presented with the task of selling an unusually large volume of securities, DLJ [**29] and the other Brokers entered into massive hedging transactions calculated to provide protection against losses due to interest rate movements -- provided that the Brokers sold their positions quickly. See Compl. PP 208, 215. The end result of this massive liquidation, the LAB claims, was damage to the markets for esoteric CMOs -- namely inverse IOs, inverse floaters, and super Pos -- as the flooding of the market crowded out market participants with long positions in those types of instruments, depressed prices below the instruments'" intrinsic recreation value,'" and resulted in the marking down of the securities held by other market participants. Compl. PP 209-11. As a result, so claims the LAB, margin calls were issued on other market participants and increased "haircuts" were demanded with respect to comparable instruments. See Compl. P 212.

According to the Complaint, the increased costs of capital resulting from the massive CMO sell-off also reduced the ability of highly leveraged firms to participate in the markets for inverse IOs, inverse floaters, and super POs. See Compl. P 212. The short-term hedging strategy employed by the Brokers, which involved short sales [**30] of large amounts of United States Treasury and other governmental agency securities, also allegedly impacted interest rates and influenced the price of Treasury notes. See Compl. P 217. To illustrate its claims of tangible market impact, the LAB refers periodically in its Complaint to specific funds and market participants that it believes were injured during the market stampede of 1994. See Compl. PP 209, 212-13

The LAB's essential claim of injury derives from the liquidation of the Funds' own holdings through deemed sales. Even assuming that those deemed sales were the result of a rigged bidding process, and that the Funds therefore recovered less in return than was their due, however, the LAB has not satisfactorily alleged that these sales had any impact whatsoever on the relevant market for CMOs. Rather, as the Complaint indicates, it is the later resale of the instruments by the Brokers that is claimed to have caused market damage. It is the subsequent hedging by the Brokers, in order to protect themselves from falling CMO values, and that hedging's attendant impact on the market [**242] for Treasury notes, that is claimed to have damaged the market. Indeed, it is the second [**31] "liquidation" by the Brokers, not the initial liquidation in which the Funds' holdings were deemed sold to the Brokers, that is alleged to have caused market injury.

There is a critical disjunction, however, between the market injury asserted, the injury allegedly suffered by the Funds, and the Brokers' alleged anticompetitive conspiracy. According to the LAB, the Brokers were able to recoup greater profits by deeming sales to themselves at artificially low prices and then reselling the CMOs on the open market. If true, this would no doubt be of great consternation to the Funds and to their various investors. However, despite the LAB's transparent attempts to conflate the Brokers' deemed sales and subsequent resales, nothing in the Complaint indicates that the subsequent resale by the Brokers was anything other than normal, given the state of the market, or that the collusive bidding arrangement among the Brokers did anything to impact the market in which the securities were resold. Even assuming that the Brokers intended to provide each other with lowball bids for the nefarious purposes stated in the Complaint, the LAB has failed to adequately allege any adverse effect on competition [**32] within the relevant market for CMOs. See *K.M.B. Warehouse Dist.*, 61 F.3d at 130 ("Without some evidence of an adverse impact on competition in either the interbrand or intrabrand market, the fact that customers induce a seller to refrain from dealing with another potential customer in order to limit competition does not satisfy a plaintiff's initial burden under § 1. KMB's evidence of defendants' intent, even belief that what they were doing might be unlawful, is unavailing in the absence of evidence of anti-competitive effect.") (citations omitted); *Capital Imaging Assocs.*, 996 F.2d at 547 ("In sum, Capital's position is simply that it has been harmed as an individual competitor. It has not shown that defendants' activities have had any adverse impact on price, quality,

or output of medical services offered to consumers in the relevant market.") *Sitkin Smelting & Ref. Co. v. FMC Corp.*, 575 F.2d 440, 448 (3d Cir. 1978) (finding that collusive scheme involving sham bids, even if reprehensible, did not constitute antitrust violation, as plaintiffs failed to maintain "their burden to show that the combination in any substantial way either [**33] did or could affect interstate commerce by controlling market prices, imposing undue limitations on competitive conditions, or unreasonably restricting competitive opportunity."); *Jarmatt Truck Leasing Co. v. Brooklyn Pie Co., Inc.*, 525 F. Supp. 749, 750 (E.D.N.Y. 1981) ("No violation of section 1 of the Sherman Act is possible absent proof of anticompetitive effect beyond the injury to plaintiffs, and facts must be pleaded from which effect can be inferred.")⁶

At most, the Complaint [**34] establishes that the Brokers were able to post significant gains where they may otherwise have suffered losses when reselling the CMOs. However, the Complaint also indicates that the Brokers had an inherent interest in quickly liquidating the instruments with which they had become saddled.⁷ [**36] The [*243] LAB's implicit assumption that the Brokers would have held onto the liquidated instruments for a longer period of time, were they unable to quickly dispose of them at a profit, is unrealistic and unconvincing. After all, according to the LAB's own pleadings the CMOs obtained from the Funds were highly volatile, even "toxic," and the market for those CMOs was declining in the face of interest rate increases.⁸ Consequently, there is nothing in the Complaint that suggests that the resale of the CMOs was anything other than ordinary, given the market into which those CMOs were being dumped and the Brokers' interest in relieving themselves as quickly as possible from the risks inherent in holding large quantities of quickly devaluing securities. While the markets were flooded with mortgage instruments at "fire sale" prices, see Compl. P 210, by no means does this alone indicate that the Brokers' [**35] collusive conduct was the cause. Moreover, while the short-term hedging strategy employed by the Brokers may well have been less profitable had the Brokers not initially obtained the Funds' securities at artificially

⁶ Setting aside the absence of any plausibly-asserted causal connection between the deemed sales and the market injuries alleged, the LAB has failed to even allege that the Brokers' resales in the secondary market for CMOs were the driving force behind the general decline of CMO prices. The LAB certainly has not alleged that the Brokers were the only, or even the primary, entities unloading CMOs into the soft market in 1994, or that their secondary market sales even set the prices for other market participants.

⁷ The Complaint makes plain the secondary traders' concerns about taking on a large inventory of esoteric CMOs, which they expected to behave bullish and thus decline under then-existing market conditions. Compl. P 247. The Complaint also makes plain the concerns that the secondary traders could be expected to have about being charged with any losses from resales of those CMOs. Indeed, according to the LAB these very concerns gave the Brokers the motive to engage in a collusive bidding scheme. Compl. P 248. The LAB's opposition papers make this point as well. As the LAB states:

The Brokers argue that the Funds' theory makes no sense -- that even if the Brokers succeeded in obtaining the CMOs at below-market prices, they should have sold them for as much as they could earn. This argument ignores the Brokers' alleged desire to dispose of the CMOs quickly to reduce their exposure, which cut against any desire to hold out for the best resale price. The Complaint explains that the traders were afraid of assuming responsibility for a large volume of liquidated CMOs and that they had confidence in their hedging activity (as a protection against interest rate changes) only if they were able to dispose of the bulk of the acquired securities quickly.

(Pls.' Mem. Law Opp. Mots. Part. Dismiss at 23.) Because the Brokers would have this very same interest in a quick liquidation even had they obtained the CMOs at market prices, the LAB's contention that the flooding of the market for those instruments was a result of the Brokers' collusion is highly questionable.

⁸ To be sure, the LAB does not explicitly make this point as such. However, the Complaint provides all the necessary raw material. First, the Complaint alleges that interest rates rose in February and March of 1994, immediately preceding the liquidations that are the subject of this lawsuit, and that the Funds therefore experienced an erosion of value. Compl. PP 7, 139-40. Second, the Complaint alleges that the Funds were in possession of a large number of high-risk instruments sensitive to interest rate changes, and that Brokers sold the Funds inappropriately "bullish" instruments -- that could be expected to decrease in value when interest rates rise. Compl. PP 31-37, 43-44, 47, 50, 80-84, 112. Assuming the truth of the Complaint's allegations, one could hardly expect anyone -- let alone the Broker defendants -- to be enthused at the market prospects for bullish instruments during the interest rate environment of March 1994. The Complaint indicates that the Brokers were, in fact, concerned about the prospects of holding onto bullish securities that would "decline in value in the then-existing market conditions." Compl. P 247.

low prices, there is no indication that this strategy was used as a result of the Brokers' collusive conduct -- as opposed to the Brokers' desire to unload a large quantity of securities in a short period of time. Given the LAB's own explanation of the benefits of this hedging strategy, such hedging could be expected as short-term protection against interest rate fluctuations even had the Brokers obtained the Funds' instruments at non-collusive prices.

[**37] While the Brokers might have recovered an untoward windfall upon resale, even one impossible without improper collusion, the LAB has not alleged that the *collusion* itself had any impact whatsoever on the secondary market for CMOs, or upon the price at which the Funds' CMOs were resold. Indeed, as with the liquidations of many other types of volatile securities, the massive dumping of CMOs onto the market by the Brokers and others might well have occurred regardless of the price at which the Brokers obtained the Funds' instruments -- if only to minimize what could be anticipated to be considerable losses.⁹ After all, assuming the validity of [*244] the LAB's own allegations, after the deemed sales of the Funds' holdings the Brokers were in possession of a significant number of securities known within industry circles as "nuclear waste."

[**38] Furthermore, the injuries ostensibly suffered by the Funds do not "flow" from that which would render the Brokers' collusion illegal under the Sherman Act -- the impact of Broker resales upon the secondary market for CMOs, and of massive hedging upon the market for Treasury notes. See ARCO, 495 U.S. at 337 ("Respondent has not suffered 'antitrust injury,' since its losses do not flow from the aspects of vertical, maximum price fixing that render it illegal."); cf. [Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co., 39 F.3d 951, 954 \(9th Cir. 1994\)](#) ("The difficulty with Weil's case is that its injury does not match either the mischief about which it complains or the markets in which it occurred."). While the LAB now contends that the Brokers' massive dumping of CMOs onto the open market negatively affected the price of those CMOs, thereby injuring other investors who held those types of obligations, the Funds no longer had any stake whatsoever in the price at which their CMOs were trading once the Brokers conducted their initial liquidation of the Funds' holdings. Indeed, the Complaint does not indicate that the Funds were participants [**39] at all in the secondary market for CMOs, once the Brokers had initiated margin calls and deemed sales of the Funds' holdings to themselves. See [Amarel v. Connell, 102 F.3d 1494, 1508 \(9th Cir. 1997\)](#) ("As a corollary to the requirement that 'the alleged injury be related to anti-competitive behavior,' we require that 'the injured party be a participant in the same market as the alleged malefactors.'") (quoting [Bhan v. NME Hosps., Inc., 772 F.2d 1467, 1470 \(9th Cir. 1985\)](#)). The Complaint also does not reveal any injury suffered by the Funds themselves as a result of the alleged disruption of the market for Treasury bonds.

The LAB has characterized the bidding scheme alleged in its Complaint as one of collusive "monopsony," whereby unreasonable restraints on trade result from the obtaining of products at below-market prices.¹⁰ Of course, according to the Complaint the bidding scheme engaged in by the Brokers ultimately restricted the Funds' access to a real market for their own CMOs and, as alleged, caused the Funds harm when the Brokers deemed sales to themselves. It is also true that the Brokers' scheme purportedly constrained a seller's access to [**40] potential

⁹ In fact, the Complaint itself notes that "Bear Stearns' secondary market traders, including Rubin, were concerned that if they acquired the Funds' portfolio at fair market value, they would be unable to liquidate such a large portfolio in a short time, without suffering trading losses that would be charged to their trading desk." Compl. P 154.

While the Brokers' desires to recover gains on resales of distressed CMOs may well have motivated them to engage in collusive bidding practices, this allegation of motive alone does not establish any causal link between that bidding and the market's response to the subsequent liquidation.

¹⁰ Monopsony is to the supply side of a market what monopoly is to the demand side. See Roger D. Blair & Jeffrey L. Harrison, Antitrust Policy and Monopsony, [76 Cornell L. Rev. 297, 306 \(1991\)](#). As Professors Blair and Harrison have observed:

Monopsony power involves the ability of buyers to lower input prices below competitive levels, which requires the ability to restrict the quantity demanded of the input. In either case, the quantity that would be exchanged is less than the quantity exchanged under competitive conditions, and the result is allocatively inefficient. Ironically, the reduced input prices the monopsonist enjoys do not lead to reduced output prices. In fact, when the monopsonist has market power in its output market, the reduced input prices cause higher output prices.

purchasers -- thus allowing the colluding parties to set lower prices and recover more profit. However, the LAB cannot survive a motion to dismiss merely by talismanically labeling the Brokers' collusive behavior as "monopsonist." In this case, no plausible connection between that collusion and [*245] market injury has been alleged. Indeed, there is no allegation that the Brokers enjoyed any monopsony power whatsoever with respect to the secondary market for CMOs.

[**41] The LAB's reliance upon *Three Crown*, 817 F. Supp. at 1033, is misplaced. In *Three Crown*, plaintiffs who had substantial "short" positions in two-year Treasury notes brought suit, alleging *inter alia* that the defendants in that action conspired in violation of the Sherman Act to "squeeze" the secondary and financing markets for those notes. The defendants in that case held significant "long" positions in two-year Treasury notes, and purportedly manipulated the supply and circulation of those notes to their benefit. See *id. at 1037*. Even a cursory glance at *Three Crown* reveals the marked differences between that case and the case at bar. In that case, the injuries allegedly suffered by plaintiffs and those inflicted upon the relevant market were one in the same, in that restrictions on the supply and circulation of Treasury notes forced investors to pay artificially inflated prices for those notes. The injuries suffered by the *Three Crown* plaintiffs had their genesis in the very same anticompetitive "squeeze" that allegedly injured other "short" investors. See *id. at 1048 n.36*. As explained above, however, in this case [**42] there is a critical disjunction between the injuries suffered by the Funds and the injuries to the relevant market, and there is no satisfactory allegation whatsoever that the Brokers' collusion itself caused injuries to other investors or to the relevant market.¹¹

[**43] *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983), is similarly inapposite. In *Reid Brothers Logging*, the defendants conspired to dominate all segments of the Alaskan timber industry, in part by refusing to compete as between themselves for timber sales -- thus allowing the defendants to recover a greater profit spread in spite of a chronic shortage of timber -- and by frustrating the efforts of others to enter the Alaskan timber market. See *id. at 1297-98*. While the anticompetitive scheme engaged in by the defendants in *Reid Brothers Logging* did involve collusive bidding practices, see *id.*, this is where any similarity to the instant case ends. In that case, plaintiffs asserted, and the court found, direct anticompetitive effects within the relevant market. The bidding conspiracy, as well as the collusive approach to purchasing timber, frustrated competition and resulted in harm to the plaintiff -- a logging company rendered captive to the plaintiffs, and upon which an unlawful flat rate, multi-year logging contract was imposed due to defendants' illegal control of the Alaskan timber industry. See *id. at 1300-01*. [**44] Unlike the instant action, there was no disjunction between the injuries suffered by the plaintiff and the injuries to the relevant market. Indeed, in that case the former flowed directly from the latter.

¹¹ The consent judgment and stipulation between Salomon Brothers and the United States arising out of the same basic set of facts as the *Three Crown* case, which the LAB has invoked for its own purposes, also reveals the marked differences between the Salomon "squeeze" and the instant case. The consent stipulation indicates that "the alleged conspiracy affected the price of the notes in the secondary market . . . and the interest rate paid by persons, such as Solomon, that lent the notes in exchange for cash." [57 Fed. Reg. 29,743, 29,744](#) (July 6, 1992). As the consent stipulation further states:

This scheme had the effect of limiting the supply of May two-year notes available in the secondary and financing markets, thereby ensuring that persons who had sold May two-year notes short in the when-issued market could obtain such notes only by purchasing them at artificially high and non-competitive prices in the secondary market or by borrowing them in exchange for cash at artificially low and non-competitive special rates in the financing market. This course of conduct continued for a period of time during which Salomon and its co-conspirators earned supracompetitive rates on transactions in the notes that are the subject of this action.

[*246] As the Honorable Richard J. Cardamone observed in *Capital Imaging Assocs., 996 F.2d at 537, "HN17"*⁴⁵ **antitrust law** is not intended to be as available as an over-the-counter cold remedy, because were its heavy power brought into play too readily it would not safeguard competition, but destroy it." *Id. at 539*. Given the relevant market asserted in the Complaint and the absence of any plausibly asserted connection between that market and the Brokers' collusive behavior, the LAB's Complaint appears to suffer from a philosophical infirmity that further amendment could not cure.

In this case, the LAB seeks redress of its private grievances with the Brokers under the aegis of the Sherman Act, despite the absence of any cognizable link between those grievances and the market injuries alleged. As was observed in *Granite II*, however, such grievances are more appropriately raised in the context of the LAB's contract claims against the Brokers. See *17 F. Supp. 2d at 298*.⁴⁶ **HN18**⁴⁷ 'The cornerstone of [antitrust] law is competition. Congress'[s] intent in passing the Sherman Act was not to subject all business and commercial torts to the scrutiny of federal [antitrust] law.'" *Teletronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 837 (S.D.N.Y. 1988)* (quoting *Falstaff Brewing Co. v. Stroh Brewery Co., 628 F. Supp. 822, 826 (N.D. Cal. 1986)*). Furthermore, "the Sherman Act is neither a lowest-responsible-bidder statute nor a panacea for all business affronts which seem to fit nowhere else." *Scranton Constr. Co. v. Litton Indus. Leasing Corp., 494 F.2d 778, 783 (5th Cir. 1974)*, quoted in *Sitkin Smelting & Ref., 575 F.2d at 448*. Accordingly, Count VI of the Complaint is dismissed.

HN19⁴⁸ 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 Found., 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, 611 N.Y.S.2d 786, 789, 634 N.E.2d 158, 161 (1994)*. The LAB's Donnelly Act claim in Count VII of the [*246] Complaint is therefore dismissed as well.

III. The LAB Has Adequately Pleaded that the Brokers Breached Contracts With the Funds to Provide Accurate Marks (Count III)

The LAB's Complaint contains a claim for breach of contract that was not present in the First Amended Complaint, and therefore not addressed in *Granite II*. Undergirding this claim, according to the Complaint, are the Brokers' failures to abide by the terms of contracts requiring the provision of accurate marks to the Funds.

The LAB contends that on October 28, 1992, Askin, on behalf of both Granite Corp. and Granite Partners, sent letters (the "October letter(s)") to each of the Brokers asking them to agree that month-end "marks" -- a broker-dealer's statement of the current market value of a security -- would henceforth be timely and accurately provided. According to the Complaint, these marks were requested by ACM or its predecessor, to be indicated on "Month End Pricing" reports, and the Brokers were aware of the importance of those marks to the Funds in "evaluating and reporting on the overall portfolios of the Funds." Compl. P 69. Though the LAB's specific allegations concerning the Brokers' provision [*247] of inaccurate marks differ depending on the specific Brokers involved, the LAB's basic claim is that the Brokers supplied the Funds with marks rather different than the Brokers' actual valuations of the securities.

The Complaint alleges that on or about November 2, 1992, DLJ, through Richard Whiting, accepted the terms of the October letter in writing. As far as the other Brokers are concerned, however, the Complaint is more circumspect. Merrill Lynch and Bear Stearns are only alleged to have "communicated [their] . . . acceptance of its terms." Compl. P 73. Though Quartz was not formed as of October, 1992, the [*247] Complaint alleges that Quartz entered into the same agreement with the Brokers at or about the time of its formation. See Compl. P 74.

While the Complaint does not specifically incorporate by reference the October letters, or attach either copies of those letters or any written acceptance, copies of the letters have been submitted as exhibits to the Brokers' papers. (See de Leeuw Decl. Ex. 6; Balber Aff. Ex. 8; Pietrzak Aff. Ex. B.) Because the Complaint clearly identifies the October letters, and the LAB has obviously relied upon their terms in bringing suit, the [*248] Court will consider these exhibits on a 12(b)(6) motion. See *Granite II, 17 F. Supp. 2d at 300*.

The letters, which were sent by David Askin on Whitehead/Sterling Advisors, L.P. stationary, request that the Brokers agree to have mark sheets completed and returned by the close of business on the second business day following the month-end. The letters also state that the marks must be both timely and accurate, and that the marks are critical to the reporting of Fund performance. The letters request that the Brokers acknowledge their agreement with their terms by signing in a space provided.

In the event that a Broker does not agree to those terms, Askin writes, then the amount of business done with that firm will be significantly reduced.

The Brokers have raised a panoply of grounds for dismissal of this particular contract claim, asserting *inter alia* that the LAB does not have standing to raise the claim, that the LAB has not pleaded valid acceptance on the parts of Bear Stearns and Merrill Lynch, and that any contract is invalid for want of consideration. Both Merrill Lynch and Bear Stearns take the position that the October letters' own terms require a written [**49] acceptance, and that even if this were not the case New York's statute of frauds would require one. DLJ has not attacked the validity of its acceptance, as the Complaint alleges the letter was signed by a DLJ representative.

A. The LAB's Standing

Since any standing infirmities would render the LAB's efforts to recover for breach of contract fruitless, this issue is addressed first.

The Brokers contend that because the October letter was sent by Askin on behalf of ACM's predecessor in advising the Funds, Whitehead/Sterling, the LAB does not have standing to enforce any binding agreement between the Brokers and the investment advisor. Furthermore, DLJ remonstrates that the existence of specific advisory agreements governing the relationships between the Funds and the advisor make clear that any agreement to provide marks would have been between the advisor and the Brokers alone.

HN20[↑] While under New York law only a party to a contract can typically bring suit to recover for its breach, one can certainly enforce a contract entered by an authorized agent. See *Merrick v. New York Subways Adver. Co., 14 Misc. 2d 456, 459, 178 N.Y.S.2d 814, 818 (Sup. Ct. 1958)* ("It [**50] is elementary that one may sue upon a contract made for him by his agent.") (*citing* 2 Williston on Contracts 1038 P 352 (rev. ed. 1936)); 2A N.Y. Jur.2d, Agency §§ 103 et seq. (1998).

HN21[↑] Under New York law a third party is also allowed to enforce a contract if that party is an intended beneficiary of the contract. See *Flickinger v. Harold C. Brown & Co., 947 F.2d 595, 600 (2d Cir. 1991)*. The general test for third-party beneficiary status, as adopted by New York from the Restatement (Second) of Contracts is as follows:

- (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee [*248] to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefits of the promised performance.

Restatement (Second) of Contracts § 302 (1981); see *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38, 44-45, 495 N.Y.S.2d 1, 5, 485 N.E.2d 208, 212 (1985)* [**51] (adopting Restatement position). **HN22**[↑] When determining the intentions of the contracting parties, the intention of the promisee is of primary importance. See *Drake v. Drake, 89 A.D.2d 207, 209, 455 N.Y.S.2d 420, 422* (4th Dep't 1982). Where the obligation to perform to the third-party beneficiary is not expressly stated in the contract at issue, a court "may look to surrounding circumstances to determine whether the contracting parties intended to benefit a third party." *United Int'l Holdings, Inc. v. The Wharf (Holdings) Ltd., 988 F. Supp. 367, 371 (S.D.N.Y. 1997)* (citations omitted); see *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 925 F.2d 566, 573 (2d Cir. 1991)*; *Septembertide Publ'g, B.V. v. Stein & Day, Inc., 884 F.2d 675, 679 (2d Cir. 1989)*.

While the Complaint does not specifically refer to Whitehead/Sterling by name, it does state that Askin sent the October letters "on behalf of" Granite Corp. and Granite Partners, Compl. P 70, and that the "same contractual arrangement" was entered by Quartz at the time of its formation. The Complaint also states that, "from September 1991 to December 1992, Askin [**52] was employed by the former investment advisor for Partners and Corp." Compl. P 18.

At this stage in the litigation, there is little reason to question the LAB's standing to seek enforcement of any contract formed pursuant to Askin's October 28, 1992 letters or any similar letters. The LAB's Complaint, while sparse, characterizes the contract as one between the Brokers and the Funds. The letters specifically indicate that the provision of marks is for the Funds' direct benefit, and their language could support the proposition that Askin was operating as an agent of the Funds -- which is not at all surprising given the Funds' reliance on Askin and the successive investment advisors for the selection and purchase of securities. The letter's language is particularly revealing in this regard:

As the Granite Funds continue to grow, so does our commitment to provide accurate and timely information to our investors. A critical component of this commitment is our ability to report our performance as soon after the end of each month as possible. This is where Bear Stearns comes in.

An important part of the service you provide the Granite Funds is the monthly marks on the bonds [**53] in our portfolios. These marks must be timely as well as accurate....

Therefore, effective with the October 1992 month-end, we would like Bear Stearns to have our mark sheets completely filled-out and returned to us by the close of business on the second business day following the month-end

Our business operates in a very competitive marketplace, just as yours does. The failure to provide our clients with the highest quality service costs us customers, just as surely as does poor portfolio performance.... .

(de Leeuw Decl. Ex. 6.)

This language certainly does not obviate any possibility that Askin was writing on behalf of the Funds. The Brokers' protestations notwithstanding, the LAB's failure to explicitly plead its agency or third party beneficiary theories in its Complaint does not merit dismissal. As the Second Circuit observed in *Flickinger*, 947 F.2d at 595, "[HN23](#)" federal pleading is by statement of claim, not by legal theory." *Id. at 600* (citations omitted). Since the LAB's breach of contract claims in connection with the provision of inaccurate marks appear to be dependent upon the October letters, and the very terms of those [**54] letters [*249] indicate that Askin could have been writing on behalf of the Funds -- or at the very least for their direct benefit -- dismissal would not be appropriate at this juncture.¹² Whether or not Askin was actually acting as an agent for the Funds when he wrote the letter, or whether the Funds were intended third-party beneficiaries, are issues more appropriately decided at a later date.

The Brokers' contentions regarding the capacity in which Askin sent the October letters are rendered all the more suspect when one considers *Granite II*'s holdings regarding the doctrine of *in pari delicto*. In *Granite II* it was held [**55] that the Funds, acting through Askin and ACM, were active and voluntary participants in the securities purchases of which they now complain. See [17 F. Supp. 2d at 309](#). In reaching this conclusion favorable to the Broker defendants, the Court relied on ACM's role as agent of the Funds. *Id. at 308*. While the issues presented in *Granite II* were not the same as those presented by the LAB's current contract claims, Askin's or the investment advisor's agency to act on behalf of the Funds cannot merely be invoked by the Brokers for their benefit alone. This agency may well turn out to be a double-edged sword -- precluding recovery for certain claims under the doctrine of *in pari delicto*, even as it gives the Funds standing to assert claims based on contracts allegedly entered by Askin on their behalf.

¹² According to the DLJ defendants, while "Askin may have been the Funds' agent for some purposes," in sending the October letter he "acted not on behalf of the Funds, but to facilitate Whitehead/Sterling's performance of its duties to the Funds under the Investment Advisory Agreements." Resolution of this disputed agency issue, however, would not be appropriate on a motion to dismiss.

That the relationship between the Funds and its advisors were governed by other investment advisory agreements does not, as DLJ suggests in its papers,¹³ alter this result. DLJ's apparent position is that, because ACM or its predecessors were themselves solely responsible for preparing and reporting valuations of the Funds' securities, any agreement [**56] concerning the provision of marks as valuations would necessarily be between the advisors and the Brokers alone. This overlooks, however, both the precise role that ACM and its predecessors played as the Funds' advisors and the appropriate level of scrutiny on a motion to dismiss. While the contractual relationship between the Funds and the advisors did give the investment advisor responsibility for valuing the Funds' holdings, and governed the respective rights as between advisor and advisee, this relationship could easily have made the advisor an agent of the Funds for their many other dealings with Brokers and investors. A contractual agreement to provide marks might have been entered into by the advisor on behalf of the Funds, just as the advisor could agree to purchase various securities on behalf of the Funds. Without further inquiry one cannot say. Simply because the subject matter of a contract concerned the domain of issues governed by the investment advisory agreements, however, does not mean that Askin could not also have written the October letters on behalf of the Funds.

[57] B. Alleged Invalidity of Oral Contracts Under Terms of October Letters and New York Statute of Frauds**

Merrill Lynch and Bear Stearns have also expended considerable efforts to convince the Court that, either by the explicit terms of the October letters or under New York's statute of frauds, any contracts formed pursuant to those letters must be accepted in writing. The Complaint's [*250] failure to plead written acceptance or the LAB's failure to append a counter-signed copy of the letter, the Brokers press, merits dismissal. Because DLJ concedes that it signed the letter, it has not challenged the manner of its acceptance.

It is well-established that [HN24](#) [↑] an offeror may, by the terms of its offer, dictate the manner of an offeree's acceptance. See [Brand v. 15 West 72nd St. Owners Corp., 117 Misc. 2d 652, 655, 458 N.Y.S.2d 1011, 1013 \(Sup. Ct. 1983\)](#); [Gram v. Mutual Life Ins. Co., 300 N.Y. 375, 382-83, 91 N.E.2d 307, 311 \(1950\)](#). This includes requirements that the acceptance be communicated in writing. See [Golden Dipt Co. v. Systems Eng'g & Mfg. Co., 465 F.2d 215, 216-17 \(7th Cir. 1972\)](#); [Antonucci v. Stevens Dodge, Inc., 73 Misc. 2d 173, 175-76, 340 N.Y.S.2d 979, 982-83 \(N.Y. Civ. Ct. 1973\)](#). [**58]

Furthermore, [HN25](#) [↑] under New York law, the application of which does not appear to be disputed, neither contracts incapable of being performed within a year nor contracts for the sale of securities entered prior to October 10, 1997 may be entered orally. Under [N.Y. Gen. Oblig. Law § 5-701](#) (McKinney's 1989), which the Brokers have invoked, an agreement, promise, or undertaking must be subscribed in writing by the party to be charged if, "by its terms [it] is not to be performed within one year from the making thereof." For [section 5-701](#) to apply the agreement's terms must truly be incapable of performance in less than one year. The parties' ability to terminate the agreement without breach in less than a year's time takes the agreement outside of the statute of frauds. See [Rail Europe, Inc. v. Rail Pass Express, Inc., 1996 U.S. Dist. LEXIS 4183](#), No. 94 CIV. 1506(PKL), [1996 WL 157503](#), at *4 (S.D.N.Y. Apr. 3, 1996).

Under former N.Y. U.C.C. § 8-319(a) (McKinney's 1990), which the Brokers have also invoked and was repealed effective October 10, 1997, see 1997 N.Y. Laws ch. 566, § 5, "[a] contract for the sale of securities is not enforceable by way of action or defense unless . . . there is [**59] some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price." While this writing requirement no longer exists, oral contracts or contract modifications entered into prior to October 10, 1997 are still governed by this provision. See N.Y. [U.C.C. § 8-601\(b\)](#); [Goshorn v. Bonamie, 1998 U.S. Dist. LEXIS 5059](#), No. 95-CIV-[188 RSP/DNH, 1998 WL 166832](#), at *7 (N.D.N.Y. Apr. 8, 1998).

¹³ DLJ claims that "the LAB's claim that the Dealers were contractually obligated to provide valuations to the Funds is obviated by the contract between ACM and the Funds upon which the LAB premised its tortious interference claim in Count XI." (DLJ/Comerford Mem. Law. Supp. Mot. Part. Dismiss at 20-21.)

Because the LAB has alleged that any contracts formed pursuant to the October letters had as their consideration the purchase of securities, the Bear Stearns defendants have claimed that any oral acceptance is void under the U.C.C. provision operative at the time of the contract.

The LAB has demonstrated a certain amount of elasticity in fashioning its Complaint, especially when one compares its specific allegations concerning DLJ's written acceptance to its purposely vague allegations concerning the other Brokers' acceptance of the October letters. However, the LAB's failure to specifically plead written acceptance of the October letters' **[**60]** terms does not currently merit dismissal of its contract claim as against Bear Stearns or Merrill Lynch, and extended discussion of New York law on this matter is better saved for another day.

The Brokers are certainly correct in observing that this Court has previously dismissed, pursuant to the statute of frauds, contract claims challenged under [Rule 12\(b\)\(6\), Fed. R. Civ. P.](#) However, in those cases the complaint itself or the parties' papers left little question that the plaintiff was claiming the existence of a binding, oral contract. See, e.g., [Keough v. Texaco, Inc., 1999 U.S. Dist. LEXIS 1276](#), No. 97 Civ. 5981 LMM, 1999 WL 61836, at *9 (S.D.N.Y. Feb. 10, 1999) (granting defendant's motion to dismiss contract claim based on statute of frauds, given that employment contract alleged was oral); [Huntington Dental & Med. Co. \[*251\] v. Minnesota Mining & Mfg. Co., 1998 U.S. Dist. LEXIS 1526](#), No. 95 Civ. 10959 (JFK), 1998 WL 60954, at **1, 3-4 (S.D.N.Y. Feb. 13, 1999) (finding contract claim explicitly premised upon breach of oral contract to be precluded, in part, by New York statute of frauds); [Mui v. Union of Needletrades, Indus. & Textile Employees, 1998 U.S. Dist. LEXIS 12783](#), No. 97 Civ. 7270(HB), 1998 WL 513052, at **6-7 (S.D. N.Y. Aug. 19, 1998) (finding affirmative defense under New York statute of frauds to be appropriately raised in [Rule 12\(b\)\(6\)](#) motion to dismiss, as plaintiff alleged breach of two oral commitments and no allegation was made that those commitments were reduced to writing); [Wallach Marine Corp. v. Donzi Marine Corp., 675 F. Supp. 838, 840-41 \(S.D.N.Y. 1987\)](#) (dismissing contract claim premised upon oral agreement under statute of frauds, despite complaint's ambiguity about contract's oral or written nature, because plaintiff's papers specified that agreement was oral); [Paper Corp. v. Schoeller Technical Papers, Inc., 724 F. Supp. 110, 115-16 \(S.D.N.Y. 1989\)](#) (holding in part, where plaintiff appended to its complaint those documents it contended contained the contract's essential terms, that statute of frauds partially barred plaintiff's breach of contract claim). Here, the LAB is more circumspect in its pleadings and its papers, leaving it an open question whether or not the acceptance it asserts was written or oral. The LAB hypothesizes in its papers that additional discovery will perhaps reveal a written acceptance that it does not currently have within **[**62]** its possession -- a claim rejected by the Brokers, who point to the extensive amount of discovery already conducted in this and related cases, as well as the LAB's presumed access to all correspondence sent to Askin or the Funds. Because written acceptance such as would satisfy the statute of frauds could exist without ever having been returned by the Brokers, the LAB counters, a signed, enforceable copy of the October letter may yet be found within the defendants' possession. See [Rail Europe, 1996 WL 157503](#), at *4 n.4 ("HN26¹⁴ The Statute of Frauds does not mandate delivery, so it does not matter that defendant never returned the signed contract to plaintiff.") (citing [Transit Advertisers, Inc. v. New York, New Haven & Hartford R.R., 194 F.2d 907, 910 \(2d Cir. 1952\)](#)).

Because the Complaint leaves unclear whether Merrill Lynch's or Bear Stearns' acceptance was written or oral, and because the LAB's papers do not commit the LAB to the position that the contract was oral, dismissal would not be appropriate at this juncture. The statute of frauds, though at times cognizable on a motion to dismiss where there is no real dispute as to the manner of acceptance, **[**63]** would not be appropriate grounds for dismissal in the instant case. See [In re Marceca, 129 B.R. 371, 374 \(Bankr. S.D.N.Y. 1991\)](#) ("If, within the framework of the complaint, evidence may be introduced, such as a written agreement upon which the claim is based, which will sustain a grant of relief to the plaintiff, the complaint is sufficient. . . . In the instant case, it cannot be concluded from the face of the complaint that the agreement upon which plaintiff . . . relies is not in writing, as required by the statute of frauds.") (citing [Sams v. United Food & Commercial Workers Int'l Union, 866 F.2d 1380 \(11th Cir. 1989\)](#)); ¹⁴ cf. [Held v. \[*252\] Kaufman, 91 N.Y.2d 425, 433, 671 N.Y.S.2d 429, 433, 694 N.E.2d 430 \(1998\)](#) (holding,

¹⁴ Merrill Lynch and Bear Stearns have challenged the applicability of *In re Marceca*, given that a copy of a signed, written agreement was actually supplied in opposition papers by the plaintiff in that case. However, the *In re Marceca* court specifically

despite plaintiff's submission of opposition affidavit clarifying that contract between plaintiff and defendant was in fact oral, that dismissal of contract-based claim for fraud in the inducement would not be appropriate under [N.Y.C.P.L.R. 3211](#); explaining that "although plaintiff ultimately will have the burden to submit evidentiary facts taking the agreement outside the Statute of Frauds . . . we must credit the [**64] assertions in plaintiff's surreply papers suggesting certain factual grounds which may defeat the Statute of Frauds defense."); [Luckel v. Kolinsky, 160 A.D.2d 1172, 1173, 554 N.Y.S.2d 374, 375](#) (3d Dep't 1990) ("HN27↑") As to defendant's argument that the Statute of Frauds bars plaintiff's action, dismissal should not result for that reason [under [N.Y. C.P.L.R. 3211](#)] unless it can be said that no significant dispute exists as to the sufficiency of the memoranda that satisfies the Statute of Frauds.") (citations omitted).

[**65] At some juncture -- perhaps in the not-too-distant future -- the LAB may of course need to do much more than simply allege a "communication" of acceptance by Bear Stearns or Merrill Lynch. Even setting aside the Brokers' contentions regarding New York's statute of frauds, the very terms of the October letters appear to demand acceptance in writing.¹⁵ However, for the time being the LAB's contract claims against Merrill Lynch and Bear Stearns withstand this line of attack.

C. Adequacy of Consideration

[HN28↑](#) Under New York law, a contract unsupported by consideration is generally invalid. If the promisor loses nothing, and the promisee acquires [**66] nothing by an arrangement, then there is no valid consideration. See [Kinley Corp. v. Ancira, 859 F. Supp. 652, 657 \(W.D.N.Y. 1994\)](#) (citing [Manufacturers Hanover Overseas Capital Corp. v. Southwire Co., 589 F. Supp. 214, 219 \(S.D.N.Y. 1984\)](#)).

Sufficient consideration, however, may be provided either by a benefit to a promisor or a detriment to the promisee. See [Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 464, 457 N.Y.S.2d 193, 196-97, 443 N.E.2d 441, 444 \(1982\)](#). As the New York Court of Appeals explained in *Weiner*, "it is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." *Id.* (quoting [Hamer v. Sidway, 124 N.Y. 538, 545, 27 N.E. 256, 257 \(1891\)](#)).

[HN29↑](#) Under traditional principles of contract law, the parties to a contract are entitled to make their own bargain, "even if the consideration exchanged is grossly unequal or of dubious value." [Apfel v. Prudential-Bache Sec. Inc., 81 N.Y.2d 470, 475, 600 N.Y.S.2d 433, 435, 616 N.E.2d 1095, 1097 \(1993\)](#). "Far from consideration needing to be coextensive [**67] or even proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee." [Weiner, 57 N.Y.2d at 464, 457 N.Y.S.2d at 197, 443 N.E.2d at 445](#). However, "n either a promise to do that which the promisor is already bound to do, nor the performance of an existing legal obligation constitutes valid consideration." [Tierney v. Capricorn Investors, L.P., 189 A.D.2d 629, 631, 592 N.Y.S.2d 700, 703](#) (1st Dep't 1993); see [FDIC v. Hyer, 66 A.D.2d 521, 529, 413 N.Y.S.2d 939, 944](#) (2d Dep't 1979) (same).

The Brokers contend that any agreements premised upon the October letters are void for want of consideration, [*253] as the language of those letters was merely precatory and neither a detriment nor a benefit of legal

rejected that plaintiff's attempt to supplement the pleadings with the written agreement. See [129 B.R. at 374](#) ("Richman . . . proposes to prove that the agreement described in the Second Claim is reflected in a writing and forms the basis for his claim However, this court will not consider matters outside the complaint in the context of [Fed. R. Civ. P. 12\(b\)\(6\)](#)."). The court also based its decision not on the written agreement, but on the conclusions that could be drawn from the face of the complaint. See *id.* ("Accordingly, apart from the fact that plaintiff, Richman, submitted a copy of the written agreement with his answering papers on this motion, the complaint sufficiently asserts a claim against the debtor and affords him an opportunity to present any objections, including the statute of frauds defense.").

¹⁵ The letter to Bear Stearns states: "Please acknowledge your receipt of and agreement with the terms of this letter by signing in the space provided below. You may return it to us either by mail or by fax." (de Leeuw Decl. Ex. 6.) At the bottom of the letter text appears a signature line with the caption "I am in agreement with the terms of this letter." *Id.*

consequence were ever exchanged. At most, the Brokers contend, the letters were non-binding requests for accurate marks -- and any "acceptances" non-binding statements of future intention.

To be sure, the October letters were not drafted in the clearest terms possible. The Brokers observe that Askin's caution that the amount of business done with the Brokers would be "reduced [**68] significantly" if marks were not provided is problematic, because Askin would not necessarily be obligated to continue doing business with the Brokers on the Funds' behalf, agreement on the terms of the October letter notwithstanding. The Brokers also make much out of the letters' statement that Askin would "like" mark sheets to be provided, characterizing the letters merely as "requests" for gratuitous compliance.

There are a number of potential approaches to the complex contractual issues presented in this case, but the Court is unable to say that any contracts formed pursuant to the October letters were necessarily invalid for want of consideration.

One plausible approach towards the October letters, which reads any agreements formed pursuant to the letters in light of the preexisting relationships between the Funds and the Brokers, finds consideration for an agreement in the actual benefits received by the Brokers as a result of later transactions and purchases of securities. Included in these benefits were substantial payments to the Brokers, as well as the benefits flowing from the Funds' purchases of deal-driving tranches of securities. Under this analysis, the actual consideration [**69] provided to the Brokers would be the same as that furnished under the pre-letter arrangements between the parties. While the Funds were always free to take their business elsewhere, and the Brokers were entitled to cease doing business with the Funds, transactions were to be governed by the terms of all agreements conditioning those transactions, including any customer or repo agreements.

A second approach to the October letters is to find consideration in the Funds' actual forbearance from reducing their business with the Brokers. While the Funds were of course free to take their business elsewhere, despite the terms of the October letters, their forbearance from doing so would certainly constitute a detriment.

Still another approach to the consideration issues raised by the Brokers -- though one not specifically mentioned by any of the parties to the instant litigation -- would be to find that consideration was not required at all, assuming that the October letters merely effected a modification of preexisting contracts between the Funds and the Brokers, and that the modification was in writing. [HN30](#) Under New York law, a written, signed agreement to discharge or modify an existing [**70] obligation is not rendered invalid because of the absence of consideration. See [N.Y. Gen. Oblig. Law § 5-1103](#) (McKinney's 1989); [Scientific Holding Co. v. Plessey Inc., 510 F.2d 15, 21 \(2d Cir. 1974\)](#); [Mega-Trends Int'l, Inc. v. Beeba's Creations, Inc., 1995 U.S. Dist. LEXIS 7236, No. 93 CIV. 8227 \(JSM\), 1995 WL 322153, at *3 \(S.D.N.Y. May 26, 1995\)](#); [GG Managers, Inc. v. Fidata Trust Co. New York, 215 A.D.2d 241, 241-42, 626 N.Y.S.2d 488, 490 \(1st Dep't 1995\)](#).

In its papers, Bear Stearns has specifically contended that because Bear Stearns' customer agreements with the Funds do not allow for modifications of the business relationship between the parties "absent a written instrument signed by an authorized representative of Bear Stearns," (de Leeuw Decl. Ex. 7), the LAB's failure to allege the existence of a written acceptance of the October letter requires dismissal. If, as Bear Stearns suggests however, the October letter could merely have modified the terms of the extant agreement(s) between Bear Stearns and the Funds, any acceptance in writing would then have brought the modifications within [*254] the ambit of [section 5-1103](#). See [Camrex Contractors \(Marine\) Ltd. v. Reliance Marine Applicators, Inc., 579 F. Supp. 1420, 1430 \(E.D.N.Y. 1984\)](#). [**71] While the absence of written modification might ultimately merit dismissal given the terms of underlying customer agreement(s), the existence of such a writing would redound to the LAB's benefit and render unnecessary any additional consideration.

The LAB has suggested that any agreements premised upon the October letters are analogous to the generic customer agreements commonly used to govern relations between brokers and their clients. Alternatively, the LAB has analogized any agreement to other forms of binding agreements premised upon relationships that are terminable at-will -- namely, at-will employment relationships where forbearance from either quitting or firing itself

supplies the consideration for secondary contracts, such as contracts not to compete. These are useful, if imperfect, analogies.

Under most brokerage customer agreements, neither the customer nor the broker is obligated to transact any specific amount of business with the other. If the client comes to realize that its investment needs are better met by using another broker, client and broker typically part ways without any contractual cause of action arising. If that client happens to purchase a security through [**72] that broker, however, there is little question but that the customer agreement is enforceable and that the transaction is governed by the terms of that agreement -- consideration having been provided both by the maintenance of a customer account and by the exchanges of rights, benefits, and obligations flowing from the specific transaction itself. This analogy is quite close to the first approach discussed above. The consideration conferred, given this approach, was emphatically not *more* purchases or an *unreduced* amount of purchases, but rather purchases simpliciter and the other exchanges of rights and obligations those purchases entailed.

The LAB'S comparison of the October letters to contracts formed attendant to at-will employment contracts is also a useful analogy, given the second approach to consideration stated above. In a number of cases, both within and without New York, courts have found that [HN31](#)[¹⁵] consideration for a contract may be supplied by actual forbearance from exercising one's rights to unilaterally cancel a contract terminable at will; even though there was no obligation to continue the at-will relationship in the first instance. See [Taylor v. Blaylock & Partners, L.P., 240 A.D.2d 289, 290, 659 N.Y.S.2d 257, 259](#) [**73] (1st Dep't 1997); [Barger v. General Elec. Co., 599 F. Supp. 1154, 1161 \(W.D. Va. 1984\)](#) ("An employee's continued service and his failure to exercise his power to terminate his employment is sufficient consideration for an additional promise by the employer which modifies the terms of the employment contract."). Forbearance, these decisions indicate, can constitute consideration, even where the forbearing party is not contractually obligated to refrain from exercising its rights. See [Taylor, 240 A.D.2d at 291, 659 N.Y.S.2d at 259](#) ("Because plaintiff's employment was terminable at will, defendant can also be said to have given consideration by forgoing its right of termination under the contract ([Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256](#) [forbearance from exercising a right constitutes consideration])."); [Foley v. Pac Am Or Bearing, Inc., 105 A.D.2d 1120, 1120, 482 N.Y.S.2d 605, 605](#) (4th Dep't 1984) (finding alleged oral modification of contract enforceable "because it was supported by the consideration of defendant's forbearance in promising to employ plaintiff between 1978 and 1981") (citations omitted).

The Brokers have made much [**74] of the fact that the October letters did not themselves obligate the Funds to do anything, or set a terminus for the provision of marks. However, the Brokers' emphasis on the absence of any requirement that the [**255] Funds actually maintain their business with the Brokers overestimates the consideration actually required to form a valid contract. [HN32](#)[¹⁶] It is consideration that is required to form a contract under New York law, not rigorous reciprocity or mutuality. See [Weiner, 57 N.Y.2d at 464, 457 N.Y.S.2d at 196, 443 N.E.2d at 444](#). Though any contracts formed pursuant to the October letters certainly did not demand that the Funds continue to transact business with the Brokers, the Complaint alleges that they did so. If the Funds or their advisor actually forbore reducing their purchases from the Brokers and increasing their business with other brokers as a result of agreements pursuant to the October letters, then consideration was adequate. While Merrill Lynch has made the point that any forbearance on the part of the Funds could not provide consideration for contracts between the Brokers and Whitehead/Sterling, and the DLJ defendants have stressed that the October letter "stands [**75] alone, ancillary to no other arrangement," (DLJ Reply Mem. Supp. Mot. Part. Dismiss at 10), as explained earlier regarding standing it is entirely possible that Askin was functioning in his capacity as an agent of the Funds when he sent the October letters. Given this possibility, it would not be proper to view the October letters in a vacuum.

Moreover, the Complaint alleges that the Funds and the Brokers continued to transact business well after the October letters were sent. To the extent that the October letters could be read to merely add terms to the pre-existing relationships between the Funds and the Brokers, the consideration for any agreement would be supplied by post-letter transactions and the real benefits those transactions imparted to the brokers -- benefits that the Funds were not under any preexisting duty to provide. At the very least, one could read the October letters as giving rise to transaction-specific obligations, requiring the Brokers to supply accurate and updated marks for all securities

purchased by the Funds subsequent to agreement on the letters' terms. It is worth mentioning at this juncture then-judge Cardozo's observation in *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), [**76] that "[HN33¹⁶] a promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed." *Id. at 91, 118 N.E. at 214* (citations omitted).

Liebowitz v. Elsevier Science Ltd., 927 F. Supp. 688 (S.D.N.Y. 1996), upon which the Brokers rely, does not require a different result. In *Liebowitz*, a case involving several disputes between parties that had contracted to publish scientific journals, the plaintiffs alleged that one plaintiff had requested that the defendant prepare periodic status reports containing information about production schedules, manuscript flow, and page budgets, and that the defendant agreed to do so orally. See *id. at 702* & n.24. These reports were not called for by an earlier contract governing the relationship between the parties. See *id. at 703*. Holding that the defendant's alleged agreement to provide status reports was not supported by any consideration whatsoever, the court observed that the agreement sought to impose a continuing obligation upon the defendant without any corresponding benefit to the plaintiff. See *id.*

Setting aside the *Liebowitz* court's failure [**77] to explicitly mention that a bargained-for detriment to the promisee could also supply consideration, the facts of that case afford ample grounds for distinguishing that decision. While the fact that the *Liebowitz* case involved an agreement to provide status reports supplemental to the parties' earlier agreement makes it superficially similar to the case at bar, in which the Brokers are also alleged to have agreed to provide the Funds with supplemental information concerning marks, the case is not analogous. In that case, there was no claim that the plaintiffs engaged in any forbearance whatsoever based upon the defendant's agreement to provide status reports. Indeed, though it concerns a [*256] slightly different point, the *Liebowitz* court explicitly noted that the plaintiffs had not relied to their detriment upon the defendant's oral agreement to provide status reports.

Moreover, the pre-existing contractual relationship between the parties in *Liebowitz* was markedly different from that between the Brokers and the Funds in this case. In *Liebowitz*, the earlier contract between the parties had governed multiple aspects of an ongoing publishing relationship, rather than a series [**78] of discrete transactions. This is quite different from the contractual arrangements at issue in the case at bar, where the Funds were at all times free to cease purchasing securities from the Brokers, but those transactions in which they were involved were to be governed by a particular set of contractual agreements.

Consequently, dismissal of this claim would not be appropriate at this time based upon inadequacy of consideration. Refusal to agree to the terms of Askin's October offer may not have eliminated all business relations between the Funds and resisting Brokers. It was within the Brokers' rights to gamble that business would not decline significantly, and to keep their original agreements with the Funds unaltered by any supplemental agreements. However, if the Brokers agreed to supply certain marks as part of their future relationship with the Funds, and the Funds either engaged in forbearance because of that agreement or participated in transactions conditioned by the letters' terms,¹⁶ consideration was supplied. The LAB's contract claims premised upon the October letters neither assert a promise to do that which the LAB was already bound to do, nor are they based [**79] upon the performance of any preexisting legal obligation. Finally, to the extent that the Brokers agreed in writing to a modification of the Brokers' customer agreement(s), or to any other contracts governing the Broker-Fund relationships, consideration would not be required at all.

D. *Miscellanea*

The Brokers' other varied and sundry grounds for dismissal of Count III are rejected as well.

¹⁶ [HN34¹⁶](#) As a general rule, even a contract unenforceable at its inception because of lack of consideration or mutuality "may nevertheless become valid and binding to the extent that it has been performed." *Howard v. Mercury Record Corp.*, 178 F.2d 449, 453 (5th Cir. 1949) (citing *Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 67 L. Ed. 1086, 43 S. Ct. 592 (1928)).

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Bear Stearns contends that, even had a contract been formed pursuant to the October letter, Bear Stearns' failure to provide certain information required by that letter manifested Bear Stearns' termination of the contract. However, this line of [**80] attack depends almost exclusively on monthly mark sheets, attached as exhibits to Bear Stearns' papers, that cannot be appropriately considered on a 12(b)(6) motion.

The DLJ defendants have alleged that the LAB's continued purchase of securities from DLJ, even though DLJ provided a second set of marks between October of 1992 and February of 1994, constituted a waiver of the Funds' rights to enforce any contract. However, as with the Bear Stearns defendants' contentions regarding termination, this waiver claim cannot be determined within the four corners of the Complaint or exhibits appropriately considered on a motion to dismiss, and would not be appropriate grounds for dismissal.

Additionally, that the October letters do not themselves contain an explicit time-frame for the Brokers' performance - other than a recitation that the letters shall be "effective October 1992" -- does not merit dismissal. The fact that the agreements alleged do not contain a specified time for performance does not constitute a form of indefiniteness that would warrant dismissal at this pleadings stage. See [Held, 91 N.Y.2d at 432, 671 N.Y.S.2d at 433](#). [**257] Moreover, the terms of a contract need [**81] not be fixed with absolute certainty for a contract to have legal efficacy. See Restatement (Second) of Contracts § 33, cmt. a (1981) ("HN35[↑] The actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon."). Certain terms of a contract may be supplied by the parties' prior course of dealings. See *New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 31 (2d Cir. 1997). The time-frame for performance may later be revealed by documents or papers not considered by the Court upon this motion to dismiss, or by interpretation of the October letters' terms in light of prior dealings among the parties. See [Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447, 453 \(2d Cir. 1977\)](#) ("Professor Corbin has observed that a court should be slow to deny enforcement 'if it is convinced that the parties themselves meant to make a 'contract' Many a gap in terms can be filled, and should be, with a result that is consistent with what the parties said and that is more just to both of them than would be a refusal of enforcement.'") (quoting Corbin [**82] on Contracts § 97, at 425-26).

The DLJ defendants' claims that the LAB fails to allege that DLJ actually breached any obligations created by the October letter are also rejected. DLJ has asserted that the LAB has only alleged that the LAB breached the October letter by superseding its initial month-end mark reports with revised reports containing different marks, and that nothing in the Complaint indicates that its initial month-end marks were accurate. Even if the revised marks were somehow inaccurate, DLJ contends, DLJ performed its obligations under the precise terms of the October letter. However, the Complaint alleges that DLJ actually "superseded" the marks provided in its initial month-end price reports with the revised and inaccurate marks, and that the revised marks were also transmitted on month-end price report forms. Compl. PP 125-26. The Complaint also states that DLJ confirmed the accuracy of the revised marks in response to Price Waterhouse's request that DLJ confirm the accuracy of its December 1992 and 1993 month-end marks. Compl. P 127. There is therefore no bright-line distinction to be made, on the face of the Complaint, between the revised marks and the marks [**83] DLJ may have been obligated to provide pursuant to the October letter -- insofar as the LAB's contract claim against DLJ is concerned. DLJ strains excessively and unsuccessfully to parse the terms of the October letter, but the Complaint sufficiently alleges a breach on DLJ's part.

Given the above holdings, the Court need not reach the parties' disputes concerning "part performance." The Brokers' motions to dismiss the LAB's claim for breach of contract contained in Count III of the Complaint are denied.

IV. Count IV Against DLJ and Comerford Alleging Common Law Fraud is Dismissed

As was explained in [Granite II, 17 F. Supp. 2d at 286, HN36[↑]](#) there are five basic 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. See [May Dep't Stores Co. v. International Leasing Corp., 1 F.3d 138, 141 \(2d Cir. 1993\)](#); [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). **[**84]** Additionally, a plaintiff must comply with the heightened pleading standard of Rule 9(b), Fed. R. Civ. P.

In Count XIII of its First Amended Complaint, the LAB alleged that the Brokers misrepresented certain securities, particularly inverse IOs, as bearish or only **[*258]** 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 LAB contended, the Funds bought securities that they would not otherwise have purchased, and they held onto securities that they would otherwise have sold. In *Granite II*, these fraud claims were dismissed, in part because the LAB had not adequately pleaded reasonable reliance. 17 F. Supp. 2d at 288-91.

Count V of the LAB's current Complaint specifically alleges that DLJ and Comerford provided erroneous marks to the Funds, "impliedly representing that the marks were accurate when DLJ and Comerford knew that the marks were inaccurate or recklessly disregarded whether they were accurate or inaccurate." Compl. P 232. The motive for this provision of inaccurate marks were DLJ and Comerford's desires that the Funds purchase volatile **[**85]** "deal driving" tranches of DLJ's CMO offerings, Compl. PP 38, 233, the sale of which was a prerequisite to the sale of the remainder of the tranches. See Compl. P 5. According to the Complaint, the "Funds were unaware of the falsity of DLJ's and Comerford's statements [regarding the marks] and justifiably relied upon them in valuing their portfolios, in purchasing certain securities, and in not selling various inverse IOs and other securities." Compl. P 235. Conversely, both DLJ and Comerford are alleged to have been well aware "that the Funds relied on the CMO prices or 'marks' that the Brokers reported, so that the Funds and their investors could assess how the portfolios as a whole and particular CMOs were reacting to, and would react to, changing interest rates, as well as to determine if the Funds were conforming to their stated investment objectives." Compl. P 50.

More specifically, the LAB alleges that:

DLJ provided the Funds with marks that did not accurately reflect DLJ's internal valuation of the securities. In every month between October 1992 and February 1994, DLJ provided the Funds with two sets of marks. DLJ provided an initial month-end price report, but **[**86]** DLJ also superseded that report with a revised report that contained inaccurate revised marks.

Compl. P 125. These revised marks are alleged by the LAB to have been inaccurate, and to have been prepared without any input whatsoever from DLJ's mortgage traders as to the value of the securities held by the Funds. Compl. P 128. In its Complaint, the LAB points to a number of occasions on which the revised marks provided by DLJ differed from DLJ's initial marks. See Compl. PP 129-35. According to the LAB, the inaccurate marks caused a myriad of problems for the Funds -- including "distorting their ability to understand their portfolios and determine whether the portfolios were being maintained in a manner consistent with their stated investment objectives," Compl. P 136, and "leading the Funds to retain [bullish] . . . securities in their portfolios when they otherwise would have sold them." Compl. P 137.

Despite the LAB's catch-all allegation that the Funds relied upon DLJ's statements regarding marks, however, the LAB never ventures to actually plead facts that underlie this reliance. The LAB's essential claim of misrepresentation revolves around DLJ's provision of erroneous **[**87]** "revised" marks. However, the LAB alleges only on information and belief that "the Funds understood that DLJ's revised marks represented DLJ's actual revised valuations of the bonds . . . [and] reasonably and justifiably relied on these revised marks as representing DLJ's actual valuations of the bonds." Compl. P 126.

"**HN37**[↑] 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 **[*259]** 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, a complaint must adduce specific facts supporting a strong inference of fraud **[**88]** or it will not satisfy even a relaxed pleading standard.").")

The LAB's "information and belief" pleadings concerning the Funds' reliance upon DLJ's revised marks are insufficient. The Funds' reliance on the marks is not a matter "peculiarly" within the defendants' knowledge, as it must for a fraud pleading premised on "information and belief." See [Campaniello Imports, 117 F.3d at 664](#). Indeed, the Funds themselves are better positioned than anyone else to know what their actual reliance was. The LAB's common law fraud claim against DLJ and Comerford could therefore be dismissed for failure to meet the specificity required by [Rule 9\(b\)](#) alone.

Even were the LAB's pleadings not found wanting under [Rule 9\(b\)](#), however, its allegations of reasonable reliance would be insufficient to state a claim under New York law. Though the LAB's claim in Count IV is distinct from Count XIII of the First Amended Complaint, dismissal is appropriate under a similar line of reasoning.

Under New York law, the LAB must establish actual, direct reliance upon the marks supplied by DLJ. 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, \[*89\]](#) at *5 (S.D.N.Y. July 14, 1998); [Turtur v. Rothschild Registry Int'l, Inc., 1993 U.S. Dist. LEXIS 11939, No. 92 Civ. 8710 \(RPP\), 1993 WL 338205](#), at *6 (S.D.N.Y. Aug. 26, 1993). Once allegations of actual, direct reliance are adequately pleaded, however, the reliance inquiry does not stop. [HN38](#) [↑] Under New York law, "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.), cert. denied, 139 L. Ed. 2d 112, 118 S. Ct. 169 (1997); [Palmadessa, 874 F. Supp. at 588](#).

Though the LAB has contended otherwise, whether a plaintiff has adequately pleaded justifiable reliance can be a proper subject for a motion to dismiss. See [Brown v. E.F. Hutton Group, Inc., 991 F.2d 1020, 1032-33 \(2d Cir. 1993\)](#); [Independent Order of Foresters v. Donaldson, Lufkin & Jenrette Inc., 919 F. Supp. 149, 154-55 \(S.D.N.Y. 1996\)](#).

[HN39](#) [↑] In evaluating whether a plaintiff has adequately [[**90](#)] 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, 991 F.2d at 1032](#). 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., 224 A.D.2d 231, 234, 638 N.Y.S.2d 11, 14](#) (1st Dep't 1996); see also [Belin, 1998 WL 391114](#), at **5-8. Reasonable reliance may be found wanting where the plaintiff failed to conduct its own diligent research into the risks or benefits of a particular transaction. See [Independent Order of Foresters, 919 F. Supp. at 154](#); [McCoy v. Goldberg, 883 F. Supp. 927, 936 \(S.D.N.Y. 1995\)](#). Sophisticated parties may well be under a duty to make affirmative efforts to protect themselves from misrepresentations, see [Lazard Freres, 108 F.3d at 1543](#), and cannot be heard to complain when they fail to make diligent inquiries. See [Qatar Nat'l Navigation, \[*91\] & \[Transp. Co. I\\[*260\\] v. Citibank, N.A., 1998 U.S. Dist. LEXIS 12852\]\(#\), No. 89 Civ. 464\(CSH\), 1998 WL 516117](#), at **24-25 (S.D.N.Y. Aug. 20, 1998), aff'd, No. 98-9322 (2d Cir. June 29, 1999).

Just as *Granite II* held that no reasonable investor could rely solely on short-hand phrases like "bullish" or "bearish" in selecting complex CMOs and mortgage-backed securities, [17 F. Supp. 2d at 290](#), no reasonable investor could rely solely on month-end valuations or portfolio analyses made after the purchase without conducting some independent due diligence -- let alone valuations provided solely by DLJ. The LAB's allegation that the Funds' reliance on DLJ's marks was reasonable is insufficient in light of ACM's own obligations to research and evaluate the Funds' holdings. While the LAB now contends that the marks provided by DLJ to the Funds were somehow integral to ACM's own analysis, this would not itself relieve the Funds from their obligations to independently value their portfolios. The very purpose of the investment advisory agreements was for the Funds to have ACM evaluate, select, and monitor the Funds' holdings, in addition to the multiple other services ACM was supposed to provide. The [[**92](#)] LAB nowhere contends that the Funds' receipt of DLJ's marks somehow satisfied the Funds' duties to conduct their own due diligence.

Even assuming that the marks DLJ provided were deliberately false, justifiable reliance has once again been insufficiently pleaded. Though the LAB has conveniently omitted various details of ACM and Askin's duties and

breaches that were explicitly relied upon in *Granite II*,¹⁷ the Complaint itself still militates against any conclusion that the Funds' wholesale reliance on DLJ's marks was reasonable. As the Complaint states, it was the duty of Askin and ACM, among other things, "to construct portfolios of low-risk, high-quality securities for Corp. and Partners that were market neutral, so as to eliminate risks resulting from interest rate movements, and to construct a portfolio for Quartz that was market directional without exposing Quartz to excessive interest rate risk." Compl. P 77. ACM and Askin were also "responsible for continually monitoring each of the Funds' portfolios and for adjusting the portfolios by purchasing and selling appropriate securities." Compl. P 77. Despite this responsibility, the Complaint alleges that "ACM and Askin did [**93] not possess or employ adequate analytic models, did not understand how certain CMOs, particularly inverse IOs, would react to changes in interest rates, and were unable to determine the effective duration of the Funds' portfolios." Compl. P 85. The Complaint also alleges that ACM "did not have the capacity to determine, at the time it committed to purchase, whether [forward-settling] . . . CMOs would be consistent with a market neutral (or even a directional) strategy, which made them inappropriate for the Funds' portfolios." Compl. P 108.

[**94] Askin and ACM were not widows or orphans, and 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. See *Schlaffer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 98 (2d Cir. 1997) ("The parties involved [*261] in this litigation are not widows or orphans. **HN41** [↑] '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.'") (quoting *Grumman Allied Indus. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir. 1984)). The Funds collectively possessed close to \$ 400 million in assets in March 1994, see Compl. P 7, and invested in highly complex and high-risk securities. Indeed, the LAB alleges that the Funds invested in especially volatile or "toxic" CMO tranches, see Compl. P 14, and that the response of certain of those CMOs to interest rate fluctuations was difficult to predict. See Compl. P 36.

The very purpose of the investment advisory agreements between ACM and the [**95] Funds was for the Funds to have Askin and ACM evaluate and monitor the Funds' holdings. "By virtue of its position as registered advisor to and manager of the Funds," ACM owed fiduciary and contractual duties to the funds to "make investments prudently, with due care, and in accordance with the Funds' stated investment objectives." Compl. P 76. These duties were breached by ACM. Instead of keeping their obligations to the Funds, Askin and ACM instead relied on Broker "recommendations, representations, valuations, and reports and they . . . exposed the Funds to near-complete "market" -- i.e., Broker -- control. Compl. P 79. Despite the LAB's internally inconsistent claim that Broker marks were somehow required to meet ACM's advisory obligations, see Compl. P 77, this reliance constituted a wholesale abdication of ACM's responsibilities -- ACM and Askin's "analytic weaknesses" notwithstanding. Compl. P 85.

Just as this lack of due diligence was held in *Granite II* to belie any representation that Askin's reliance on February marks or DLJ's September 1993 valuation was justifiable or reasonable, see *17 F. Supp. 2d at 290-91*; this lack of due diligence belies [**96] the reasonableness of any reliance that the Funds may have had on the accuracy of the marks supplied by DLJ. Try as the LAB might, it cannot transform wholesale breaches of duty by the Funds' investment advisor into a claim against a broker selling the Funds securities at arm's length. Thus, Count IV of the Complaint is dismissed.

¹⁷ For example, the Complaint omits any allegation that 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.*) The Complaint also omits other details of ACM's nonfeasance, a catalogue of which is unnecessary.

HN40 [↑] Because an amended pleading supersedes the original pleading, facts not incorporated in the amended pleading are generally considered *functus officio*. See *Kelley v. Crosfield Catalysts*, 135 F.3d 1202, 1204-05 (7th Cir. 1998); *Barris v. Hamilton*, 1999 U.S. Dist. LEXIS 7225, No. 96 CIV. 9541(DAB), 1999 WL 311813, at *2 (S.D.N.Y. May 17, 1999). This being the case, the LAB's prior allegations have not been relied upon in deciding the instant motions to dismiss.

V. The LAB Has Not Adequately Alleged Common Law Fraud, Based on the Brokers' Sale of Securities to the Funds at Excessive Markups (Count V)

In Count V of the Complaint, the LAB has asserted a claim for common law fraud based on the Brokers' alleged sale of securities to the funds at excessive markups. This claim was not present in the First Amended Complaint, and was therefore not addressed in *Granite II*.

The gravamen of this particular claim is that the Brokers sold CMO securities to the Funds at prices well in excess of either the prices at which the Brokers had obtained those instruments or the values that the Brokers had themselves assigned to the securities. The LAB claims that the Brokers passed these markups along to the Funds without full disclosure, and that the dealer-customer relationship between the Funds and the Brokers gave [**97] rise to an "implied representation that the prices they charge are reasonably related to the fair market prices of the securities offered for sale." Compl. P 240. The LAB contends that the Funds were themselves unable to discover the markups prior to 1998, as it was only then that the Funds had access to the true acquisition costs of the bonds sold to the funds. The LAB further contends that the Funds would not have purchased securities sold at such extensive markups had those markups been disclosed.

In support of its claim, the LAB has offered multiple examples of CMOs that it believes were sold to the Funds at excessive [*262] markups. DLJ is alleged to have sold at least fifteen CMOs at prices well above their fair market price, recouping markups ranging from 3.5% to 36.7%. Compl. P 115. Bear Stearns is alleged to have sold the Funds at least nine CMOs at excessive markups, ranging from 3.7% to 13.4%. Compl. P 116. Merrill Lynch is alleged to have sold at least two CMOs to the Funds at prices between 5.8% and 8.5% above their fair market value. All of the Brokers are claimed to have recovered significant profits as a result of these markups.

As the Brokers have correctly contended, Count [**98] V of the Complaint is essentially a "shingle theory" claim. The claim is that, as brokers selling securities, the defendants impliedly represented that the prices they charged the Funds for mortgage-related securities bore some reasonable connection to the fair market value of those securities or the price at which the Brokers obtained the securities. When a broker hangs out her "shingle" and does business with the public, the argument goes, the broker implicitly represents that customers will be dealt with fairly and cannot exploit the customer's trust and ignorance for profits higher than those that might be realized from an informed customer. See *In re Duker & Duker, 6 S.E.C. 386 (1939)*; *Charles Hughes & Co. v. SEC, 139 F.2d 434, 437-38 (2d Cir. 1943)*; 8 Louis Loss & Joel Seligman, *Securities Regulation* 3776-77 (1991).

Over the past six decades, the shingle theory has provided a remedy against brokers under federal law -- first to Government regulators and, later, to injured customers bringing private actions. [HN42](#) Under the shingle theory, a broker-dealer who sells a security without disclosing that the price at which he is selling is not reasonably [**99] related to the current fair market price of the security violates the anti-fraud provisions of the federal securities laws -- namely section 10(b) of the Securities Exchange Act of 1934, [Rule 10b-5](#) promulgated thereunder, and section 17(a) of the Securities Act of 1933. See, e.g., *Grandon v. Merrill Lynch & Co., 147 F.3d 184, 189-90, 192-93 (2d Cir. 1998)*; *SEC v. First Jersey Secs., Inc., 101 F.3d 1450, 1469 (2d Cir. 1996)*, cert. denied, 139 L. Ed. 2d 21, 118 S. Ct. 57 (1997); *Charles Hughes & Co., 139 F.2d at 437-38*; Loss & Seligman, *supra*, at 3772-98. As the Second Circuit observed in *Grandon*, the Supreme Court "has a rich tradition of interpreting the antifraud provisions of the federal securities laws expansively." [147 F.3d at 192](#). The shingle theory is an outgrowth of that general tradition, and has been expanded over the years to cover excessive markups of a wide variety of securities:

We have held previously that sales of securities by broker-dealers carry an implied representation that the prices charged are reasonably related to the prices charged in an open and competitive market. *First Jersey, 101 F.3d at 1469* [**100] (citing *Charles Hughes & Co., 139 F.2d at 437*). Moreover, we have held that "a broker-dealer who charges customers retail prices that include an undisclosed, excessive markup violates § 17(a) and § 10(b) of the securities laws." *First Jersey, 101 F.3d at 1469*.

True, our decision in *First Jersey* was in the context of an SEC enforcement action regarding excessive markups on over-the-counter securities. The time has come, however, to extend the *First Jersey* principles to private actions arising out of excessive markups on municipal bonds.

147 F.3d at 193. A considerable amount of attention has been devoted by both the courts and regulators to evaluating the reasonableness of markups in the sale of securities, as appropriate markups may vary depending on the market, the position of the broker, and the types of securities involved. See generally 3C Harold S. Bloomenthal, Securities and Federal Corporate Law § 12.13 (1997) (discussing calculation of appropriate dealer markups and markdowns); Anthony W. Djinis & Lee A. Pickard, Fair Prices: Markups, [*263] Markdowns and Guidelines for Determining Current Market Price, 744 PLI/Corp 239 [**101] (1991) (same); Grandon, 147 F.3d at 193 (holding that, in assessing whether markups on municipal bonds are excessive, "courts should begin with the factors set forth under MSRB [Municipal Securities Rulemaking Board] Rule G-30."); Banca Cremi v. Alex, Brown & Sons, Inc., 132 F.3d 1017, 1033 (4th Cir. 1997) ("Although each case requires an independent analysis for determining whether a given markup is reasonable, the Board of Governors of the NASD has determined that, as a general guideline, a five percent markup is reasonable.").

However, the LAB's excessive markup claim has not been brought pursuant to section 10(b), Rule 10b-5, or any other federal law or regulation, but rather is a common law claim alone. A claim under the federal securities laws was not brought, perhaps, as a result of the time limits articulated by the Supreme Court in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991) (holding that statute of limitations for section 10(b) claims is one year from date of discovery, but no longer than three years from the date of the alleged fraud). The LAB claims that New York law affords the Funds [**102] relief for common law fraud, as New York recognizes that omissions as well as misrepresentations may give rise to a claim for fraud. Nevertheless, neither the parties' memoranda nor this Court's independent research have revealed any explicit New York authority supporting a common law fraud claim based upon the shingle theory, let alone a shingle theory claim for excessive broker markups.

It is true that HN43[^A] New York law allows recovery for frauds based upon omissions, conduct, or speech that are tantamount to false representations. See Banque Arabe et Internationale v. Maryland Nat'l Bank, 57 F.3d 146, 153, 155 (2d Cir. 1995); Minpeco v. Conticommodity Servs., Inc., 552 F. Supp. 332, 336 (S.D.N.Y. 1982) (collecting cases). As the Second Circuit explained in Brass v. American Film Tech., 987 F.2d 142 (2d Cir. 1993):

New York recognizes a duty by a party to a business transaction to speak in three situations: first, where the party has made a partial or ambiguous statement, on the theory that once a party has undertaken to mention a relevant fact to the other party it cannot give only half of the truth; second, when the parties [**103] stand in a fiduciary or confidential relationship with each other; and third, "where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge."

Id. at 150 (quoting Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A., 731 F.2d 112, 123 (2d Cir. 1984)) (citations omitted); see Banque Arabe, 57 F.3d at 155.

The LAB has not alleged that the Brokers made partial or ambiguous statements concerning markups, or that the Brokers gave a less than truthful answer to any Fund's questioning about the extent of markups, but rather that the Brokers made no statements about markups at all. Furthermore, the Brokers did not have discretionary authority over the Funds' holdings, and owed no fiduciary duties to the Funds under New York law such as would give rise to a duty of disclosure. HN44[^A] Under ordinary circumstances a broker owes no fiduciary duties to a purchaser of securities, see Perl v. Smith Barney Inc., 230 A.D.2d 664, 666, 646 N.Y.S.2d 678, 680 (1st Dep't 1996), except those duties necessarily attendant to the "narrow task of consummating [**104] the transaction requested." Press v. Chemical Inv. Servs. Corp., 166 F.3d 529, 536 (2d Cir. 1999) (citations omitted). The fact that the Funds allege excessive markups does not change this basic analysis. Cf. Press, 166 F.3d at 536-37 (finding no claim for failure to disclose markups given nature of broker-customer relationship under New York [*264] law, as no case law applying New York's fiduciary requirements supports broad proposition that all markups must be disclosed).

The LAB has pressed that the Brokers' charging of excessive markups gave rise to an affirmative obligation to disclose, because the brokers were in possession of superior knowledge concerning the market value of the securities it was selling the Funds. This begs the question, however, as to the real representation(s) inferred under New York law when a broker sells a security. Under the Federal securities laws, the representation of reasonable pricing is inferred. However, [HN45](#)¹⁸ the shingle theory has not developed as a generic theory of fraud liability based upon omissions, but rather a specific theory of recovery under the federal securities laws.¹⁸ A review of the cases cited by the LAB [**105] in support of its position reveals facts and circumstances rather dissimilar from those of the case at bar. See, e.g., [Minpeco, 552 F. Supp. at 334-37](#) (brokers' failure to disclose fact that increase in global price of silver was result of broker defendants' own conspiracy to monopolize silver market could constitute fraud under New York law, where brokers were alleged to have actively induced plaintiff to enter into futures contracts for short sales of silver); [Donovan v. Aeolian Co., 270 N.Y. 267, 272, 200 N.E. 815, 817 \(1936\)](#) (placement of used piano for sale in piano manufacturer's showroom, without indicating it as such, could constitute fraud; acts of manufacturer and words of salesman "may be regarded as an affirmation that the piano was taken out of stock and unused.").

[**106] The only two cases cited by the LAB that remotely support its position, [Farley v. Baird, Patrick & Co., 1995 U.S. Dist. LEXIS 12036](#), No. 90 Civ. 2168 (MBM), 1995 WL 498785 (S.D.N.Y. Aug. 18, 1995), and [Manela v. Garantia Banking Ltd., 5 F. Supp. 2d 165 \(S.D.N.Y. 1998\)](#), did not specifically address New York's embrace of the shingle theory. In *Farley*, the plaintiff had brought both federal securities claims and state common law claims, in addition to a RICO claim under [18 U.S.C. § 1962](#), based on allegations of overcharges for commissions on purchases of over-the-counter stock. Despite dueling motions for summary judgment, the *Farley* court held that summary judgment was not appropriate as to plaintiff's section 10(b), [Rule 10b-5](#), and state law claims -- as there were significant questions remaining as to the actual extent of markups charged. See 1995 WL 498785, at *1 ("The threshold factual issue underlying both parties' motions is the extent of the markups . . . charged plaintiff for the PSI and Hybrilonics shares. Without dispositive findings on this issue, summary judgment is inappropriate because plaintiff's federal and state law [**107] claims fall or stand on the extent of the markups."). [*265] However, the decision concerned state law claims that apparently paralleled timely federal claims, and never explicitly discussed New York law or the relief that New York common law affords litigants under the shingle theory of broker liability. Indeed, the decision contains no real discussion of state law at all.

¹⁸ As the Second Circuit implicitly recognized in *Charles Hughes & Co.*, the shingle theory was emphatically the result of federal regulation of securities markets, and of the SEC's interpretation of the securities laws:

We need not stop here to decide, however, how far common-law fraud was shown. For the business of selling investment securities has been considered one peculiarly in need of regulation for the protection of the investor. . . .

...

The essential objective of securities legislation is to protect those who do [not] know market conditions from the overreachings of those who do. Such protection will mean little if it stops short of the point of ultimate consequence, namely, the price charged for the securities. Indeed, it is the purpose of all legislation for the prevention of fraud in the sale of securities to preclude the sale of 'securities which are in fact worthless, or worth substantially less than the asking price.' [People v. Federated Radio Corp., 244 N.Y. 33, 40 154 N.E. 655, 658](#). If after several years of experience under this highly publicized legislation we should find that the public cannot rely upon a commission-licensed broker not to charge unsuspecting investors 25 per cent more than a market price easily ascertainable by insiders, we should leave such legislation little more than a snare and a delusion. We think the Commission has correctly interpreted its responsibilities to stop such abusive practices in the sale of securities.

58 F. Supp. 2d 228, *265L¹ 999 U.S. Dist. LEXIS 11523, **107

While the *Manela* court spent a much more significant amount of time discussing fraud under New York's common law, it too allowed a state fraud claim based on excessive markups to survive summary judgment alongside a timely federal claim based upon the same price inflation. [5 F. Supp. 2d at 179](#). Rejecting defendants' motion for summary judgment on the [Rule 10b-5](#) claim, the *Manela* court indicated that plaintiff's common law fraud claims could survive summary judgment as well -- explaining that having rejected defendants' arguments "pertaining to the alleged above-market price sale . . . there [was] no reason to reach a different conclusion in the common law fraud context." *Id.* While this outcome lends some measure of support to the LAB's position, it can hardly be taken as an indication that the [\[**108\]](#) shingle theory has become part of the fabric of New York's common law.

Moreover, that courts have commented that the basic elements of a common law fraud claim in New York are "essentially" or "largely" the same as those establishing a claim under section 10(b) and [Rule 10b-5](#), see [Manela, 5 F. Supp. 2d at 178-79; The Pits, Ltd. v. American Express Bank Int'l, 911 F. Supp. 710, 719 \(S.D.N.Y. 1996\)](#), does not mean that all fraud claims cognizable under the federal securities laws are also cognizable under New York law, or that all theories of recovery are available under New York's common law as exist under federal law. See Norman S. Poser, Broker-Dealer Law & Reg. § 3.01[D][2], at 3-21 (1997) ("Liability under [Rule 10b-5](#) does not depend on whether the defendant's activity would support an action for common law fraud, but rather on whether the activity 'constitutes a misleading or deceptive practice in the special [Rule 10b-5](#) sense of the word [fraud].'"') (*quoting Messer v. E.F. Hutton & Co., 833 F.2d 909, 914 (11th Cir. 1987)*, amended on reh'g in part, [847 F.2d 673 \(1988\)](#)); see also *In re Motel 6 Sec. Litig.*, 1997 U.S. Dist. LEXIS 3909, Nos. 93 Civ. 2183 (JFK), 93 Civ. 2866 (JFK), 1997 WL 154011, [\[**109\]](#) at [**5-6](#) (S.D.N.Y. Apr. 2, 1997); [Schultz v. Commercial Programming Unlimited Inc., 1992 U.S. Dist. LEXIS 19557, No. 91 CIV. 7924 \(LJF\), 1992 WL 396434](#), at [*4](#) (S.D.N.Y. Dec. 23, 1992). Indeed, as the LAB itself contends in its papers, in addition to the absence of any common law "in connection with" requirement akin to that required for [Rule 10b-5](#) claims, true shingle theory claims under the federal securities laws may not even require proof of affirmative reliance. See [Manela, 5 F. Supp. 2d at 176 n.102](#). Moreover, shingle theory claims under the federal securities laws do not require a plaintiff to demonstrate that the defendant Broker knew that the plaintiff was acting in reliance on mistaken information -- a showing that appears necessary under common law fraud claims based upon the withholding of "superior knowledge." See *Banque Arabe*, 57 F.3d at 155-56.¹⁹

[\[**110\]](#) The shingle theory is a theory of liability that has its genesis in a complex and wide-ranging statutory scheme. The Federal securities laws place many obligations on Brokers and others involved in the sale or trading of securities that did not exist at common law, and the markets in which those securities are exchanged have been heavily regulated pursuant to those laws. The shingle theory itself had its origins not in private litigation, but rather in SEC actions. See *In re Duker & Duker*, 6 S.E.C. at 386; [\[*266\] In re Trost & Co., 12 S.E.C. 531 \(1942\)](#).

Despite the LAB's best efforts, the Funds cannot avoid the consequences of *Lampf* and/or their failures to assert claims under the federal securities laws merely by raising a state claim for fraud. Without any indication that the New York courts have ever embraced the shingle theory as part of New York's common law of fraud, this Court is chary to do so itself. Consequently, Count V of the Complaint is dismissed.

VI. The Brokers' Motions' to Dismiss Counts XI and XII Alleging Tortious Interference With Contracts Are Granted

In its Complaint, the LAB has reasserted claims of tortious interference [\[**111\]](#) with contracts against the Brokers, based once again on the Brokers' interference with both investment advisory agreements between the Funds and ACM (Count XI) and Public Securities Association Master Repurchase Agreements ("PSA agreements") governing the liquidation of the Funds' securities (Count XII). Though these claims essentially mirror those tortious interference claims dismissed in [Granite II, 17 F. Supp. 2d at 292-95](#), the LAB has both pared down these claims and supplemented its allegations.

¹⁹ To the extent that the LAB's fraud claim based on excessive markups would be dependent on such a showing, the Complaint's allegations concerning the Brokers' awareness of the Funds' reliance are deficient. Consequently, even were the Court to decide that a quasi-shingle theory claim is available under New York law, Count V of the LAB's Complaint would be dismissed.

While Count II of the LAB's First Amended Complaint alleged that Bear Stearns, DLJ, and Merrill Lynch interfered with investment advisory agreements between ACM and each of the Funds by recommending and selling to the Funds inappropriate securities, the LAB has augmented its claims in Count XI of the Complaint. The LAB still maintains that the Brokers interfered with the advisory agreements by recommending and selling inappropriate securities, but now adds that the Brokers' provision of incorrect monthly marks also interfered with those agreements. The Brokers, the LAB alleges, "knew by virtue of the October 28, 1992 Agreements and the Brokers' provision of monthly marks [**112] that ACM was contractually required to report accurately the market value of the Funds' portfolios on a monthly basis." Compl. P 283. Because ACM was allegedly unable to properly advise the Funds without those marks -- which the LAB contends the Brokers were uniquely able to provide -- the LAB claims that the Brokers' failure to provide accurate marks constituted tortious interference with the investment advisory agreements.

Count XII remains essentially unchanged, insofar as the LAB's basic claim is concerned, with the only noteworthy alteration being that the LAB now only asserts this claim against Bear Stearns for its tortious interference with the Funds' agreements with Kidder.

In *Granite II*, the LAB's tortious interference claims were dismissed on the grounds that the First Amended Complaint had not adequately pleaded "but for" causation. [17 F. Supp. 2d at 292](#). Though the LAB's papers manifest profound disagreement with that decision, as well as more general disagreement with this Court's articulation of New York's law of tortious interference with contractual relations, see [Mina Inv. Holdings Ltd. v. Lefkowitz, 184 F.R.D. 245, 1999 WL 25050](#), at **5-12 (S. [**113] D.N.Y. Jan. 20, 1999), the LAB has failed once again to adequately plead "but for" causation. Because it would be unduly repetitive to venture down a path that has already been well-traveled, Counts XI and XII are dismissed for essentially the same reasons stated in *Granite II*.

As far as Count XI of the Complaint is concerned, the LAB's only new pleadings of moment are those concerning the Brokers' provision of inaccurate marks. The pleadings are deficient for the very same reasons that the recommendation and sale of inappropriate securities allegations were found deficient in *Granite II*. Setting aside the Complaint's failure to adequately and credibly allege that the provision of marks, [*267] or even monthly reportage of the Brokers' assessment of the Funds' market value, were contractual obligation of ACM to the Funds that were breached,²⁰ [**115] and its wholesale failure to adequately allege intent,²¹ [**116] the logic of *Granite II* would

²⁰ A prerequisite to any tortious interference claim by the LAB would, of course, be some actual breach of a contract. See *Robins v. Max Mara, U.S.A., Inc.*, 923 F. Supp. 460, 468 (S.D.N.Y. 1996) ("HN46↑") 'In order for the plaintiff to have a cause of action for tortious interference of contract, it is axiomatic that there must be a breach of that contract by the other party.") (quoting *Jack L. Inselman & Co. v. FNB Fin. Co.*, 41 N.Y.2d 1078, 1080, 396 N.Y.S.2d 347, 349, 364 N.E.2d 1119, 1120 (1977)). The LAB has failed to adequately allege that any contract between ACM and the Funds was actually breached by the Brokers' provision of inaccurate marks. A review of an investment advisory agreement between ACM and Quartz, appropriately considered given the LAB's reference to the advisory agreements in the Complaint and presumed access to such a foundational document, reveals no explicit requirement whatsoever that ACM or any other advisor provide the Funds with Broker marks.

Nowhere does the LAB indicate how the Brokers' provision of false marks would result in any real breach of the investment advisory agreements, or provide any contractual language that supports its assertions.

²¹ [HN47↑](#) To maintain a claim for tortious interference with contracts, a plaintiff must also allege that the defendant intended to interfere with a contract. See *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 768 (2d Cir. 1995); *Gruntal & Co. v. San Diego Bancorp*, 1996 U.S. Dist. LEXIS 8583, No. 94 Civ. 5366 (DC), 1996 WL 343079, at *3 (S.D.N.Y. June 21, 1996). In their papers, the parties have jostled over whether or not a plaintiff must plead "exclusive malicious motivation" -- that the interference was for the sole purpose of harming the plaintiffs, rather than merely for the defendant's own economic gain. See *Elliott Assocs., L.P. v. Republic of Panama*, 975 F. Supp. 332, 341-42 (S.D.N.Y. 1997); *Rapp Boxx, Inc. v. MTV, Inc.*, 226 A.D.2d 324, 325, 642 N.Y.S.2d 228, 228 (1st Dep't 1996); *Benjamin Goldstein Prods., Ltd. v. Fish*, 198 A.D.2d 137, 138, 603 N.Y.S.2d 849, 851 (1st Dep't 1993). Because the LAB's Complaint does not adequately allege any intent whatsoever, or even the Brokers' awareness of any contract requiring the provision of Broker marks, this issue need not be reached.

Conclusory allegations that the Brokers acted "knowingly, intentionally, purposefully, maliciously, and without regard for the rights and interests of the Funds," are not sufficient pleadings of intent. Compl. P 291. The LAB's vague assertion that "by virtue

apply to the LAB's mark-dependent contentions as well. *Granite II* held that the LAB's own complaint established that ACM "was predisposed toward breaching its agreements with the Funds and would have done so independently of each of the Broker's [**114] actions or participation." [17 F. Supp. 2d at 294](#). Though the LAB has artfully and conveniently trimmed various sections of its Complaint, including sections that were explicitly relied upon by this Court in rendering its earlier decision,²² it has done [*268] nothing that changes this outcome as to its tortious interference claims.

[**117] The LAB's Complaint still alleges that "ACM and Askin repeatedly breached their fiduciary and contractual relations to the Funds to make investments with due care and in accordance with the Funds' stated investment objectives." Compl. P 79. As described in more detail with regard to the LAB's new common law fraud claim against DLJ and Comerford, the Complaint still establishes that ACM itself approached its investment advisory agreements with the Funds with abandon. See [supra at 70-74](#).

While the LAB's earlier claim regarding purchases of inappropriate securities alone is distinct from its later, marks-supplemented claim, the LAB's own pleadings still indicate that ACM and Askin approached the investment advisory agreements with either carelessness or ineptitude, failing to exercise even the most rudimentary diligence in evaluating, selecting, or valuing the bonds which were purchased and held by the Funds. This being the case, it can hardly be said by the LAB that the defendant Brokers' failures to supply accurate marks was the "but for" cause of any breach of ACM's contractual duties to provide accurate valuations of the Funds' holdings. Valuation and evaluation of the esoteric [**118] securities held by the Funds was, presumably, a complicated and difficult task that was entrusted to ACM precisely because it could do the job properly. In fact, as the LAB's own pleadings establish, ACM made no credible attempt whatsoever to evaluate the Funds' securities, did not "possess or employ adequate analytic models, did not understand how certain CMOs, particularly inverse IOs, would react to changes in interest rates, and were unable to determine the effective duration of the Funds' portfolios." Compl. P 85. Just as ACM's careless approach to selecting securities leads to the conclusion that it was predisposed towards breaching its obligations to the Funds by making inappropriate purchases from other broker-dealers, its lackluster approach to valuing the Funds' holdings leads to the conclusion that it was predisposed towards providing inaccurate or

of their knowledge of ACM's status as a registered investment advisor, or otherwise, the Brokers knew or should have known that ACM was a party to investment advisory agreements with each of the Funds and knew or should have known of those agreements' terms" is also patently insufficient. Compl. P 282. Nowhere does the LAB point to any facts indicating awareness on the Brokers' part that the advisory agreement required ACM to obtain accurate Broker marks, let alone any language in those agreements that even demanded those marks. Further, the LAB's assertion that the Brokers knew of ACM's contractual obligation to provide marks to the Funds "by virtue of the October 28, 1992 Agreements," Compl. P 283, is hardly adequate given the specific language of the October 28, 1992 letters. Nowhere do the October letters ever state that ACM is contractually obligated to provide the Funds with Broker marks.

Consequently, even had the LAB successfully pleaded "but for" causation, its failure to adequately plead intent would merit dismissal.

²² Compare First Am. Compl. P 4 ("Bear Stearns, DLJ, and Merrill Lynch . . . were among the principal sellers of CMOs to the Funds"), with Compl. P 4 ("Bear Stearns, DLJ, and Merrill Lynch . . . sold CMOs to the Funds"). In *Granite II*, P 4 of the LAB's First Amended Complaint was specifically relied upon by this Court in ruling that the LAB's own pleadings negated any possibility of "but for" causation:

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 Brokers, it would have breached its contractual obligations to the Funds by making purchases from other broker-dealers.

[17 F. Supp. 2d at 292](#). Despite the LAB's careful pruning of its Complaint, it does not now allege that the Brokers were the only sellers of CMOs to the Funds.

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incomplete valuations of the Funds' holdings -- no matter what marks the Brokers may have provided. Indeed, any dependence that ACM might have had on broker marks alone might itself have constituted a breach of its obligations to provide the Funds with appropriate valuations, given the Complaint's own assertion that ACM and Askin [**119] breached their fiduciary and contractual duties to the Funds by exposing the Funds to "near-complete 'market' -- i.e., Broker -- control." Compl. P 79.

Regarding Count XII even less discussion is necessary. In the First Amended Complaint the LAB alleged that Bear Stearns, Rubin, DLJ, and Merrill Lynch had all interfered with the PSA and other agreements between the Funds and each of the Brokers. The gravamen of the LAB's current claim, as with Count XII of the First Amended Complaint, is that the collusive bidding process engaged in by the Brokers interfered with PSA and other agreements governing liquidation of the Funds' portfolios. In *Granite II*, this claim was dismissed as against all of the Brokers, given that the LAB's own pleadings alleged collusive conduct on the part of all of the Brokers. Because each Broker was itself part of the alleged bidding conspiracy, *Granite II* held, the LAB could not simultaneously allege that "each Broker's conduct was the causal force behind the purported breaches of contract by the [*269] other broker-dealers." [17 F. Supp. 2d at 295](#).

The LAB's rehashing of its prior pleadings, albeit with some greater specificity, and revision [**120] of Count XII to only assert a claim against Bear Stearns do not now allow it to succeed where it has previously failed. The Complaint still establishes that all of the Brokers, including both Bear Stearns and Kidder, were participants in a collusive bidding scheme. Compl. P 249. While the current limitation of the claim to Bear Stearns' interference with agreements between the Funds and Kidder makes the LAB's pleading infirmities less obvious than was the case with the First Amended Complaint, the LAB's inability to allege "but for" causation remains.

Because the LAB's own pleadings belie any assertion that any of the Brokers' conduct was the "but for" cause of any breaches of contract, whether they be investment advisory contracts between ACM and the Funds, agreements between Kidder and the Funds, or any other agreements, the tortious interference with contract claims in Counts XI and XII of the Complaint are dismissed. Since the LAB's allegations fail to state a claim, the Brokers' contentions that the LAB's tortious interference claims are barred by New York's three-year statute of limitations need not be addressed.

Conclusion

For the reasons set forth above, the [**121] Brokers' motions for partial dismissal of the Complaint are granted in part and denied in part.

Specifically, the Brokers' motions to dismiss the LAB's claims for common law fraud (Counts IV and VI), tortious interference with contracts (Counts XI and XII), and violations of the Sherman and Donnelly Acts (Counts VI and VII, respectively), are hereby granted.

The Brokers' motions to dismiss the LAB's claim for breach of contract (Count III) are denied.

It is so ordered:

New York, N. Y.

July 26, 1999

ROBERT W. SWEET

U.S.D.J.

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Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.

United States Court of Appeals for the Third Circuit

April 23, 1998, Argued ; July 27, 1999, Filed

No. 97-3440

Reporter

185 F.3d 154 *; 1999 U.S. App. LEXIS 17726 **; 1999-2 Trade Cas. (CCH) P72,595

ARMSTRONG SURGICAL CENTER, INC., Appellant, v. ARMSTRONG COUNTY MEMORIAL HOSPITAL; ROGELIO BORJA; RICHARD BOSCO; ZAFAR CHOWDHRY; JEFFREY DAVID; FRANK DAVIE; EGBERT DEVRIES; PAUL L. FREDERICK; JOHN GARROTT; FRANK N. GENOVESE; IRVING KLEIN; DAVID H. KOHL; LEE H. KOSTER; JOHN MARTY; MICHAEL P. ONDICH; KARL R. SALTRICK; WILLIS SHOOK; ANTHONY SMALDINO; PETER SOTOS; JAE T. YANG

Subsequent History: Certiorari Denied June 26, 2000, Reported at: [2000 U.S. LEXIS 4347](#).

Prior History: [\[**1\]](#) On Appeal From The United States District Court For The Western District Of Pennsylvania. (D.C. Civil No. 96-01384). District Judge: Honorable Gustave Diamond.

Disposition: Affirmed.

Core Terms

immunity, misrepresentations, Surgical, state action, boycott, parties, antitrust, outpatient, Sherman Act, anticompetitive, injuries, surgery, petitioning, defendants', ambulatory, conspiracy, antitrust liability, majority opinion, private party, circumstances, adjudicatory, alleged misrepresentation, operating room, surgery center, duplicate, arena, government action, partially, corrupt, doctrine of immunity

LexisNexis® Headnotes

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

[HN1](#) [down arrow] Standards of Review, De Novo Review

The court reviews a district court's order dismissing the plaintiff's complaint de novo. In reviewing that order, the court employs the same standard the district court used, accepting as true all factual allegations contained in the complaint and all reasonable inferences that can be drawn therefrom.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

185 F.3d 154, *154L999 U.S. App. LEXIS 17726, **1

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN2 **Conspiracy to Monopolize, Sherman Act**

To state a claim under the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must allege a contract, combination or conspiracy; a restraint of trade; and an effect on interstate commerce.

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

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN3 **Monopolies & Monopolization, Actual Monopolization**

The Sherman Act, [15 U.S.C.S. § 2](#) prohibits both monopolies and attempts to monopolize. A claim under [§ 2](#) must allege (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 > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > 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 > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN4 **Horizontal Refusals to Deal, Boycotts**

A classic boycott involves concerted action with a purpose either to exclude a person or group from the market, or to accomplish some other anticompetitive object, or both. Such commercially motivated group boycotts, or concerted refusals to deal, generally are considered illegal per se under the Sherman Act, [15 U.S.C.S. § 1](#). When a boycott's aim is to monopolize trade, it might also violate [§ 2](#).

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

HN5 **Exemptions & Immunities, Parker State Action Doctrine**

The Sherman Act, [15 U.S.C.S. § 1](#), does not apply to anticompetitive restraints imposed by the states as an act of government.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

[HN6](#) Exemptions & Immunities, Noerr-Pennington Doctrine

Antitrust liability cannot be predicated solely on petitioning to secure government action even where those efforts are intended to eliminate competition.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

[HN7](#) Exemptions & Immunities, Noerr-Pennington Doctrine

The immunity afforded to a private party under the Noerr doctrine is not unlimited. Where the challenged private conduct is only "sham" petitioning, i.e., where it is not genuinely aimed at procuring favorable government action as opposed to a valid effort to influence government action, Noerr immunity is not available. In essence, sham petitioning entails the use of the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

[HN8](#) Exemptions & Immunities, Noerr-Pennington Doctrine

Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability. The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Criminal Law & Procedure > ... > Bribery > Public Officials > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Public Health & Welfare Law > Healthcare > General Overview

[HN9](#) Private Actions, State Regulation

Considerations of federalism require an interpretation of the Sherman Act, [15 U.S.C.S. § 1](#), that forecloses liability predicated on anticompetitive injuries that are inflicted by states acting as regulators. Liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process. The remedy for such conduct rests

with laws addressed to it and not with courts looking behind sovereign state action at the behest of antitrust plaintiffs. Federalism requires this result both with respect to state actors and with respect to private parties who have urged the state action.

Counsel: John L. Laubach, Jr., John P. Klee, Laubach & Fulton, Carnegie, PA. James G. Park (Argued), Pittsburgh, PA, Attorneys for Appellant.

Alan A. Garfinkel, Klett, Lieber, Rooney & Schorling, Pittsburgh, PA. Jules S. Henshell (Argued), Klett, Lieber, Rooney & Schorling, Harrisburg, PA, Attorneys for Appellee Armstrong County Memorial Hospital.

Wendelynne J. Newton (Argued), Sheila S. DiNardo, Buchanan Ingersoll Professional Corporation, Pittsburgh, PA, Attorneys for Appellees Rogelio Borja, Richard Bosco, Zafar Chowdhry, Jeffrey David, Frank Davie, Egbert Devries, Paul L. Frederick; John Garrott, Frank N. Genovese, Irving Klein, David H. Kohl, Lee H. Koster, John Marty, Michael P. Ondich, Karl R. Saltrick, Willis Shook, Anthony Smaldino, Peter Sotos and Jae T. Yang.

Judges: BEFORE: NYGAARD and STAPLETON, Circuit Judges and SCHWARTZ, * District Judge. SCHWARTZ, Senior District Judge, Dissenting. [**2]

Opinion by: STAPLETON

Opinion

[*155] OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Appellant Armstrong Surgical Center, Inc. (the "Surgical Center") contends that Armstrong County Memorial Hospital and nineteen of its staff physicians (the "Hospital Defendants") conspired to prevent it from establishing an ambulatory surgery center, thereby restraining and monopolizing trade in violation of [sections 1](#) and [2](#) of the Sherman Act. The District Court dismissed the complaint after concluding that the alleged conduct was immune from antitrust scrutiny. We will affirm.

I.

[HN1](#) [↑] We review the District Court's order dismissing the Surgical Center's complaint *de novo*. See [Jeremy H. v. Mount Lebanon Sch. Dist.](#), 95 F.3d 272, 277 (3d Cir. 1996). In reviewing that order, we employ the same standard the District Court used, accepting as true all factual allegations contained in the complaint and all reasonable inferences that can be drawn therefrom. See [Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.](#), 113 F.3d 405, 411 n.2 (3d Cir.), cert. denied, 522 U.S. 977, 118 S. Ct. 435, 139 L. Ed. 2d 335 (1997).

II.

The Surgical Center [**3] has plans to build a free-standing ambulatory surgery center in the city of Kittanning, Armstrong County, Pennsylvania. If constructed, that facility would provide outpatient surgical services, including both general surgery and various specialities. Currently, the Hospital is the only facility with operating rooms in Armstrong County, and the nineteen staff physician defendants perform the vast majority of surgeries in the county. Only one independent ambulatory surgery [*156] center operates in the four counties that border Armstrong County, and this center is approximately fifty miles from the Surgical Center's proposed site. If constructed, the Surgical Center's facility would compete directly with the Hospital and its staff physicians in the outpatient surgery

* Honorable Murray M. Schwartz, Senior Judge for the United States District Court for the District of Delaware, sitting by designation.

market. Moreover, the Surgical Center alleges that it would offer outpatient surgical services at prices significantly lower than the Hospital's.

Under the Pennsylvania Health Care Facilities Act, anyone proposing to establish a new health care facility must first obtain a Certificate of Need ("CON") from Pennsylvania's Department of Health. See [Pa. Stat. Ann. tit. 35, § 448.701\(a\)\(2\)](#). The Act seeks to ensure "the orderly [**4] and economical distribution of health care resources to prevent needless duplication of services." *Id.* at § 448.102. The Department individually reviews CON applications in an extensive proceeding consisting of an investigation, an evaluation of submitted materials, and a public hearing. During this review, the Department considers various health planning issues, including the adequacy of existing health care providers and the need for additional services or facilities. See *id.* § 448.707. Interested parties, including health care providers who supply similar services in the area, may petition for public meetings or hearings and submit information to the Department on any CON application. See *id.* §§ 448.103, 448.704(b).

In March of 1991, the Surgical Center filed an application for a CON with the Department as required. Thereafter, according to the Surgical Center's complaint, the Hospital defendants, including fourteen physicians who originally supported the Surgical Center's project, entered into a conspiracy to subvert establishment of the new facility. The alleged conspiracy involved: (1) the physicians announcing that they would boycott the proposed outpatient center [**5] and (2) the Hospital defendants submitting false and misleading information to the Department. Specifically, the Surgical Center alleges that the Hospital defendants informed the Department that its nineteen physicians would not use the Surgical Center facility in the hope that this information would convince the Department that the proposed facility could not meet the statutory requirements for a CON. In addition, the Surgical Center claims that the Hospital defendants sought to mislead the Department into believing that the Hospital intended to open its own outpatient center, which was then under construction, and that this facility would satisfy all of Armstrong County's outpatient surgery needs. The Hospital's partially constructed facility was designed to provide alternative space for outpatient surgeries then conducted in three of the Hospital's six mixed-use operating rooms. According to the Surgical Center, however, the Hospital defendants knew that the construction of the Hospital's facility had been stopped with only the shell of the building completed and that the Hospital had made no commitment to resume construction. Despite this knowledge, it is alleged that the Hospital [**6] defendants falsely represented to the Department that its new center was either in use or very near completion.

The Department denied the Surgical Center's CON application. The Surgical Center appealed that decision to the Commonwealth of Pennsylvania State Health Facility Hearing Board, which conducted its own hearing and received additional evidence.¹ The Board affirmed the Department's decision after finding that (1) the Surgical Center's facility would result in needless duplication of existing facilities and health care services, and (2) the Surgical Center would not be economically viable [*157] because the nineteen Hospital surgeons who performed ninety percent of Armstrong County's surgeries would not use the Surgical Center facility. According to the Board, "the most damaging evidence [against the Surgical Center's application] is that the number of physicians who might have been expected to support the facility decreased significantly after the Applicant had submitted its projections." The Surgical Center appealed the Board's decision to the Commonwealth Court of Pennsylvania, which affirmed the Board's decision.

[**7] The Surgical Center filed this antitrust action seeking treble damages for, *inter alia*, denial of the CON, lost value of the CON and the proposed outpatient center, and lost profits. It contends that the Hospital defendants' conspiracy caused the Department to deny its CON application. The District Court dismissed the Surgical Center's suit for failure to state a claim upon which relief may be granted, see [Fed. R. Civ. P. 12\(b\)\(6\)](#), holding that the Hospital defendants' conduct was immune from antitrust scrutiny.

III.

¹ The Act of Feb. 23, 1996, P.L. 27, 1996 Pa. Laws 10, § 9(a) (repealing Pa. Stat. Ann. tit. 35, §§ 448.501-448.507), has since eliminated the Health Facility Hearing Board and transferred its review functions to the Health Care Policy Board. This change does not affect our review of the Surgical Center's appeal.

We begin by considering the Surgical Center's claim that the Hospital defendants conspired to boycott its outpatient center, thereby violating [sections 1](#) and [2](#) of the Sherman Act. [HN2](#)[⁸] To state a claim under [section 1](#), a plaintiff must allege "a contract, combination or conspiracy; a restraint of trade; and an effect on interstate commerce." [Fuentes v. South Hills Cardiology](#), 946 F.2d 196, 201 (3d Cir. 1991). [HN3](#)[⁹] [Section 2](#) of the Sherman Act prohibits both monopolies and attempts to monopolize. See [15 U.S.C. § 2](#). A claim under [section 2](#) must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct [**8] 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, 890-91, 122 L. Ed. 2d 247 (1993); see also [Schuylkill Energy Resources](#), 113 F.3d at 413.

"[HN4](#)[¹⁰] A classic boycott involves concerted action with a purpose either to exclude a person or group from the market, or to accomplish some other anticompetitive object, or both." [Fuentes](#), 946 F.2d at 202 (internal quotes omitted); see also [St. Paul Fire & Marine Ins. Co. v. Barry](#), 438 U.S. 531, 541, 98 S. Ct. 2923, 2929-30, 57 L. Ed. 2d 932 (1978). Such commercially motivated group boycotts, or concerted refusals to deal, generally are considered illegal per se under [section 1](#). See [F.T.C. v. Superior Court Trial Lawyers Ass'n](#), 493 U.S. 411, 431-32, 110 S. Ct. 768, 779-80, 107 L. Ed. 2d 851 (1990); [Weiss v. York Hospital](#), 745 F.2d 786, 818 (3d Cir. 1984). When a boycott's aim is to monopolize trade, it might also violate [section 2](#). See [Retina Associates v. Southern Baptist Hosp. of Fla., Inc.](#), 105 F.3d 1376, 1384 (11th Cir. 1997). [**9]

The Hospital defendants do not deny that the complaint alleges a threat of a boycott that might under other circumstances constitute an antitrust violation. They insist, however, that the complaint alleges facts establishing that they are immune from antitrust liability. Specifically, they contend that their activities are insulated from antitrust scrutiny because their allegedly wrongful conduct occurred in the context of supplying information to the Pennsylvania Department of Health during the Surgical Center's CON application process and because the injuries alleged resulted solely from the Department's denial of the CON.

In [Parker v. Brown](#), 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), an agricultural producer challenged a marketing program adopted by California's Director of Agriculture as invalid under the Sherman Act. The program served to restrict competition among growers and maintain prices in commodity distribution. "Relying on principles of federalism and state sovereignty, [the Supreme Court] held that [HN5](#)[¹¹] the Sherman Act did not apply to anticompetitive [*158] restraints imposed by the States 'as an act of government.' " [City of Columbia v. Omni Outdoor Adver., Inc.](#), 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991). [**10]

In [Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.](#), 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961), and [United Mine Workers v. Pennington](#), 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965), the Supreme Court held that [HN6](#)[¹²] antitrust liability cannot be predicated solely on petitioning to secure government action even where those efforts are intended to eliminate competition. As the Court explained in *Noerr*, "the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend on their interest in doing so." [Noerr](#), 365 U.S. at 139.

The *Parker* doctrine and the *Noerr-Pennington* doctrine have been interpreted as complementing each other to protect the two related but distinct principles upon which they are founded. As the Supreme Court has more recently observed:

Parker and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation [**11] in government.

[Omni](#), 499 U.S. at 383.

As the Surgical Center emphasizes, however, [HN7](#)[¹³] the immunity afforded to a private party under *Noerr* is not unlimited. Where the challenged private conduct is only "sham" petitioning -- i.e., where it "is not genuinely aimed at procuring favorable government action as opposed to a valid effort to influence government action" -- *Noerr* immunity is not available. [Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.](#) 508 U.S. 49, 123 L.

Ed. 2d 611, 113 S. Ct. 1920 (1993) ("PRE"). In essence, sham petitioning entails "the use of the governmental process -- as opposed to the *outcome* of that process -- as an anticompetitive weapon." PRE, 508 U.S. at 61 (emphasis added). Accordingly, the sham petitioning exception does not apply in a case like the one before us where the plaintiff has not alleged that the petitioning conduct was for any purpose other than obtaining favorable government action.²

[**12] [*159] It is also true that a private party can be held liable even for bona-fide petitioning conduct where that conduct has caused direct antitrust injury in the market place. F.T.C. v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990). In *Trial Lawyers*, for example, the public defenders of the District of Columbia engaged in a concerted refusal to represent indigent defendants in order to pressure the District into raising the hourly rate paid. The Court held that the defendants could be held liable under the Sherman Act for injuries that resulted directly from the boycott, even though the boycott was intended to secure government action.

The limitation on *Noerr* immunity recognized in *Trial Lawyers* is inapplicable, however, to a case where the sole antitrust injury is caused directly by the government action that the private defendant has helped to secure. Thus, even where the same petitioning conduct might give rise to antitrust liability for injury *directly* caused to a competitor in the marketplace, if relief is sought solely for injury as to which the state would enjoy immunity under *Parker*, the private [**13] petitioner also enjoys immunity. As the Supreme Court explained in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*:

HN8 [↑]

Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by [*Noerr*; *Pennington*, and *California Motor Transport Co. v. Trucking*

² Plaintiff's allegations that both the threatened boycott and the claimed misrepresentations were intended to secure denial of the CON distinguish the situation before us from cases like *Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119 (3d Cir. 1999)*, that deal with the "sham" exception to the *Noerr* doctrine. In *Cheminor*, the defendant, Ethyl, had petitioned the International Trade Commission and the Department of Commerce, alleging that Cheminor was dumping bulk ibuprofen on the U.S. market and seeking the imposition of extra duties to offset the alleged subsidies that enabled it to do so. Although Cheminor withdrew from the U.S. market prior to a final decision on Ethyl's petition, it alleged injuries resulting from the petition and brought an antitrust suit against Ethyl. In response to Ethyl's reliance on *Noerr* immunity, Cheminor asserted that the petition was a "sham" and *Noerr* immunity thus was unavailable. We analyzed and rejected Cheminor's argument under the teachings of PRE.

PRE holds that *Noerr* immunity is lost when the petition is a "sham," i.e., "is not genuinely aimed at procuring favorable government action." PRE, 508 U.S. at 58. As we noted in *Cheminor*, PRE further holds that determining whether a petition is a sham requires a two-step process. First, the Court determines whether the petition is "objectively baseless;" if not, the petition is not a sham without regard to the subjective intent of the petitioner. Second, if the petition is objectively baseless (and only if it is objectively baseless), the Court is to look to the petitioner's "subjective motivation" and determine "whether the baseless [petition] conceals an attempt to interfere *directly* with the business relationships of a competitor through the use of governmental process -- as opposed to the *outcome* of that process -- as an anticompetition weapon." 508 U.S. at 60-61 (emphasis in original) (quoting *Noerr, 365 U.S. at 144*, and *Omni, 499 U.S. at 380*).

Cheminor holds that where the petitioning effort allegedly involves misrepresentations, the Court, at the first step, must "determine whether [the] petition was objectively baseless under[PRE] without regard to those facts that the [plaintiff] alleges [the petitioner] misrepresented." *Cheminor, 168 F.3d at 123* (emphasis in original). Such a determination is unnecessary here, however, because the plaintiff affirmatively alleges that defendants' purpose was to secure the *outcome* of the process -- denial of the CON. Thus, even if defendants' opposition to the CON were found to be objectively baseless (a conclusion that could not be reached on this record), defendants would pass the second, "subjective" test and the sham exception to *Noerr* immunity would be inapplicable here.

While *Cheminor* focuses on the sham exception to *Noerr* immunity, it also rejects Cheminor's more general argument that "*Noerr-Pennington* immunity does not apply at all to petitions containing misrepresentations." *Id.* To that extent, it supports the conclusion reached below with respect to the misrepresentation claim.

Unlimited]. The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. "Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.

[486 U.S. 492, 499, 108 S. Ct. 1931, 100 L. Ed. 2d 497 \(1987\)](#) (citations omitted) (quoting [Noerr, 365 U.S. at 136](#)).

We applied this principle in [Mass. School of Law at Andover, Inc. v. American Bar Assoc., 107 F.3d 1026 \(1997\)](#) ("MSL"). There, the plaintiff, an unaccredited law school, complained of injuries resulting from the fact that, without ABA accreditation, the school's graduates were refused admittance to most states' [\[**14\]](#) bar examinations. We identified the critical issue as "whether state or private conduct caused the injury MSL alleges it suffered." [Id. at 1035](#). Looking to the source of the restraint-causing injury, we found that because "every state retains the final authority to set all the bar admission rules," any injury the plaintiff suffered "is the result of state action and thus immune." [Id. at 1035-36](#).

This reasoning was similarly applied in [Sandy River Nursing Care v. Aetna Casualty, 985 F.2d 1138, 1147 \(1st Cir. 1993\)](#), where the defendant insurers allegedly employed a boycott in an effort to force the legislature to enact legislation permitting rate increases. Because all the plaintiff's claimed injuries were associated with increased rates charged by the defendants after the legislature removed the rate limits, the court concluded that "[plaintiff's [\[*160\]](#) injuries] must be viewed as a product of state action" and that the defendants were, accordingly, immune from liability.

Here, looking to the source of the complained of injuries, we find that all of the Surgical Center's alleged injuries arise solely from the denial of the CON: the denial [\[**15\]](#) of the ability to operate the proposed facility; the loss of the CON's value, the value of the facility, and the value of the operation's proceeds; the delay in securing the CON; and "other related losses." Each of the injuries the plaintiff claims is a direct result of the Department's decision to deny the plaintiff's application for a CON.³

In sum, where, as here, all of the plaintiff's alleged injuries result from state action, antitrust liability cannot be imposed on a private party who induced the state action by means of concerted anticompetitive activity. It follows that the complaint fails to [\[**16\]](#) state a boycott claim upon which relief can be granted. See [Noerr, 365 U.S. at 136](#); [Parker, 317 U.S. at 352](#).

IV.

The Surgical Center's second claim is that the Hospital defendants, as a part of their conspiracy, misled the Department, the Board, and the Commonwealth Court into believing that the Hospital's partially constructed facility would soon open and meet the needs of the relevant market when the Hospital defendants knew that the facility would not be completed. The resulting injury, it is said, was the denial of the Surgical Center's application for a CON. The Center would have us deny antitrust immunity to the Hospital defendants on the grounds that they successfully opposed the issuance of a CON using information known to be false.

Although the Supreme Court suggested in [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512-13, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#), that petitioning activity involving knowingly false information submitted to an adjudicative tribunal might not enjoy antitrust immunity, the Court has never so held. See *PRE*, 508 U.S. at 61 n.6 (suggesting that the issues [\[**17\]](#) of whether there is a misrepresentation exception to *Noerr* and, if so, the extent thereof, remain open). Moreover, since *California Motor*, the Supreme Court has decided a case that casts doubt on whether such an exception exists under any circumstances and dictates that, in the circumstances of this case, we honor the Hospital defendants' claim to immunity.

³ While plaintiff also claims "increased costs, legal and otherwise, in pursuing Plaintiff's application for a CON," the referenced costs apparently relate to the appeal plaintiff prosecuted from the Board's decision. Plaintiff does not contend that it incurred costs at the Board level in excess of the cost it would have incurred had the threat of a boycott (or the alleged misrepresentations) not been made.

In *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991), Columbia Outdoor Advertising, Inc. ("COA") controlled 95 percent of the billboard rental business in Columbia, South Carolina. According to respondent Omni Outdoor Advertising, Inc. ("Omni"), a newcomer to the market, COA and city officials conspired to restrain competition in the market through adoption of a zoning ordinance limiting the size, spacing, and location of billboards in the city. Omni filed suit against the city and COA alleging a violation of the Sherman Act. A jury found the existence of a conspiracy between the city and COA, and both were held liable for Omni's injuries despite their insistence that they were entitled to antitrust immunity under *Parker* and *Noerr*, respectively.

The [**18] Court first concluded that Omni's alleged injury was the result of state action. South Carolina had authorized its municipalities to regulate land use and construction and, in doing so, had provided a "clear articulation of state policy to authorize anticompetitive conduct by the municipality" [*161] in connection with its regulation." *Omni*, 499 U.S. at 372 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)). As the Court explained:

The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers.

499 U.S. at 373 (footnote omitted).

Having thus concluded that "the city's restriction of billboard construction was *prima facie* entitled to *Parker* immunity," *id. at 374*, the Court turned to the issue of whether the existence of a conspiracy between city officials [**19] and COA had stripped the city of that immunity. It first noted the foundation of *Parker* immunity:

The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators.

Id. It then observed that if conspiracy was taken to mean "nothing more than an agreement to impose the regulation in question," the purpose of *Parker* immunity would be defeated because "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them." *Id. at 375*.

Because the jury had been instructed that a conspiracy was "an agreement . . . to accomplish an otherwise lawful result in an unlawful manner," *id. at 376 n.5*, the Court next considered whether *Parker* immunity is lost when it is shown that an agreement between the defendants involved governmental corruption, bribery, or other violations of state or federal law. It held that *Parker* immunity remains in such circumstances. The Court found "impractical" [**20] the contention that *Parker* immunity is forfeited by governmental corruption, "defined variously as 'abandonment of public responsibilities to private interests,' . . . 'corrupt or bad faith decisions,' . . . and 'selfish or corrupt motives.'" *Id. at 376*. Such a rule would call upon antitrust courts to speculate as to whether state action purportedly taken in the public interest was the product of an honest judgment or desire for private gain. The Court stressed that *Parker* "was not meant to shift [judgments about the public interest] from elected officials to judges and juries." *Id. at 377*.

With respect to the contention that *Parker* immunity should be forfeited at least where bribery or other illegal activity may have subverted the state decision making process, the Court observed that this approach had "the virtue of practicality but the vice of being unrelated to" the purposes of the Sherman Act and *Parker*. 499 U.S. at 378. It chose to rely on sanctions other than the Sherman Act to discourage such behavior:

To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles [**21] of good government. But the statute we are construing is not directed to that end. Congress has passed other laws aimed at combating corruption in state and local governments.

Id. at 378-79.

For these reasons, the Court rejected "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on [charges that the state's decision making process was corrupted by bribery or other unlawful activity]." Id. at [*162] 379. It concluded its discussion of the city's immunity by "reiterating that, with the possible market participant exception,⁴ any action that qualifies as state action is 'ipso facto . . . exempt from the operation of the antitrust laws.' "Id. at 379 (emphasis in original) (quoting *Hoover v. Ronwin*, 466 U.S. 558, 568, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984)).

[**22] Turning to the liability of Omni, the Court addressed whether *Noerr*'s immunity for private parties was subject to any of the exceptions that had been urged in the context of *Parker* immunity.⁵ It declined to restrict *Noerr* immunity in this way for the same reason it had declined to so restrict *Parker* immunity:

Insofar as the identification of an immunity-destroying "conspiracy" is concerned, *Parker* and *Noerr* generally present two faces of the same coin. . . . The same factors which, as 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. "It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became . . .'co-conspirators' " in some sense with the private party urging such action. And if the invalidating "conspiracy" is limited to one that involves some element [**23] of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In *Noerr* itself, where the private party "deliberately deceived the public and public officials" in its successful lobbying campaign, we said that "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." 365 U.S. at 145.

499 U.S. at 383-84 (emphasis added).

The teachings of *Omni* are pertinent here. HN9 Considerations of federalism require an interpretation of the Sherman Act that forecloses liability predicated on anticompetitive injuries that [**24] are inflicted by states acting as regulators. Liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process. The remedy for such conduct rests with laws addressed to it and not with courts looking behind sovereign state action at the behest of antitrust plaintiffs. Federalism requires this result both with respect to state actors and with respect to private parties who have urged the state action.

Here, the Department is authorized by state statute to regulate the number, size, and spacing of health care facilities. Like the statute in *Omni*, this statute provides a "clear articulation of state policy" which authorizes the Department "to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." Id. at 373. While it is true that the challenged decision of the Department involved an individualized application of established criteria, rather than the establishment of criteria as in [*163] *Omni*, the Department's [**25] action was every bit as essential to the execution of the sovereign's regulatory policy as was the adoption of the zoning ordinance by the Columbia city council.

The Surgical Center's CON application called upon the Department to determine whether the opening of a new ASC was in the public interest. The Department conducted its own investigation and then held a hearing at which all interested parties had the opportunity to tender evidence and argument. It then made findings and determined that

⁴ The referenced possible exception relates to state action as a purchaser or seller in the market rather than as a sovereign regulator.

⁵ The Court first concluded that the "sham" exception to *Noerr* immunity was inapplicable because that exception "encompasses situations in which persons use the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon." Id. at 380. COA had sought to use only the outcome of the process to suppress competition.

the issuance of the CON was not in the public interest. After a second hearing, that determination was concurred in by the Board, and the Commonwealth Court thereafter concluded that the Board's decision was supported by substantial evidence.

It is not clear to us that the issue of whether the Hospital's new facility would be completed was considered important by the Department or the Board. Neither made an express finding on that issue.⁶ It is clear from the Board's written decision, however, that the Board heard evidence on the issue, knew construction had been halted, and believed "there was credible evidence that the project had not been abandoned." Board Op. at 14. Thus, to the extent [**26] this issue was material, the record reflects that the decision makers recognized that there was a dispute and made a credibility determination concerning it.

[**27] On the facts alleged in the complaint, it is also clear that the state decision makers were disinterested, conducted their own investigation, and afforded all interested parties an opportunity to set the record straight. The initial decision was then twice reviewed. Finally, anyone who believed that a fraud was committed on the Department or Board could have moved to reopen the proceeding and attempted to persuade them that they were materially misled. See, e.g., 1 Pa. Code §§ 35.231, 35.233 (authorizing a reopening of an administrative proceeding on motion of a participant or by the agency whenever the public interest requires). As matters currently stand, however, the Department's decision concerning where the public interest lies remains in place as the final decision of the Board and the judgment of the Commonwealth Court.

In these circumstances, *Omni* compels us to affirm the District Court.⁷ [**29] Indeed, such a result seems to follow, *a fortiori*, [*164] from *Omni* given the conceded presence here of disinterested decision makers, an independent investigation, an open process, and extensive opportunities for error correction. The risk that the plaintiff's injury is [**28] not the result of a bona fide execution of state policy is far less substantial here than in *Omni* and there is, accordingly, far less justification for federal court review of the state's policy judgment. For these reasons, we must decline the Surgical Center's invitation to look behind the decisions of the Department, the Board, and the Commonwealth Court. Rather, based on *Omni*, we are constrained to honor the Hospital defendants' claim to Noerr immunity.⁸

⁶The Board's "need projection formula" projected a need for 6.5 operating rooms. The Hospital currently had six general purpose operating rooms and a room used for "short procedures" such as endoscopies, colonoscopies and sigmoidoscopies. If and when the Hospital's proposed facility was completed, three of the general purpose operating rooms would be closed and the ambulatory surgical services provided in the main building would be provided in the new facility. The Surgical Center proposed to add two operating rooms under circumstances where the State Health Plan's need-project formula indicated, at most, need for one additional (seventh) operating room. In terms of the population to be served and the surgical services to be rendered, the Surgical Center's project would do little other than raise the number of operating rooms in Armstrong County above the limit set by the State Health Plan. The Board, therefore, concluded that approval of the instant CON application would result in needless duplication of *existing facilities* and health care services. While the Surgical Center projected a higher need and suggested that its facility would serve a larger area than the hospital, the Board found its projections flawed. The opinion of the Commonwealth Court establishes that it also understood this to be the basis for the Board's ruling, a basis for which it found support in the record.

⁷We acknowledge that the result we reach is in conflict with the holding of the court in *St. Joseph's Hospital v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986) and with the analysis of the courts in *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998) and *Potters Medical Center v. City Hospital Ass'n.*, 800 F.2d 568 (6th Cir. 1986). To the extent of that conflict, we respectfully disagree with the views there expressed. We note that the courts in *St. Joseph's Hospital* and *Potters Medical Center* did not have the benefit of the Supreme Court's 1991 decision in *Omni* and that *Kottle's* brief analysis does not reference that decision.

⁸This is not a case like *Walker Process Equip., Inc. v. Food Machinery and Chem. Corp.*, 382 U.S. 172, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965), or *Woods Exploration & Prod. Co., Inc. v. Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971). In *Walker*, the state action was the issuance of a patent which allegedly had been procured by fraud. The attempted enforcement of the patent against the plaintiff was held actionable under the Sherman Act. The decision making process there was an *ex parte* one in which the Patent Office was wholly dependent on the applicant for the facts. While the Patent Office can determine the prior act from its own records, it effectively and necessarily delegates to the applicant the factual determinations underlying

[**30] V.

Accordingly, we will affirm the District Court's order dismissing the Surgical Center's complaint for failure to state a claim upon which relief may be granted.

Dissent by: MURRAY M. SCHWARTZ

Dissent

SCHWARTZ, Senior District Judge, *Dissenting*:

With its decision today, the majority holds private parties who make misrepresentations that pervasively influence the decision making process of public entities are entitled to immunity under both the state action immunity doctrine and the *Noerr-Pennington* immunity doctrine. The majority opinion conflicts with the teaching of this Court in an opinion issued less than four months ago, which held that under certain circumstances applicable here, material misrepresentations that affect the core of a litigant's submissions to an administrative body are not entitled to *Noerr-Pennington* immunity. See [*Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 \(3d Cir. 1999\)](#).

I respectfully dissent for three reasons. First, I believe the misrepresentation exception to the *Noerr-Pennington* doctrine should be applied when intentional falsehoods pervade the entire state administrative proceeding leading to the denial of plaintiff [**31]'s application for a certificate of need ("CON"). Second, the majority's position that the misrepresentation exception has no place in the jurisprudence of this Circuit is not supported by case law. Finally, the majority relies on a Supreme Court decision that is not applicable to this case. As a consequence, the defendant should not be able to escape liability for its misrepresentations under either the state action or *Noerr-Pennington* immunity doctrines.

According to the majority opinion, the defendants are immune from antitrust liability for their conduct during the course of petitioning the Pennsylvania State Health Facility Hearing Board ("Board") to deny plaintiff's application for a CON. The majority opinion finds [*City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 \(1991\)](#), supports the dismissal of plaintiff's claim. First, the majority finds that the District Court properly dismissed the boycott and misrepresentation claims under [*165] the *Noerr-Pennington* doctrine. The majority believes that *Omni* and *Cheminor Drugs* cast doubt on whether a misrepresentation exception to *Noerr-Pennington* immunity [**32] exists under any circumstances. Further, even if a misrepresentation exception exists, the majority asserts that the alleged misrepresentations were irrelevant because the Board denied the CON on grounds independent of the misrepresentations. The majority emphasizes that the decision makers were disinterested, conducted an independent investigation, and the process afforded opportunities for error correction. In summary, the majority has essentially found the denial of the CON was untainted by the alleged misrepresentations or boycott threats.

Second, the majority decision argues it was not the boycott or misrepresentation, but rather the denial of the CON that was the direct cause of the Surgical Center's alleged injuries. The majority concludes denial of the CON was state action and the Hospital parties are therefore immunized from antitrust liability under state action immunity, arguing that "liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did so by . . . wrongful conduct that may have affected the decision making process."

the issuance of a patent. Accordingly, when the applicant has submitted false factual information, the state action is dependent on financially interested decision making. See Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, [*80 Calif. L. Rev.* 1177, 1249 \(1992\)](#) (suggesting that the immunity exception recognized in *Walker* is "very narrow" and applies only when financially interested parties essentially made the factual determinations that triggered the governmental restraint). The same is true of the situation in *Woods* where the Texas Railroad Commission was wholly dependent on the antitrust defendants for the factual information on which it predicated its allocation of production from a given field.

[Majority opinion at page 15]. Given the procedural posture of a motion to ****33** dismiss, I believe the majority's conclusion is not only impermissible fact-finding, but also contrary to the Surgical Center's entitlement to all favorable inferences and resolution of factual disputes in its favor.¹

DISCUSSION

[[34] I. The Hospital Parties' Actions**

Armstrong Surgical Center asserts the Hospital parties conspired to subvert the establishment of its facility by announcing to the Board, which was reviewing the Surgical Center's CON application, their intent to boycott the facility, and by submitting false and misleading information to the Board regarding the Hospital's ASC. The purpose of the boycott and misrepresentations was to eliminate a potential new entrant whose competition would adversely affect all the defendants. The Hospital has a complete area monopoly in providing operating room services. The nineteen physicians who sent boycott letters performed nearly 90% of all surgery in the relevant geographic area. Thus, the Hospital parties' actions targeted two criteria the Board considers in reviewing a CON application: (1) the need for the facility, and (2) its prospective economic viability.

The nineteen physicians in question sent letters to the Board, as it was considering the CON application, stating they would not use the plaintiff's ASC, but would only use the (fictional) ASC provided by the Hospital. The letters stated:

I do not intend to perform surgery at the proposed **[[**35]]** Armstrong Surgical Center. I intend to use the services of the Ambulatory Surgery Center at Armstrong County Memorial Hospital. The hospital's Ambulatory Surgical Center provides the highest quality medical care at the most reasonable cost.

The letters go on to suggest that since the Hospital's ASC is superior, the proposed ASC is unnecessary: "It duplicates services already being provided, and it is not cost effective." All nineteen letters submitted to the Board were on the Hospital stationery, and contained the same language.

[[*166]] The Pennsylvania Department of Health ("Department") disapproved plaintiff 's CON application on November 23, 1993. The Board affirmed the Department's decision on March 13, 1996. The Board relied on two grounds for affirming the denial of the CON: (1) the Board found the Hospital ASC made Armstrong's ASC duplicative and unnecessary, and (2) Armstrong's ASC would not be economically viable because 90% of the staff physicians would not use it.

The Hospital misrepresented to the Board that its ASC was substantially built and would be ready for use in the near future. When the Hospital parties made their misrepresentations, they knew the Hospital had **[[**36]]** ceased construction of its outpatient facility months before the hearing, and that construction had not resumed. The fact that the Department learned that this representation was false before it denied the CON does not detract from the falsity of the representation. The Department and the Board learned construction on the Hospital ASC had been interrupted, but they did not know the Hospital had no intent to build or operate a Hospital ASC. In fact, the Board opinion demonstrates the opposite was true. Although the Board knew the Hospital was using the building as a storage facility, it was led to believe that the Hospital had not abandoned the project. Further, because it was not in its economic interest, the Hospital did not plan to resume construction if Armstrong's CON application was denied. The Board's decision relied on the misrepresentation that the Hospital ASC was or would be built and the threat of a boycott.

¹ In ruling on a motion to dismiss, the court must accept the well-pleaded facts as true and resolve them in the light most favorable to the plaintiff. *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir. 1998); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). In addition, the court may consider allegations contained in the complaint, exhibits attached to the complaint, and matters of public record. See *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 259 (1998); *Steinhardt Group, Inc. v. Citicorp*, 126 F.3d 144, 145 (3d Cir. 1997). Accordingly, this dissent, like the majority, considers both the Board's decision and the Commonwealth Court decision.

Armstrong's ASC would not be economically viable because the nineteen physicians who performed nearly all surgeries in the area would not use the new facility if completed because they would use the Hospital ASC. The Board noted the effect of the boycott letters sent [**37] by the physicians in explaining its denial of Armstrong's CON application:

The most damaging evidence is that the number of physicians who might have been expected to support the facility decreased significantly after the Applicant had submitted its projections. . . . The nineteen physicians who opposed the project in writing are responsible for approximately 90 percent of all surgery performed at the Hospital and each is on the Hospital's staff.

In other words, after the application was submitted (and for whatever reason) support for the facility eroded among physicians who either had supported it initially or were being counted upon for their eventual participation. Because the Applicant would therefore have to generate much of its volume from outside the service area or from patients who reside in the service area but currently "migrate" to other locales for ambulatory surgery, we seriously doubt that the volume projections made for the facility can be achieved.

Board Op. at 47-48 (citations and footnote omitted).

With these facts in mind, I turn to the majority conclusion that the Hospital parties have immunity for the injuries resulting from their misrepresentations.

[**38] II. Applicability of the *Noerr-Pennington* Doctrine

The Hospital parties contend the *Noerr-Pennington* immunity doctrine applies because their announced intentions not to perform operations at Armstrong's ASC facility and statements regarding the existence of the Hospital ASC came in the context of supplying information to state agencies. In general, the *Noerr-Pennington* doctrine immunizes concerted efforts to restrain or monopolize trade when petitioning the government. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); see *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.* ("PRE"), 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993). [*167] The purpose or motive in petitioning government officials is irrelevant; the fact that the sole purpose might be to destroy a competitor does not undermine the protection afforded by the immunity. *Noerr*, 365 U.S. at 139. This is true even if "some direct injury" is an "incidental effect" of legitimate petitioning activity, regardless of whether the petitioner is aware of the infliction [**39] of such injury. *Id. at 143-144*.²

If the physicians had simply expressed their opposition to the proposed facility without intentionally misleading administrative decision makers about their intent to use the uncompleted Hospital ASC, the *Noerr-Pennington* doctrine would protect their statements. Similarly, if the Hospital had not informed the administrative decision makers it was going to build and operate [**40] a Hospital ASC, or if it had informed the decision makers it originally intended to build and operate a Hospital ASC but had concluded it would no longer do so, *Noerr-Pennington* immunity would be available to them. However, as set forth above and in the majority opinion, that is not what occurred.

A. Courts Have Distinguished Between Misrepresentations Made In The Political Context As Opposed to the Administrative or Adjudicative Context

The majority's reliance on *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991), for the proposition that there is no misrepresentation exception to *Noerr-Pennington* immunity is

² The Court in *Noerr* stated:

It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

misplaced. In *Omni*, one defendant sought to persuade the city of Columbia to create zoning ordinances, which had a detrimental effect on the plaintiff, who was a competitor of that defendant. The Supreme Court held that the defendant was not liable for antitrust violations for statements made to the city. [499 U.S. at 382](#). *Omni* reaffirmed that deliberate misrepresentations *in the legislative arena*, "reprehensible as [they are], can be of no consequence so far as [**41] the Sherman Act is concerned." [Id. at 384](#). The majority's reliance on *Omni* is not persuasive because here, the setting is an adjudicatory arena, not a lobbying or legislative one as in *Omni*.

The majority cites *Omni* for the proposition that there is no misrepresentation exception. *PRE*, which was decided two years after *Omni*, suggests that the issue of whether there is a misrepresentation exception to *Noerr-Pennington* remains an open question. [508 U.S. at 61 n.6](#). While *PRE* cited [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512-13, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#), with approval, the Supreme Court in *PRE* declined to decide whether *Noerr* permits antitrust liability for a litigant's fraud or other misrepresentations. [508 U.S. at 61 n.6](#).

The Supreme Court has stated, not once, but twice, that "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." [California Motor Transp., 404 U.S. at 513](#). [Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499-500, 100 L. Ed. 2d 497, 108 S. Ct. 1931 \(1988\)](#), [**42] stated that unethical and deceptive practices in "less political arenas," such as administrative or adjudicatory settings, could violate antitrust laws. Thus, the Supreme Court has broadly hinted *Noerr-Pennington* immunity [*168] is not intended to shield petitioning activities that do not further, but rather distort, the decision-making process in the non-legislative context.

Several Circuit Courts of Appeal also have distinguished between the level of immunity afforded to misrepresentations made in different forums. In [Potters Medical Center v. City Hospital Ass'n, 800 F.2d 568, 571 \(6th Cir. 1986\)](#), the plaintiff alleged that the defendant hospital's certificate of need application contained materially false statements about the plaintiff. The court stated that "the knowing and willful submission of false facts to a government agency falls within the sham exception to the *Noerr-Pennington* doctrine." [800 F.2d at 580](#). The Fifth Circuit in [Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1296-98 \(5th Cir. 1971\), cert. denied, 404 U.S. 1047, 30 L. Ed. 2d 736, 92 S. Ct. 701 \(1972\)](#), held that [**43] *Noerr* did not protect, *inter alia*, the filing of false production forecasts with a state regulatory commission. The court stated that the *Noerr-Pennington* doctrine seeks to protect attempts to influence policies and held that "the abuse of the administrative process here alleged does not justify antitrust immunity." [Id. at 1298](#).

Other cases have held the *Noerr-Pennington* doctrine does not immunize misrepresentations made in the administrative or adjudicative context. See, e.g., [Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 124 \(3d Cir. 1999\)](#) (holding that material misrepresentations in an adjudicative arena are not protected by *Noerr-Pennington* immunity); [Whelan v. Abell, 310 U.S. App. D.C. 396, 48 F.3d 1247, 1255 \(D.C. Cir. 1995\)](#) (finding that if sham claim involves administrative agencies, then *Noerr* does not protect "petitions based on known falsehoods"); [St. Joseph's Hosp., Inc. v. Hospital Corp. of Am., 795 F.2d 948, 955, reh'g denied en banc, 801 F.2d 404 \(11th Cir. 1986\), see infra; Ottensmeyer v. Chesapeake & Potomac Tel. Co., 756 F.2d 986, 994 \(4th Cir. 1985\)](#) [**44] (suggesting that knowing submission of false information to police -- communications which "do not constitute the type of 'political activity' protected by the *Noerr-Pennington* doctrine" -- would fall within the sham exception); [Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1261 \(9th Cir. 1982\)](#) (stating that *Noerr* does not immunize false information given to an administrative or adjudicatory body), cert. denied, 459 U.S. 1227, 75 L. Ed. 2d 468, 103 S. Ct. 1234 (1983); [Israel v. Baxter Labs., Inc., 151 U.S. App. D.C. 101, 466 F.2d 272, 278 \(D.C. Cir. 1972\)](#) ("No actions [efforts to deceive the Food and Drug Administration] which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption.").

The rationale for limiting immunity for private actors' efforts to mislead adjudicatory or administrative officials is that these entities, as compared to legislative bodies, rely on information supplied by the parties to a greater extent than legislative bodies. [Allied Tube, 486 U.S. at 499-500](#). The Ninth Circuit [**45] in *Clipper Express*, c [690 F.2d at 1261](#), explained:

There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.

The majority recognizes the decision by the Department to deny the CON involved an individualized application of established criteria. However, it attempts to reconcile the difference between the adjudicative context and legislative context by arguing that the Department's decision to deny the certificate of need was "essential to the execution of the sovereign's regulatory policy" regarding health care facilities. [Majority opinion at page 16]. This distinction [*169] is unpersuasive. Although the government agency's decision on the certificate of need application could be viewed as essential to regulating health care facilities, *St. Joseph's Hospital, 795 F.2d at 952*, **46 and *Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1063 (9th Cir. 1998)*, cert. denied, 143 L. Ed. 2d 40, 119 S. Ct. 1031 (1999), both held that misrepresentations in this context do not have *Noerr* immunity. Every adjudicative decision could be viewed as essential to a sovereign's regulatory policy and thus, the majority would nullify the distinction the Supreme Court and other appellate courts have made between misrepresentations made in the legislative context as opposed to the administrative or adjudicative context.

The majority appears to argue that the process employed by the Department could uncover misrepresentations because the Department conducted its own investigation. However, in *Cheminor*, the governmental bodies -- the Department of Commerce ("DOC") and the International Trade Commission ("ITC") -- also conducted their own investigation, but another panel of this Court still held material misrepresentations that affect the core of the defendant's petition will preclude *Noerr-Pennington* immunity. *168 F.3d at 121, 124* (stating that the "DOC and ITC make final determinations after they have conducted their own **47 investigations . . . and after they have heard further arguments from the parties involved"); see *Clipper Express, 690 F.2d at 1261-62* (stating that submitting false information in an adjudicatory proceeding can be the basis for antitrust liability even if the agency was not misled by the information). The majority's view, carried to its logical extreme, would allow the more skillful liar to avoid antitrust liability so long as the decision maker conducts its own investigation.

Moreover, it is not clear the Department conducted an independent investigation. Rather, the Department relied on the Hospital defendants to give truthful information so that it could make a fully informed decision. The majority's opinion recognizes the Board was misled because the Board "made a credibility determination" "that the project had not been abandoned." [Majority opinion at page 17]. However, the majority refuses to acknowledge that the Board opinion demonstrates that the denial of the CON was based on the false belief, nurtured by the Hospital defendants, that the Hospital would build its ASC.

B. Similar Cases Have Held That Misrepresentations Relating to a CON Application **48 Do Not Enjoy *Noerr* Immunity

The facts in *St. Joseph's Hospital* closely parallel those alleged by the plaintiff. The defendant, Memorial Medical Center ("MMC"), was the sole provider of cardiac surgery services in the relevant market area. *795 F.2d at 952*. It opposed St. Joseph's CON application, claiming it already had the capacity to perform more heart procedures in the region than required, thus making its competitor's services unnecessary. *Id.* The Board relied upon this information in denying St. Joseph's request for a CON. *Id.* St. Joseph's sued, asserting MMC provided false information to the Board. *Id. at 953*. The court found that the misrepresentations were not made in the political arena and held that parties furnishing false information to a government agency passing on specific certificate applications are not entitled to *Noerr-Pennington* petitioning immunity. The court held:

When a governmental agency such as [the State Health Planning Agency] is passing on specific certificate applications it is acting judicially. Misrepresentations under these circumstances do not enjoy *Noerr* immunity.

Id. at 955. **49 Accordingly, the court reversed the district court's decision granting the defendant's motion to dismiss. *Id. at 957*.

[*170] The Ninth Circuit, like the Eleventh Circuit in *St. Joseph's Hospital*, also held *Noerr-Pennington* immunity does not protect a party's intentional misrepresentations in similar circumstances. *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998), cert. denied, 143 L. Ed. 2d 40, 119 S. Ct. 1031 (1999). As in this case, the district court in *Kottle* granted the defendant's motion to dismiss. *Id.* at 1058-59. The *Kottle* court also examined allegedly false information relating to a CON application. *Id.* at 1058. The court stated that if misrepresentations made by a defendant were of such magnitude that the "entire CON proceeding was deprived of its legitimacy," then the sham exception to *Noerr-Pennington* immunity would apply. *Id.* at 1063.

The misrepresentations in *Kottle* were made in an administrative or adjudicatory arena because the Department of Health, the decision maker, conducted public hearings, accepted written and oral arguments, [**50] permitted representation by counsel, issued written findings, and its decision was appealable. *Id.* at 1062. In this case, the Department also conducted public hearings, accepted evidence and argument from interested parties, made findings, and its decision was appealable. Since the court in *Kottle* found that the misrepresentations were not made in the political or lobbying context, the court applied a different standard than the one set forth in *Omni*. *Id.* (stating that "intentional misrepresentation to government officials" is treated differently "outside of the political realm"). The court found, however, that the plaintiff's complaint fell short of invoking the sham exception because the plaintiff's vague allegations of misrepresentation were insufficient to overcome the defendant's *Noerr-Pennington* immunity. *Id.* at 1064. The court could not ascertain "what representations [the defendant] made, or to whom; with whom [the defendant] conspired . . . or what other testimony the Department may have had that could have influenced its decision to deny [plaintiff]'s CON application." *Id.* In contrast, the plaintiff's complaint [**51] in this case details the alleged misrepresentations made by the defendants, and the Board decision demonstrates that such material misrepresentations influenced its decision, as well as that of the Commonwealth Court. See *infra*.

C. The Defendants' Actions Nullify Their *Noerr-Pennington* Immunity

Our recent decision in *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999), does not support the majority's position. In *Cheminor*, the defendant Ethyl Corporation complained to the ITC and the DOC that plaintiff Cheminor was dumping and selling ibuprofen at less than fair value. *Id.* at 120. Cheminor brought antitrust claims in which it alleged that Ethyl's statements to the ITC were baseless, made in bad faith, contained false statements, and were brought only for anti-competitive reasons. *Id.* The issue decided by this Court was whether alleged misrepresentations by Ethyl vitiated its *Noerr-Pennington* immunity. The Court in *Cheminor* found the alleged misrepresentations were neither material, nor affected the core of the defendant's petition because the misrepresentations relating to the defendant's profitability [**52] were "only a small proportion of the numerous factors the ITC must consider when making a determination of material injury." *Id.* at 126. Therefore, we affirmed the decision to grant summary judgment in favor of Ethyl because Cheminor did not satisfy the first step of PRE's sham exception to the *Noerr-Pennington* doctrine. *Id.* at 127.

Cheminor held material misrepresentations that "infect the core" of the defendant's claim and the government's resulting actions are not entitled to *Noerr-Pennington* immunity under the "objectively baseless" prong of PRE. *Id.* at 123. *Cheminor* requires evaluation of misrepresentations in determining whether a defendant [*171] is entitled to *Noerr-Pennington* immunity. The majority relies on the following language in *Cheminor* to assert *Cheminor* stands for the proposition that this Circuit has held the misrepresentation exception is not part of its jurisprudence.

We decline to carve out a new exception to the broad immunity that *Noerr-Pennington* provides. Rather, we will determine whether [defendant]'s petition was objectively baseless under the Supreme Court's [**53] test in PRE, without regard to those facts that [plaintiff] alleges [defendant] misrepresented.

Id. There are three answers to the majority position. First, it ignores the immediately succeeding sentence in the opinion:

If the alleged misrepresented facts do not infect the core of Ethyl's claim and the government's resulting actions, then the petition had an objective basis and will receive *Noerr-Pennington* immunity under the first step of *PRE*.

Id. I read this language as meaning that prior to determining whether the "petition had an objective basis" the Court must determine "if the alleged misrepresented facts do . . . infect the core of Ethyl's claim." *Id.* If they do, the misrepresentation exception applies and there can be no "objective basis" for the defendant's position. If, on the other hand, the misrepresentation exception is not applicable, the defendant's petition could well have an objective basis.

Second, the majority has not explained why, if the *Cheminor* court held there was no misrepresentation exception to the *Noerr-Pennington* doctrine, it formulated a test for the misrepresentation exception and then painstakingly [**54] applied the test analyzing whether the misrepresented facts affected "the core of Ethyl's claim and the government's resulting action. . . ." *Id.* Third, the court in *Cheminor* relied on a district court case, [Music Center S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp., 874 F. Supp. 543, 549 \(E.D.N.Y. 1995\)](#). The specific language cited with approval by *Cheminor* reads:

[A] determination [of objective basis] requires consideration, *inter alia*, of . . . the nature of the particular allegations of the petition or actions before the administrative agency claimed to be fraudulent or improper, and whether these claimed misrepresentations or improper actions would have been significant to the ultimate outcome or continuation of the proceeding.

[Cheminor, 168 F.3d at 124](#) (citing [Music Center, 874 F. Supp. 543 at 549](#)) (emphasis added). If there were any doubts regarding the court's reliance on *Music Center* and its approval of the misrepresentation exception to *Noerr-Pennington* immunity, the *Cheminor* court set them to rest:

If the government's action was not dependent [**55] upon the misrepresented information, the misrepresented information was not material and did not go to the core of Ethyl's petition. *In sum, a material misrepresentation that affects the very core of a litigant's . . . case will preclude Noerr-Pennington immunity, but not every misrepresentation is material to the question of whether a petition such as Ethyl's had an objective basis.*

[168 F.3d at 124](#) (second emphasis added and footnote omitted). I am simply unable to accept the majority's reading of *Cheminor*.

Further, the test set forth in *Cheminor* is applicable here because the alleged misrepresentations in *Cheminor* were made in the adjudicative context. *Omni* is not applicable because the alleged misrepresentations in that case were made in a legislative context. In a factually similar case, the 11th Circuit found that "when a government agency . . . is passing on specific certificate [of need] applications it is acting judicially." [St. Joseph's Hospital, 795 F.2d at 955](#). Misrepresentations made under these circumstances do not enjoy *Noerr* immunity. *Id.*

[*172] There is a final troubling aspect of the majority's opinion. Assuming this [**56] dissent's position is correct that *Cheminor* recognizes a misrepresentation exception as part of this Circuit's jurisprudence and that the majority holds there is no misrepresentation exception to the *Noerr-Pennington* immunity doctrine, the majority has done something it cannot do. Under Rule 9.1 of the Internal Operating Procedures of this Court, "no subsequent panel overrules the holding in a published opinion of a previous panel."

1. The Defendants' Alleged Misrepresentations Were Material And Infected The Core Of The Defendants' Statements To The Department

The legitimacy of the Board's decision is in question because it relied upon materially false information and was influenced by threats of an illegal boycott. As stated previously, at this stage of the litigation, the plaintiff is entitled to all favorable inferences and resolution of factual disputes in its favor. Therefore, the court must examine whether

Armstrong Surgical is entitled, at a minimum, to an inference that the misrepresentations were not only material, but also affected the core of the defendant's claims.

The majority concluded the Board would have denied the CON application regardless of whether the [**57] Hospital ASC would be completed. However, the Board's opinion clearly shows that it premised the denial of the CON upon the Hospital's misrepresentation that it would complete and operate a Hospital ASC. In successive Findings of Fact the Board found:

25. The Hospital has partially completed construction of a building on its premises that would house a dedicated outpatient surgical facility.
26. Upon completion of the Hospital's outpatient surgical facility, three of its existing operating rooms would be moved into the new building.
27. The proposed ambulatory surgery center and the one which has been partially constructed by the Hospital would serve the same population and would provide essentially the same surgical services.
28. The Applicant's proposed ambulatory surgery center would needlessly duplicate existing facilities and health care services in Armstrong County.

Board Op. at 6 (citations omitted). Taken in context the phrase "needlessly duplicate existing facilities," *supra*, can only mean that Armstrong's proposed ASC would duplicate the proposed Hospital ASC. In addition, the letters from the 19 physicians stated that the proposed facility duplicated the [**58] services already being provided. As previously rehearsed, the Hospital parties knew there was no commitment or intent to complete a functioning Hospital ASC.

Not only the Findings of Fact, but also the Board opinion make clear that the Board, relying upon the misrepresentations of the Hospital parties, premised its denial of the CON and its entire discussion of need-projection upon there being no need for two ASCs-- the Hospital's ASC and Armstrong's ASC:

Although outpatient surgery at the Hospital is now performed in the same operating room as inpatient surgery, the Hospital has partially completed construction of a building on its premises to house a dedicated outpatient surgery facility. Upon completing construction, the Hospital would move three existing operating rooms into the new building.

With regard to the population to be served and the surgical services to be offered, there would be little difference between the Applicant's ambulatory surgical center and the one that the Hospital has partially completed, except that the Applicant's project would raise the number of operating rooms in Armstrong County above the limit set by the SHP. We conclude that approval [**59] of the instant CON application would result in needless duplication of existing facilities and health care services.

[*173] We believe that the factors set forth above, in themselves, are sufficient to support a finding that the Applicant has failed to establish need for the proposed facility by the population to be served. . . .

9. Apparently, after construction of the building and some of the interior walls had been completed, staff physicians at the Hospital began to question whether a separate outpatient facility was necessary. Although the building is currently being used as a storage facility, there was credible evidence that the project has not been abandoned.

Board Op. at 14 (citations omitted). It is noteworthy that the three Commonwealth Court judges, conducting judicial review, were of the belief that the Hospital ASC would be completed:

The hospital has partially completed construction of a building on its premises that would house a dedicated outpatient surgical facility. Upon completion of the hospital's outpatient surgical facility, three of its existing operating rooms would be moved into the new building.

The proposed ambulatory surgery center [**60] and the one which has been partially constructed by the hospital would serve the same population and would provide essentially the same surgical services. Armstrong's proposed ambulatory surgery center would needlessly duplicate existing facilities and health care services in Armstrong county.

Commonwealth Court Op. p. 5. At the very least four judges -- three Commonwealth judges and this judge -- read the Board opinion as indicating that the Department believed the Hospital ASC would be completed.

The presence or absence of a Hospital ASC was significant. A CON is granted if a proposed health care expenditure will meet medical needs of the target population in an effective and *cost efficient* manner. See Pa. Stat. Ann. tit. 35 § 448.707. There is no question that an ASC was more cost efficient than the continued use of the six hospital operating rooms. The Hospital's own accountant documented projected average cost savings of \$ 400 per case if an ASC were used relative to the current Hospital operating rooms.

The issue before the Board was whether there would be overcapacity of ASCs if a CON were issued to Armstrong. Because the misrepresentations led the Board to [**61] believe there would be a Hospital ASC, it never reached the issue of delivering effective and cost efficient medical services under the scenario in which there was no Hospital ASC. There is simply no way for the District Court or this Court to determine whether the Board would have granted the CON had it known the true facts. With the Court having to accept all well-pleaded facts as true and resolve them in the light most favorable to the nonmovant, see [*Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 \(3d Cir. 1998\)](#), the plaintiff is surely entitled to the reasonable inference that the Board predicated its decision, in major part, on the belief that a Hospital ASC would be completed. Therefore, I would hold the alleged misrepresentations deprive the Hospital parties of *Noerr-Pennington* immunity because their misrepresentations were material and infected the very essence or core of the administrative proceeding and consequent denial of the CON by the Board and affirmance of the Board's decision by the Commonwealth Court. Where as here, the misrepresentations caused the Board and Commonwealth Court to make their determinations based upon [**62] the existence of a fictional Hospital ASC, the administrative proceeding and Commonwealth Court review have been deprived of their legitimacy.

2. *Noerr-Pennington* Immunity Does Not Protect Threats of an Illegal Boycott

While an issue of first impression, the question of whether *Noerr-Pennington* [*174] petitioning immunity protects threats of an illegal boycott must also be answered in the negative. The Supreme Court has stated, "there are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations." [*California Motor Transp.*, 404 U.S. at 513](#). If the Supreme Court would not immunize misrepresentations in the judicial or administrative context, it surely would not immunize threats of illegal activity when they corrupt the administrative adjudication process. Where a threat of illegal activity plays such a strong role in the administrative decision-making process and forms part of the basis for an administrative decision, it is impossible to say that the process has not been corrupted. Denying *Noerr-Pennington* immunity to those who provide false information to [**63] the government in its deliberative decision-making process can only *improve* the information flowing to the government.

Attention is now turned to whether the Hospital parties are protected by state action immunity as urged by the majority.

III. Applicability of State Action Immunity

The majority opinion also dismisses Armstrong's complaint on the theory that the Hospital defendants' actions are immunized under the *Parker* state action immunity doctrine. See [*Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#). The state action immunity doctrine has two related aspects. First, as elaborated in *Parker*, state action immunity protects parties who engage in otherwise actionable antitrust conduct, pursuant to, and in reliance upon, state action. Second, state action immunity applies when the antitrust injury complained of arises directly from state action, as distinguished from the private action alleged in the complaint before us. [*Noerr*, 365 U.S. at 136](#). In this case, neither aspect of state action immunity is applicable.³

³The staff physicians defendants eschewed reliance upon *Parker* state action immunity, stating in the catch line of their argument, "Plaintiff's Attempt to Reframe this Appeal in Terms of State Action Immunity is Misguided. . ." Individual Appellee's Br. at 20. Further, the Hospital dropped all reference to state action immunity on appeal. Appellee's counsel made a deliberate,

[**64] It is clear the actions complained of were not pursuant to, or in reliance upon, state action. Indeed, reliance upon the state action of denial of the CON to immunize unlawful anti-competitive conduct which occurred *prior* to and caused the denial of the CON presents severe conceptual difficulties. The only state action was denial of the CON. The Hospital parties engaged in no alleged unlawful anti-competitive behavior *following* the denial of the CON. Rather, the misrepresentations combined with the expressed intent to engage in a boycott all occurred *before* the Board's denial of the CON. With this state of affairs, it is difficult to understand how the misrepresentations coupled with the stated intent to boycott are somehow immunized by the CON, where the alleged wrongful activity itself was directed to and resulted in the denial of the CON. Furthermore, even assuming these conceptual difficulties are not insurmountable, there is no indication the Hospital parties relied upon the denial of the CON in carrying out the alleged unlawful anticompetitive behaviors, or were authorized by the state to do so. Indeed, the *Parker* court expressly noted that "a state does not [**65] give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." [317 U.S. \[*175\] at 351](#). Therefore, the "authorization" aspect of state action immunity is not applicable to the facts of this case.

The second aspect of state action immunity doctrine "immunizes" antitrust injuries directly caused by state action. It is this second aspect upon which the majority opinion rests, arguing that liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did do by unlawful conduct.

The defendants' actions are not protected by state action immunity for two reasons. First, at least some of the injuries of which Armstrong complains were not the direct result of the only state action alleged -- the denial of the CON. Second, a misrepresentation exception to state action immunity must apply under the circumstances presented by this case.

The majority finds the plaintiff failed to allege that its injuries were caused by the hospital parties' alleged economic boycott and misrepresentations. Rather, the majority asserts the alleged injuries were either directly [**66] related to the denial of the CON, or the consequences thereof. Even accepting *arguendo* that state action immunity applies to this case, some of the injuries alleged by Armstrong are not the direct result of state action, but of the alleged misrepresentations and conspiracy to boycott. After reciting throughout its complaint the boycott and misrepresentations, the Surgical Center lists the following damages:

- (1) Denial of the CON required to establish and operate [its ambulatory surgery center].
- (2) Denial of [its] ability to establish and operate [the proposed facility].
- (3) Delay in securing the required CON, if ultimately granted, for the establishment and operation of the [ambulatory surgery center].
- (4) Increased costs, legal and otherwise, in pursuing Plaintiff's application for a CON.
- (5) Complete loss of the value of the CON, or a reduction in its value when and if ultimately granted.
- (6) Complete loss of the value of Plaintiff's [facility], or reduction of its value when and if permitted to be operated.

- (7) Complete loss of, or reduction in, the income and cash flow which Plaintiff would have received from operation of [**67] the [center].
- (8) Other related losses.

Because of the threatened boycott, damage claims 5, 6 and 7 would have occurred even if Armstrong had received the coveted CON. The boycott of plaintiff's surgical center by physicians who perform 90% of surgical procedures in the relevant geographic market surely would serve to reduce the value of the plaintiff's facility, either by the loss of business or the increase in costs associated with attracting personnel to the facility. An agreement to exclude the plaintiff from the relevant market by an economic boycott and misrepresentations to the Board may result in antitrust injury. See, e.g., [Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 877 \(3d Cir. 1995\)](#) (finding complaint

reasoned choice not to rely on the theory, going so far as to state that "the correctness of the District Court's decision . . . is not accurately analyzed under state action immunity." Individual Appellee's Br. at 22. Thus, this is not a circumstance where a litigant's counsel overlooked a theory. While this Court is not limited by positions advanced by the litigants, caution is warranted where capable counsel expressly disavow reliance on a defense. The majority nonetheless has relied upon a state action defense explicitly and impliedly discarded by the defendants.

adequately alleged antitrust injury where plaintiff alleged that defendants unreasonably restricted his ability to practice medicine in the relevant market and thus reduced competition). Therefore, I cannot agree with the majority's conclusion that damage claims 5, 6 and 7 stemmed from denial of the CON.

The misrepresentation exception to *Noerr-Pennington* immunity should also apply to state action immunity in the adjudicatory or administrative [**68] context. Where misrepresentations and/or threats of illegal activity subvert the entire decision making process, the direct cause of the injury is not the state action, but rather the misrepresentations or threats which made a decision based on accurate information impossible. See *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1295 (5th Cir. 1971), cert. denied, 404 U.S. 1047, 30 L. Ed. 2d 736, 92 S. Ct. 701 [*176] (1972); see also [Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.](#), 382 U.S. 172, 176, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965) (holding that procurement of patent by fraud on the United States Patent Office is actionable under the Sherman Act, notwithstanding intervening state action of granting the patent).

In the legislative arena, it is difficult to say that any particular action, no matter how inappropriate, results in a particular legislation which causes injury. However, in the administrative and judicial arenas, where agencies and courts write *reasoned* opinions and make decisions based on information supplied by the parties, they must depend on the parties to provide accurate information. [**69] ⁴ [**70] As stated above, the Supreme Court has noted different standards apply to conduct in administrative or adjudicatory processes. [Allied Tube & Conduit Corp. v. Indian Head, Inc.](#), 486 U.S. 492, 500, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988); [California Motor Transp. Co. v. Trucking Unlimited](#), 404 U.S. 508, 513, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972); see *supra*, Part II.A. The misrepresentations here, at the very least, largely influenced and very probably dictated the outcome of the administrative process. Under that circumstance, it is the misrepresentations, not the state action, which caused the alleged injuries and dictated the Board's decision to deny the CON.⁵

Because *Parker* and *Noerr* are complementary expressions of one principle of *antitrust law*, a misrepresentation exception to *Parker* immunity is necessary to effectuate the misrepresentation exception [**71] to *Noerr-Pennington* immunity. Without an exception for those misrepresentations which have a pervasive influence on administrative and adjudicative decisions, only those defendants who most effectively subvert the state's process -- the ones whose improper behavior results in favorable results for them from the state's administrative and adjudicatory processes -- would be immune under state action immunity. This would not only be a perverse result, but would entirely vitiate the misrepresentation exception to *Noerr-Pennington* immunity.

This case is similar to *Woods*. In *Woods*, the defendants, partial owners of a natural gas field, intentionally gave false information about their production forecasts to the Texas Railroad Commission. 438 F.2d at 1295. The Commission used that information to determine allowable production. *Id.* The court rejected "the facile conclusion that action by any public official automatically confers exemption." *Id.* at 1294 (citations omitted). The court held that state action immunity was not applicable because the misrepresentations dictated the outcome: "defendants' conduct here can in no way be said to have [**72] become merged with the action of the state since the Commission neither was the real decision maker nor would have intended its order to be based on false facts." *Id.*

⁴ It is for this reason that reliance by the majority on [Sandy River Nursing Care v. Aetna Casualty](#), 985 F.2d 1138, 1142 (1st Cir.), cert. denied, 510 U.S. 818, 126 L. Ed. 2d 39, 114 S. Ct. 70 (1993), is misplaced. That case involved a decision by a *legislature* to change the law in the face of a boycott. It is impossible to say that the boycott dictated the outcome of the legislature's decision.

⁵ The majority's reliance on [Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n](#), 107 F.3d 1026 (3d Cir.), cert. denied, 118 S. Ct. 264 (1997), also is misplaced. There, an unaccredited law school alleged the American Bar Association engaged in anticompetitive conduct because graduates from unaccredited schools could not sit for most state bar examinations. This Court concluded the source of the injury was the action of each of those states because "every state retains the final authority to set all the bar admission rules." *Id.* at 1035. That case is distinguishable from the instant case for two reasons. First, the state action in that case was non-adjudicative in nature. Second, and more importantly, the plaintiff made no allegation that the ABA knowingly made misrepresentations which were central to each state's actions.

at 1295. Thus, the injury was not directly [*177] caused by state action, but by the misrepresentations. Similarly in the instant case, the Board relied on the Hospital parties' statements of subjective intent in making its decision.

The majority believes that *Woods* is distinguishable from the present case because the Texas Railroad Commission "was wholly dependent on the antitrust defendants for the factual information on which it predicated its allocation of production from a given field." [Majority opinion at 18 n.8]. The court in *Woods* stated that the Railroad Commission had "no opportunity for meaningful supervision or verification" of the defendants' statements and therefore, the Commission "must rely on the truthfulness of the gas producers." *Id.* at 1295. I do not find *Woods* to be so different from this case. Here, the Department and Board had no way of ascertaining whether the Hospital truly intended to complete its ASC. The Department and the Board were reasonable in [**73] relying on the defendants' statements, which clearly implied that the Hospital ASC would be completed and utilized. Further, the court in *Woods* did not require that the government entity be "wholly" dependent on the information provided by a defendant in order to deny state action immunity.

CONCLUSION

For the reasons stated above I would hold state action immunity does not protect the defendants' actions. I also conclude there is a misrepresentation exception to *Noerr-Pennington* immunity and that it applies in this case. My view that material misrepresentations can vitiate *Noerr-Pennington* immunity is supported by *Cheminor, 168 F.3d at 124*, and the case law of other circuits, specifically the Fifth, *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286, 1298 (5th Cir. 1971)*, Sixth, *Potters Medical Center v. City Hospital Ass'n, 800 F.2d 568, 580 (6th Cir. 1986)*, Ninth, *Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1060 (9th Cir. 1998)*, cert. denied, *143 L. Ed. 2d 40, 119 S. Ct. 1031 (1999)*, Eleventh, *St. Joseph's Hospital v. Hospital Corp. of America, 795 F.2d 948, 955 (11th Cir. 1986)*, [**74] and District of Columbia, *Whelan v. Abell, 310 U.S. App. D.C. 396, 48 F.3d 1247, 1254-55 (D.C. Cir. 1995)*. See also *Cheminor, 168 F.3d at 131* (Sloviter, J., dissenting) (citing *Whelan* and *Kottle* for the proposition that PRE preserves a fraud exception to antitrust immunity).

The misrepresentations were material as there is an overpowering inference that in denying the CON the Board accepted the Hospital parties' misrepresentation that the Hospital would complete construction and operate a Hospital ASC. These same misrepresentations caused the Board and Commonwealth Court to pass upon the question of whether there was a need for two ASCs. Specifically, the misrepresentations deprived the Board from passing upon the CON application based upon the true facts -- six hospital rooms vis-a-vis the grant of Armstrong's application for a CON, with concomitant cost savings of \$ 400 per case, thereby meeting the statutory goal of meeting medical needs in an effective and cost efficient manner. We do not know, of course, whether the Board would have granted or denied the CON application had its proceeding not been so pervasively infected by the [**75] misrepresentations and threat of boycott.

I respectfully and regrettably dissent for all of the reasons set forth above. While respecting my colleagues differing views, I cannot agree with them. I regret the majority result for two reasons. First, the majority opinion, in light of *Cheminor*, has provided little, if any, guidance to the bar, future litigants or the public. Second, to the extent the majority result provides guidance, it signals that it is willing to immunize clear antitrust violations if they can be disguised, however disingenuously, as petitioning activities without regard to whether they are legitimate, and without [*178] distinguishing the arena in which they are made.



Miller Pipeline Corp. v. British Gas PLC

United States District Court for the Southern District of Indiana, Indianapolis Division

July 27, 1999, Decided ; July 27, 1999, Opinion Filed

IP 94-1421-C-B/S

Reporter

69 F. Supp. 2d 1129 *; 1999 U.S. Dist. LEXIS 15086 **; 1999-2 Trade Cas. (CCH) P72,694

MILLER PIPELINE CORPORATION, Plaintiff, vs. BRITISH GAS PLC, Defendant.

Disposition: [**1] Defendant's motion for partial summary judgment granted.

Core Terms

patents, pipe, fracturing, infringement, fragments, baseless, intense, mole, patent office, irregular, replacing, cutting, asserting, immunity, crack, anticompetitive, antitrust, sham, bad faith, contends, spreading, notices, antitrust liability, patent infringement, lawsuit, Sherman Act, threats, argues, axis, genuine issue of material fact

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > 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[] Discovery, Methods of Discovery

A motion for summary judgment shall be granted 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.

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

HN2[] Summary Judgment, Entitlement as Matter of Law

A genuine issue of material fact exists if there is sufficient evidence for a jury to return a verdict in favor of the nonmoving party on the particular issue.

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

[**HN3**](#) **Summary Judgment, Entitlement as Matter of Law**

A disputed fact is material only if it might affect the outcome of the suit in light of the substantive law.

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

[**HN4**](#) **Summary Judgment, Burdens of Proof**

While the burden rests squarely on the party moving for summary judgment to show that there is an absence of evidence to support the nonmoving party's case, the nonmoving party may not simply rest on the pleadings, but must affirmatively demonstrate by specific factual allegations that a genuine issue of material fact exists for trial.

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

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

[**HN5**](#) **Summary Judgment, Opposing Materials**

Conclusory allegations by a party opposing a motion for summary judgment cannot defeat the motion.

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

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

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

[**HN6**](#) **Burdens of Proof, Movant Persuasion & Proof**

The moving party is entitled to a judgment as a matter of law if the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. However, if doubts remain as to the existence of a material fact, those doubts should be resolved in favor of the nonmoving party and summary judgment denied.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

[**HN7**](#) **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) provides that fraud must be pled with particularity.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

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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 > General Overview

HN8 [] **Bad Faith, Fraud & Nonuse, Fraud**

Antitrust liability under [15 U.S.C.S. § 2](#) of the Sherman Act applies to the enforcement and maintenance of a patent obtained by fraud on the United States Patent and Trademark Office.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN9 [] **Defenses, Fraudulent Procurement of Patent**

In order to prove its claim that a party committed fraud on the United States Patent and Trademark Office in the procurement of its patents, a claimant must show by clear and convincing evidence that the party obtained its patents by knowingly and willfully misrepresenting or omitting material facts to the office.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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 > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

HN10 [] **Scope, Exemptions**

The Noerr-Pennington doctrine provides general immunity from antitrust liability under the Sherman Act, [15 U.S.C.S. 1 et seq.](#), to persons pursuing relief through legislative action or influencing government officials, as well as administrative agencies and the courts, unless the activities are merely a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

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Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN11[**Exemptions & Immunities, Noerr-Pennington Doctrine**

Under the Noerr-Pennington doctrine, an antitrust plaintiff first must show that the defendant's lawsuit is 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 the doctrine, and an antitrust claim premised on the sham exception must fail. If the lawsuit is objectively baseless, the antitrust plaintiff must show additionally that the defendant's subjective motivation was anticompetitive, such that the defendant's meritless 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.

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN12[**Infringement Actions, Burdens of Proof**

Patent infringement claims are presumed to be brought in good faith. This presumption can be rebutted only by clear and convincing evidence.

Counsel: For Plaintiff: Donald Knebel, BARNES & THORNBURG, Indianapolis, Indiana.

For Defendant: Edward W. Harris, SOMMER & BARNARD, Indianapolis, Indiana.

For Defendant: Marvin Petry, LARSON & TAYLOR, Alexandria, Virginia.

Judges: SARAH EVANS BARKER, CHIEF JUDGE, United States District Court, Southern District of Indiana.

Opinion by: SARAH EVANS BARKER

Opinion

[*1130] ENTRY GRANTING DEFENDANT'S¹ MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on Defendant's motion for partial summary judgment as to Plaintiff's claim that Defendant violated § 2 of the Sherman Act, 15 U.S.C. § 2 in asserting its patents against Plaintiff for anticompetitive **[**2]** purposes. Defendant contends that Plaintiff's antitrust claim must fail because Defendant's assertion of its patents was not objectively baseless and thus Defendant is immune from antitrust liability. Plaintiff argues that antitrust immunity is not available in this case because (1) Defendant perpetrated fraud on the patent

¹We were informed after this decision was handed down, but before publication, that "in connection with a corporate reorganization during the pendency of this litigation, its name was changed to BG plc and the right to use the name British Gas plc was assigned to another entity."

office in prosecuting its patents, (2) Defendant asserted its patents against Plaintiff in bad faith and (3) Defendant's patent infringement claims were objectively baseless and motivated by an anticompetitive purpose. In addition to their submissions with respect to the current [*1131] motion, the parties incorporate their briefs and supporting evidence from Defendant's prior motion for partial summary judgment that Miller Pipeline infringes Defendant's patents. For the reasons set forth below, we grant Defendant's motion.

STATEMENT OF MATERIAL FACTS²

[**3] Plaintiff, Miller Pipeline Corporation ("Miller Pipeline"), is an Ohio corporation, having a principal place of business in Indianapolis, Indiana. Compl. P 1. Defendant, British Gas PLC ("British Gas"), is a corporation duly organized and existing under the laws of England and Wales, having a principal place of business at Rivermill House, 152 Grosvenor Road, London, SW1V 3JL, England. Compl. P 2. British Gas is the successor to British Gas Corporation, a government corporation that was dissolved in 1990. See *id.* Miller Pipeline and British Gas are competitors in the business of trenchless repair of underground pipes. Plaintiff Resp. Br. at 2. The relevant market at issue in this litigation is the licensing, promotion and sale of products and services for trenchless pipe repair. *Id.*

British Gas owns U.S. Patent No. 4,738,565 (the "565 patent"), entitled "Method of Replacing Mains," granted on April 19, 1988, and U.S. Patent No. 4,720,211 (the "211 patent"), entitled "Apparatus for Replacing Mains," granted on January 19, 1988. See Compl. P13; Def. Summary of Statement of Material Facts, Def. Prior Mot. Summ. Judg. ("SSMF") at 1. The '565 method patent and the '211 apparatus [**4] patent disclose methods and apparatus for replacing crackable existing pipes with new pipe wherein the existing pipe is fractured into irregular fragments and the new pipe is moved into a clearance through the fractured pipe. The patents describe the use of a mole device to crack and expand the fragments of crackable existing pipe. Def. SSMF at 4-5. For purposes of its prior summary judgment motion on infringement, British Gas listed 4 exemplary claims, 2 from each patent. Claim 45 of the '565 patent describes:

- 45. A method for replacing an existing main with a new main, comprising the steps of:
 - A. starting with an existing main which is of a rigid material which cracks and is thus fracturable into irregular fragments,
 - B. moving a tool through the existing main which engages the internal wall thereof as it moves through the main, to apply an intense local pressure to the existing main to crack and fracture it into irregular fragments as the tool moves therethrough,
 - C. spreading the fragments outwardly generally about the axis of the tool to form a sufficient clearance through the fractured main for movement therethrough of an assembly for replacing the existing main, at [**5] least a portion of the outward movement of the fragments occurring under the action of said intense local pressure which causes the fracturing of the existing main into irregular fragments.

Def. Prior Summ. Judg. Mot. Br. at 2-3. Claim 9 of the '565 patent describes:

- 9. A method for replacing an existing main which is of crackable, fracturable material with a new main using a mole having a front end which tapers radially inwardly towards the front of the mole and has a fracturing surface for engagement with the internal wall of the existing main, said fracturing surface comprising blades on the front end radially openable and retractable in relation to the axis of the taper surface, the method comprising

[*1132]

- A. attaching to the rear end of the mole a tubular replacement assembly,
- B. inserting the mole into the existing main with the front end of the mole leading and moving the mole along the existing main so that the front end of the mole engages internally with the existing main and

²The facts in this case are quite extensive, as the parties have been litigating since 1994 on very complex legal and factual issues. However, this motion addresses only Miller Pipeline's antitrust claim under the Sherman Act and so we will address facts relating to the patent infringement claims and defenses only to the extent necessary to establish a proper background for this case and when such facts are relevant to the issue directly before the Court today.

C. sequentially opening and retracting the blades to engage and fracture the wall of the existing main ahead of the assembly with the said blades exerting an intense local pressure [**6] to crack and fracture the material of the existing main into irregular fragments,

D. spreading the fragments outwardly generally about the axis of the mole to form a sufficient clearance through the fractured main for movement of the assembly thereamong,

E. at least a portion of the outward spreading of the fragments occurring under the action of the blades essentially concurrently with the fracturing of the existing main into such fragments.

Def. Prior Summ. Judg. Mot. Br. at 3. Claim 31 of the '211 patent describes:

31. An apparatus for replacing an existing main which is of a rigid material which cracks and is fracturable into irregular fragments, said apparatus comprising:

A. an elongated pipe fracturing an displacement tool, (i) said tool having a fracturing means for applying an intense local pressure against the internal wall of the existing main to crack and fracture the existing main into irregular fragments, said fracturing means being operable to cause at least some outward movement of the fragments under the action of said intense local pressure which causes the fracturing of the main into irregular fragments, and said tool further having [**7] (ii) an expansion means for moving the irregular fragments radially outwardly generally about the axis of the main to enlarge the clearance through the fractured existing main for the passage therethrough of an assembly for replacing the existing main, and

B. means for moving the tool through the existing clearance.

Def. Prior Summ. Judg. Mot. Br. at 3-4. Claim 22 of the '211 patent describes:

22. A device for replacing an existing buried fracturable main of a crackable fracturable material with a tubular replacement assembly, the device comprising:

A. an elongated main fracturing and bore widening mole for insertion into and movement along the existing main, the mole having

(i) a rearwardly, outwardly tapering bore widening potion having a small extremity not greater than the internal diameter of the buried fracturable main and a large extremity greater than the internal diameter of the buried fracturable main, to provide bore widening, and the mole being provided with

(ii) a fracturing means for applying an intense local pressure against the existing main to crack and fracture it into irregular fragments, said fracturing means comprising at least one retractable [**8] outwardly movable main fracturing member which is so positioned on the mole to engage the internal wall of the fracturable main to crack and fracture the buried fracturable main to debris in the form of irregular fragments and causing at least some outward movement of said fragments, said large extremity comprising an expansion means for forcing the fragments radially outwardly from the axis of the existing main, generally about said axis to form a passage,

B. means for connecting the trailing end of the mole to a leading end of the assembly, whereby in use the new main or liner is moved linearly through the passage so formed, and

C. means for moving the mole through the buried fracturable main.

Def. Prior Summ. Judg. Mot. Br. at 4.

British Gas has been attempting to enforce its patents against allegedly infringing [*1133] devices by Miller Pipeline for many years, specifically products marketed under the name "XPANDIT" and including, among other things, a mole incorporating the invention disclosed in U.S. Patent No. 4,789,268 (the " '268 patent" or the "Yarnell mole"), a patent owned by Miller Pipeline and issued December 6, 1988. See Plaintiff. Resp. Br. at 3; Compl. PP [**9] 62-63. In June 1989, British Gas and its former exclusive licensee, PIM Corporation ("PIM"), first contacted Miller Pipeline and threatened to bring suit against Miller Pipeline for patent infringement based on its XPANDIT products and the Yarnell mole. *Id.*; Plaintiff. Exh. 1, Topf Aff. P 8. In August 1990, the parties met in Fredericksburg Virginia at a job site on which Miller Pipeline was using the Yarnell mole and other products to perform a trenchless operation in order that British Gas could witness the products in use. See Plaintiff. Resp. Br. at 3; Topf Aff. P 10. The parties did not reach any resolution at this meeting or any other subsequent time. In late 1989 through at least 1994, British Gas also contacted several of Miller Pipeline's customers to inform them that it was British Gas' position that it may be entitled to royalties for the use of the XPANDIT system in view of its '565 patent. See Plaintiff. Exh. 2, letter to Costa Rica Sanitary District; Exh. 4, letter to Mountain Cascade Inc. However, British

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Gas did not file suit against Miller Pipeline at this time. British Gas also pursued similar claims against TT Technologies, Inc. ("TTT") and Trenchless Replacement [**10] Systems, Inc. ("TRS"), threatening these companies with patent infringement litigation but not bringing suit. See Plaintiff. Resp. Br. at 4. Both TTT and TRS filed declaratory judgment actions against British Gas, at which point British Gas counterclaimed with its infringement claims, and the cases ultimately settled before trial. See *id.*

On September 23, 1994, Miller Pipeline sued British Gas for antitrust violations under § 2 of the Sherman Act, contending that British Gas asserted its patents against Miller Pipeline and certain of Miller Pipeline's customers in order to absorb all or most of the market in trenchless underground pipe repair and with the knowledge that such patents were invalid and unenforceable. Miller Pipeline contends that "British Gas has used two (invalid) patents against its competitors. For ten years, British Gas has threatened and coerced its competitors, and British Gas has done so in such a way as to avoid adjudication on the issues of validity and infringement." Plaintiff. Resp. Br. at 6. Miller Pipeline also asserted a patent infringement claim based on its '268 patent against British Gas. British Gas subsequently filed an infringement action against [**11] Miller Pipeline in the District of New Jersey on February 10, 1995 but did not serve Miller Pipeline immediately, instead seeking to negotiate a settlement agreement. See *id.* at 5. When its settlement attempts proved unsuccessful, British Gas served Miller Pipeline with the complaint, and the action was dismissed by the District of New Jersey in deference to the pending litigation in this case. See *id.* British Gas filed a counterclaim for patent infringement in the present litigation and also filed a Request for Reexamination with the United States Patent and Trademark Office of Miller Pipeline's '268 patent. Upon reexamination, the patentability of the '268 patent was confirmed, with amendments to some of the claims. See *id.* at 5-6.

British Gas moves for partial summary judgment on Miller Pipeline's antitrust claim, asserting that its patents are valid and enforceable and that in any event British Gas has a colorable claim for infringement by Miller Pipeline and that all that is required for immunity against antitrust claims is a reasonable belief that its patents are valid and infringed under the *Noerr-Pennington* "sham litigation" doctrine. Further, British Gas asserts [**12] that Miller Pipeline has produced no evidence indicating that British Gas subjectively intended an anticompetitive effect by its conduct in attempting to enforce its patents. Thus, British Gas claims it is immune from liability for any alleged antitrust violation under the Sherman Act.

[*1134] Miller Pipeline responds that British Gas' attempts to enforce its patents were objectively baseless and subjectively motivated to produce an anticompetitive effect. Miller Pipeline also contends that there is more than one theory supporting its antitrust claims. In addition to the theory relied upon by British Gas, the *Noerr-Pennington* "sham litigation" doctrine, Miller Pipeline argues that it can prove that British Gas violated antitrust laws by showing that (1) British Gas obtained its patents through fraud on the patent office or (2) British Gas asserted its patents in "bad faith." British Gas asserts that Miller Pipeline has raised the theory of fraud on the patent office for the first time in this litigation in its response brief and that Miller Pipeline did not plead fraud with particularity in its complaint as required by [Federal Rule of Civil Procedure 9\(b\)](#). In addition, British Gas contends [**13] that there is no generic "bad faith" theory for antitrust liability for asserting patent rights and that the only recognized theories are fraud in the prosecution of the patent or "sham litigation."

SUMMARY JUDGMENT STANDARD

[Rule 56\(c\) of the Federal Rules of Civil Procedure](#) provides that [HN1](#) [↑] a motion for summary judgment shall be granted "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\(c\)](#). [HN2](#) [↑] A genuine issue of material fact exists if there is sufficient evidence for a jury to return a verdict in favor of the nonmoving party on the particular issue. See [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 \(1986\)](#); [Methodist Med. Center v. American Med. Sec., Inc., 38 F.3d 316, 319 \(7th Cir. 1994\)](#). [HN3](#) [↑] A disputed fact is material only if it might affect the outcome of the suit in light of the substantive law. See [Anderson, 477 U.S. at 248, 106 S. Ct. at 2510; Greenslade v. Chicago Sun-Times, Inc., 112 F.3d 853, 857 \(7th Cir. 1997\)](#). [**14] Moreover, "in rendering a

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decision on a motion for summary judgment, a court must 'view the evidence presented through the prism of the substantive evidentiary burden' that would inhere at trial." [Monarch Knitting Mach. Corp. v. Sulzer Morat GmbH, 139 F.3d 877, 880-881 \(Fed. Cir. 1998\)](#) (quoting [Anderson, 477 U.S. at 254, 106 S. Ct. at 2513](#)). In considering a summary judgment motion, a court must draw all justifiable inferences in a light most favorable to the opposing party and must resolve any doubt against the moving party. See [Anderson, 477 U.S. at 255, 106 S. Ct. at 2513; Spraying Sys. Co. v. Delavan, Inc., 975 F.2d 387, 392 \(7th Cir. 1992\)](#).

HN4 [↑] While the burden rests squarely on the party moving for summary judgment to show "that there is an absence of evidence to support the nonmoving party's case," [Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 \(1986\)](#), the nonmoving party may not simply rest on the pleadings, but must affirmatively demonstrate by specific factual allegations that a genuine issue of material fact exists for trial. See [Celotex, 477 U.S. at 322-23, 106 S. Ct. at 2552-53](#); [**15] [Billups v. Methodist Hosp. of Chicago, 922 F.2d 1300, 1302 \(7th Cir. 1991\)](#). **HN5** [↑] Conclusory allegations by a party opposing a motion for summary judgment cannot defeat the motion. See [Smith v. Shawnee Library System, 60 F.3d 317, 320 \(7th Cir. 1995\)](#). **HN6** [↑] The moving party is 'entitled to a judgment as a matter of law' [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." [Celotex, 477 U.S. at 323, 106 S. Ct. at 2553](#). However, if doubts remain as to the existence of a material fact, those doubts should be resolved in favor of the nonmoving party and summary judgment denied. See [Wolf v. City of Fitchburg, 870 F.2d 1327, 1330 \(7th Cir. 1989\)](#).

DISCUSSION

First we will address the issue of fraud on the patent office. We agree with [*1135] British Gas that Miller Pipeline does not appear to have raised this theory previously, certainly not in their pleadings. **HN7** [↑] Averments of fraud on the patent office must satisfy [Rule 9\(b\)](#)'s requirement that fraud be pled with particularity. See [Xilinx Inc. v. Altera Corp., 33 U.S.P.Q.2D \(BNA\) 1149, 1150 \(N.D. Cal. 1994\)](#); [**16] [Sun-Flex Co. Inc. v. Softview Computer Prods. Corp., 750 F. Supp. 962, 18 U.S.P.Q.2D \(BNA\) 1171, 1179 \(N.D. Ill. 1990\)](#); [Micro Motion, Inc. v. Exac Corp., 112 F.R.D. 2, 3 \(N.D. Cal. 1985\)](#). Because Miller Pipeline has not alleged in its complaint that British Gas committed fraud on the patent office, it follows necessarily that Miller Pipeline has not pled fraud with particularity. However, in order to prevent merely delaying this issue while Miller Pipeline amends its complaint to add its fraud on the patent office allegation and because we find that we can decide the issue based on the evidence before the Court, we will address the merits of Miller Pipeline's fraudulent patent prosecution theory at this time.

The Supreme Court in *Walker Process* determined that **HN8** [↑] antitrust liability under § 2 of the Sherman Act applies to the enforcement and maintenance of a patent obtained by fraud on the Patent and Trademark Office. [Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172, 174, 86 S. Ct. 347, 349, 15 L. Ed. 2d 247 \(1965\)](#). **HN9** [↑] In order to prove its claim that British Gas committed fraud on the patent office in the [**17] procurement of its patents, Miller Pipeline must show that British Gas obtained its patents by knowingly and willfully misrepresenting or omitting material facts to the patent office. See [Walker Process, 382 U.S. at 177, 86 S. Ct. at 350](#). The Federal Circuit in [Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059 \(Fed. Cir. 1998\)](#) articulated what type of evidence is required to prove fraud on the patent office under *Walker Process*. "Such a misrepresentation or omission must evidence a clear intent to deceive the examiner and thereby cause the PTO to grant an invalid patent. . . . A finding of *Walker Process* fraud requires higher threshold showings of both intent and materiality than does a finding of inequitable conduct. . . . 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." [Nobelpharma, 141 F.3d at 1070-1071](#). Because patents are presumed valid and "a patentee's infringement suit is presumptively in good faith," Miller Pipeline must prove fraud on the patent office by [**18] clear and convincing evidence. See [Argus Chemical Corp. v. Fibre Glass-Evercoat Co., 812 F.2d 1381, 1385 \(Fed. Cir. 1987\)](#), quoting [Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 996 \(9th Cir. 1979\)](#).

Miller Pipeline asserts that British Gas committed fraud on the patent office in connection with its prosecution of its '565 patent, in particular its representations regarding U.S. Patent No. 3,181,302 (the "302 patent" or the "Lindsay

patent"). In procuring its '565 patent, British Gas distinguished its invention over the Lindsay patent. Miller Pipeline challenges the following representation by British Gas to the patent examiner:

Applicant's operation of applying intense local pressure to crack and fracture the material of the existing main into irregular fragments is distinguishable from a true cutting action such as in Lindsay. Technically speaking, a cutting operation as in Lindsay involves an intense local pressure. But in a true "cutting" operation, the object is to apply the force so locally that the surrounding area of the subject material is undisturbed. This object is quite clear during the true cutting operation as in Lindsay, **[**19]** wherein the cutter discs 46 slit a malleable pipe material without any intent to concurrently reposition or breakup the pipe at locations other than along the cutting line. (Of course the slit halves of Lindsay's pipe are eventually spread apart. But the spreading action is deferred until the pipe halves are subsequently engaged by spreader 20.) Another everyday example is the **[*1136]** cutting of a tomato. One seeks to make a cut in a tomato which is so sharp (the local pressure is so intense) that the knife will not disturb (mash) the portions of the tomato to either side of the cut. In contrast, the claims of the application now recite that the intense local pressure is characterized by causing cracking and fracturing into irregular elements, coupled with a disturbance of that general area sufficient for the fragments to be urged outwardly to some extent by the same intense local pressure action, and concurrently therewith.

Plaint. Exh. 8, '565 patent, Paper No. 8 at 15-16 (emphasis in original). British Gas also represented "Lindsay could not be modified to cut an existing pipe 'into a multiplicity of fragments rather than two halves.'" Plaintiff. Exh. 9, '565 patent, Paper No. **[**20]** 7 at 14.

Miller Pipeline challenges the accuracy of these representations that the Lindsay patent could not be used for anything other than cutting malleable pipe. Miller Pipeline points to the fact that the Lindsay patent describes replacement of pipe "primarily due to corrosion of the pipe" (Plaint. Exh. 10, col. 1, line 12), asserting that "pipe which corrodes primarily is cast iron pipe, and contrary to British Gas' representations, the Lindsay device clearly was intended for use on cast iron pipe. Also, when pulled through cast iron pipe, the Lindsay device causes fracturing and cracking of the pipe." Plaintiff. Resp. Br. at 12, citing Plaintiff. Exh. 11, Bowles Aff. PP 7, 8. Miller Pipeline's argument rests entirely on the affidavit of David A. Bowles, who worked with William R. Lindsay, the Lindsay patent inventor, in the late 50's and through the 60's, and who observed the Lindsay patented device in operation. See Bowles Aff. PP 3, 5, 6. In his affidavit, Mr. Bowles testified that he considers himself "intimately familiar with the operating principles of the Lindsay apparatus due to [his] involvement in designing, building and testing the same." Bowles Aff. P 5. Mr. Bowles **[**21]** testified that "the Lindsay apparatus as described in the patent was intended and designed to crack and fracture existing pipes made of various frangible materials, including cast iron." *Id. at P 7*. He asserted that he had witnessed the Lindsay device in public demonstrations used on cast iron pipes and that the device did not sever the pipe in half but rather cracked and fractured the pipes. See *id. at P 9*. Miller Pipeline provides no additional evidence in support of its fraud claim.

Even assuming that Mr. Bowles' testimony is accurate and the Lindsay device was in fact designed and used to crack and fracture cast iron pipes in a similar fashion to the '565 patent, Miller Pipeline has produced no evidence suggesting that British Gas had knowledge of this fact, much less that British Gas willfully misrepresented this fact to the patent office with the intent to deceive.³ **[**23]** In addition, Miller Pipeline has produced little or no evidence showing that this alleged misrepresentation was material and that the patent office relied upon it, such that the '565 patent would not have issued but for the misrepresentation (aside from the fact that British Gas addressed the issue in the **[**22]** course of its patent prosecution, which we recognize indicates some measure of importance).⁴ Miller

³ It appears that Miller Pipeline at some point contended that the public demonstrations witnessed by Mr. Bowles constitute public use prior art, but Miller Pipeline has produced no evidence besides Mr. Bowles' own affidavit. British Gas argues that this uncorroborated evidence is insufficient, citing *Lockheed Aircraft Corp. v. United States*, 213 Ct. Cl. 395, 553 F.2d 69, 75 (Ct. Cl. 1977): "Indeed, the oral testimony of witnesses, speaking only from memory in regard to past transactions has, in the absence of contemporaneous documentary or physical evidence, consistently been found to be of little probative value Such uncorroborated testimony is insufficient to show anticipation, within the meaning of *35 U.S.C. § 102*, of an issued patent." Miller Pipeline has not disputed this and so to the extent Miller Pipeline has advanced this argument, we consider it waived or abandoned, at least for purposes of this motion.

Pipeline asserts, "At best, it was [*1137] disingenuous for British Gas to represent that the teachings of the '302 patent are limited to the replacement of malleable pipe only. At worst, British Gas committed fraud on the patent office by making these misrepresentations." Plaintiff. Resp. Br. at 12. However, this statement is nothing more than sheer speculation on Miller Pipeline's part. Considering Miller Pipeline's heavy burden at trial to prove by clear and convincing evidence that British Gas perpetrated fraud on the patent office, we find that Miller Pipeline has not produced sufficient evidence on several essential elements to survive summary judgment on this claim.

Next, Miller Pipeline asserts that British Gas is liable under antitrust law for asserting its patents in "bad faith," a theory Miller Pipeline claims is [**24] distinct from the Noerr-Pennington "sham litigation" doctrine British Gas proposes. Miller Pipeline relies upon Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700 (Fed. Cir. 1992), Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952) and Betmar Hats, Inc. v. Young America Hats, Inc., 116 F.2d 956 (2d Cir. 1941). These cases refer to infringement notices that were made in "bad faith" or for monopolistic purposes, lending support to Miller Pipeline's position that a showing of bad faith is sufficient for antitrust liability. See Mallinckrodt, 976 F.2d at 710; Kobe, 198 F.2d at 424-425; Betmar Hats, 116 F.2d at 957.

British Gas contends that there is no generic "bad faith" theory of antitrust liability for infringement notices and threats to sue, arguing that conduct falling short of actual litigation is still covered by HN10⁴ the *Noerr-Pennington* doctrine, which provides general immunity from antitrust liability under the Sherman Act to persons pursuing relief through legislative action or influencing government officials, as well as administrative agencies and the courts, unless [**25] the activities are merely a sham. See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626, (1965); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972). "Under the *Noerr-Pennington* doctrine, therefore, 'the federal antitrust laws do not regulate the conduct of private individuals in seeking anti-competitive action from the government'" or courts. McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1558 (11th Cir. 1992), quoting City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, , 111 S. Ct. 1344, 1354, 113 L. Ed. 2d 382 (1991). HN11⁴ In order to show that an antitrust defendant's lawsuit is a sham under the *Noerr-Pennington* doctrine and thus not entitled to immunity, an antitrust plaintiff first must show that the defendant's lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude [**26] 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." Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 1928, 123 L. Ed. 2d 611 (1993). If the lawsuit is objectively baseless, the antitrust plaintiff must show additionally that the defendant's subjective motivation was anticompetitive, such that the defendant's meritless lawsuit "conceals an attempt to interfere directly with the business" [*1138] relationships of a competitor through the use of the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon." PREI, 508 S. Ct. at 61, 113 S. Ct. at 1928 (citations omitted).

British Gas contends that its activities in notifying Miller Pipeline and its customers or competitors about potential infringement of British Gas patents and threatening to sue, although not litigation activities per se, nevertheless are covered by the *Noerr-Pennington* doctrine, and so Miller Pipeline must show that British Gas' infringement notices and threats to sue were [**27] objectively baseless and subjectively motivated by anticompetitive purposes. See Def. Rep. Br. at 16, citing Glass Equipment Development, Inc. v. Besten, Inc., 174 F.3d 1337, 1999 WL 190747, *5 (Fed. Cir. 1999) (plaintiff failed to allege that defendant's "actual or threatened infringement suits were sham litigations"); Thermos Co. v. Igloo Prods. Corp., 1995 U.S. Dist. LEXIS 18382, 1995 WL 745832, *5 (N.D. Ill. Dec.

⁴ Although this point is ignored by Miller Pipeline, we note that the patent office had the entire text of the Lindsay patent before it during the prosecution of the '565 patent and could have read the word "corrosion" in the text of the patent that Miller Pipeline finds so critical and could have determined independently whether the teachings of the Lindsay patent included cutting non-malleable pipe. While we recognize that prospective patentees may mislead the patent examiner, it is important to remember that British Gas disclosed the Lindsay patent and so the patent examiner had the opportunity to make its own determination, rather than relying exclusively on British Gas' representations. We do not need to factor this point into our analysis, primarily because Miller Pipeline has failed woefully in its evidentiary burden and because likely it is accounted for in the presumption of the validity of the patent, but we find it worthy of note.

13, 1995) ("Thermos' lawsuit and the related actions it took to protect its federally registered trademark constitute a protected activity immune from antitrust liability"); The Consortium, Inc. v. Knoxville Int'l Energy Exposition, 563 F. Supp. 56, 59 (E.D. Tenn. 1983) ("activity to enforce federal rights, short of filing lawsuits, must also be protected if the right of access to the courts is to have significance"); see also Pennwalt Corp. v. Zenith Laboratories, Inc., 472 F. Supp. 413, 424 (E.D. Mich. 1979) (granting Noerr-Pennington immunity to both lawsuits and threats of lawsuits). In addition, British Gas attempts to distinguish the cases cited by Miller Pipeline in support of its theory that mere "bad faith" is **[**28]** enough to impose antitrust liability by asserting that such cases either dealt with issues other than antitrust law or were decided before PREI, 508 U.S. at 60-61, 113 S. Ct. at 1928, in which the Supreme Court reaffirmed the extension of *Noerr-Pennington* antitrust immunity to judicial proceedings and specifically in the intellectual property context.

We believe that extension of the "sham litigation" doctrine to activities that fall short of litigation but which manifest the patentholder's intent to protect its rights through judicial action, if necessary, is the more logical and practical rule and is consistent with the public interest in protecting access to the courts, a right derived at least in part from the First Amendment. Although the Seventh Circuit has not addressed this issue, we note that several circuit courts deciding this issue have found the *Noerr-Pennington* doctrine applicable to pre-litigation activities such as infringement notice letters and threats to sue, and we find this precedent persuasive. See Cardtoons v. Major League Baseball Players Assoc., 182 F.3d 1132, 1999 WL 436272, *4 (10th Cir. 1999); McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1558-1560 (11th Cir. 1992); **[**29]** CVD, Inc. v. Raytheon Co., 769 F.2d 842, 850-851 (1st Cir. 1985); Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1367 (5th Cir. 1983); see also Glass Equipment Development Inc. v. Besten, 174 F.3d 1337, 1999 WL 190747, *5 (Fed. Cir. 1999) (stating that plaintiff failed to allege that defendant's "actual or threatened infringement suits were sham litigations," suggesting that threats to sue are covered by *Noerr-Pennington*). As the Fifth Circuit stated in *Coastal States Marketing*, "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. If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute." 694 F.2d at 1367. Particularly because the patentholder's competitors who receive infringement notices and threats to sue have available to them the vehicle of a declaratory judgment action under 28 U.S.C. § 2201 **[**30]** to challenge the patentholder's assertions of infringement,⁵ we find that the **[*1139]** sham litigation doctrine protects pre-litigation infringement notices and threats to sue. British Gas' activities about which Miller Pipeline complains in this case fall within this category and accordingly we will evaluate them under Noerr-Pennington and PREI, 508 U.S. at 60-61, 113 S. Ct. at 1928.

However, we note **[**31]** that choosing between Miller Pipeline's and British Gas' proposed standards is somewhat unnecessary, as there appears to be little meaningful difference between them. Under the "bad faith" standard offered by Miller Pipeline, even if British Gas were incorrect as to the nature and scope of its patent rights, it would be absolved from liability as long as it had a good faith belief in its patent rights. See Mikohn, 165 F.3d 891 at 897. In other words, if the information contained within the notices was inaccurate but British Gas honestly and reasonably believed it to be true, it would not be subject to liability, while as long as the information was correct, even if British Gas had an anticompetitive motive for providing infringement notices, the notices would be legal. This standard is not unlike the objectively baseless and subjective anticompetitive intent standard of the *Noerr-Pennington* doctrine proposed by British Gas. Under both standards, any anticompetitive motive by British Gas is irrelevant as long as its patents are valid and infringed or British Gas had a reasonable belief in the validity and infringement of its patents. However, we will use the standards **[**32]** set forth in *Noerr-Pennington* and its progeny to decide whether British Gas is entitled to antitrust immunity for its litigation-related activities. Because there is no dispute that the *Noerr-Pennington* doctrine applies to British Gas' infringement counterclaims in the present action

⁵ See, e.g., Kaplan v. Helenhart Novelty Corp., 182 F.2d 311, 314 (2d Cir. 1950): "The only evidence of bad faith is the defendants' failure to sue promptly. But the plaintiffs have continuously had a plain and complete remedy for any wrong done them, in that they could have brought this suit whenever they pleased after the first notice was given, instead of waiting as they did . . . Any delay in putting the defendants' asserted rights to the test of actual litigation was, therefore, only what the plaintiffs chose to permit . . . The suit is as timely as they chose to make it."

and British Gas' pre-litigation activities are predicated on the same patents and claims as the counterclaim, we will consider all of British Gas' patent enforcement activities together in the same analysis.

Turning to the merits, we first must examine Miller Pipeline's allegations of anticompetitive conduct by British Gas. Miller Pipeline asserts that British Gas acted in restraint of trade by (1) repeatedly notifying Miller Pipeline, its customers and its competitors of its patents, (2) repeatedly threatening to sue for patent infringement without intending to sue and (3) bringing objectively baseless counterclaims in bad faith against Miller Pipeline in this lawsuit. Miller Pipeline asserts that these activities constitute an attempt by British Gas to monopolize the market in the promotion and sales of products and services related to trenchless repair and replacement of utility pipes in the [**33] United States. As discussed above, British Gas' subjective intent is irrelevant provided it had a reasonable belief in the validity and infringement of its patent rights. Thus, our inquiry must focus first on the objective merits of British Gas' infringement claims to determine whether British Gas had probable cause to sue or threaten to sue Miller Pipeline for infringement. We must determine whether Miller Pipeline has shown that there is a genuine issue of material fact that British Gas' claims were objectively baseless. In addition, we recognize that, "as patents are cloaked in a presumption of validity, [HN12](#)[¹²] a patent infringement suit is presumed to be brought in good faith," [*Atari Games Corp. v. Nintendo of America, 897 F.2d 1572, 1577 \(Fed. Cir. 1990\)*](#), and "this presumption can be rebutted only by clear and convincing evidence," [*Argus Chemical Corp. v. Fibre Glass-Evercoat Co., 812 F.2d 1381, 1385 \(Fed. Cir. 1987\)*](#).

Miller Pipeline argues as follows: "Miller [Pipeline] concedes that the British Gas [*1140] patents are facially valid and are susceptible to a valid claim interpretation. However, under a valid claim interpretation, Miller's devices do not [**34] infringe." Plaintiff. Resp. Br. at 19. Miller Pipeline claims that:

in order to be valid over the prior art, British Gas' claims must be interpreted more narrowly than British Gas has asserted, and such a narrow interpretation necessarily means that Miller does not infringe. If the claims are given the broad interpretation asserted by British Gas, then British Gas' patent claims are invalid due to the prior art. Either Miller does not infringe or British Gas' claims are invalid. British Gas cannot have it both ways. Given that there is no construction which renders the British Gas patents valid *and* infringed, there is no objective basis for British Gas' infringement counterclaims.

Id. (citations omitted). As an example, Miller Pipeline focuses the Court's attention on the "intense local pressure" claim language in British Gas' '565 patent. Miller Pipeline contends that the prosecution history of the '565 patent reveals that "intense local pressure" was made distinct from "cutting" to allow the '565 patent to be patentable over the prior art, the Lindsay '302 patent. Miller Pipeline argues further that "this distinction was necessary for patentability, since the [**35] prior art Lindsay device cuts the pipe with a series of rollers. Thus, in order to be patentable over the prior art, the 'intense local pressure' of the '565 patent cannot include cutting with rollers." Plaintiff. Resp. Br. at 20. Miller Pipeline contends that each of its challenged devices contains such rollers and so cannot infringe British Gas' patent.

British Gas, of course, disputes Miller Pipeline's proposed claim construction, referring the Court to the prosecution history of the '565 and '211 patents. British Gas contends that the words "intense local pressure" were never meant to be considered alone, particularly as it was undisputed that the Lindsay '302 patent, the prior art, contained the words "intense local pressure." Rather, British Gas argues that in the prosecution of the '565 and '211 patents, the patent examiner was concerned that the claims specify that the intense local pressure was of a kind that would cause the pipe to fracture into irregular fragments and cause the fragments to spread outward about the axis of the pipe, as distinct from the type of intense local pressure that would cut the pipe into halves, citing to British Gas' own statements as applicant ([**36] see Plaintiff. Exh. 8, '565 patent, Paper No. 8 at 15-16, quoted in discussion above) and the patent examiner's statements in allowing the amended claims. The patent examiner stated, ". . . the claims are considered to be patentable over the reference to Lindsay in that Applicants' fracturing means are claimed as being 'operable to cause at least some outward movement of the fragments under the action of said intense local pressure which causes the fracturing of the main into irregular fragments.' This distinction was pointed out by Applicants' attorney, Mr. Petry, during the interview of June 25, 1987." Def. Statement of Material Facts, Def. Prior Summ. Judg. Mot. ("SMF") P 26, quoting prosecution history, A/573. Earlier in the prosecution history, in the portion of the Examiner Interview Summary Record entitled "Description of the general nature of what was agreed to . . .",

the Examiner stated: "The claims to be amended to include the pipe broken by intense local pressure into irregular pieces; the pieces are spread generally about the axis; and the breaking and spreading takes place at the same location axially and at the same time." SMF P 19, quoting prosecution history, A/429.

[**37] We find that British Gas' argument is supported reasonably by the language of the claims themselves and the prosecution history, including the remarks of the patent examiner, and that Miller Pipeline has not produced sufficient evidence supporting its proposed claim construction and non-infringement arguments to create a genuine issue of material fact that British Gas' claims were objectively baseless. [*1141] While the language of the prosecution history may be susceptible to the interpretation urged by Miller Pipeline, it is by no means clear that it is the only possible, reasonable interpretation or that British Gas' proposed interpretation is completely without support in the language of the claims and the prosecution history, nor has Miller Pipeline even created a genuine issue of material fact on this issue. The thrust of Miller Pipeline's argument appears to be that, because its devices are based upon the Lindsay '302 patented device, there is no way its devices can infringe the '565 patent. However, we note that Miller Pipeline does not dispute that it has made modifications to the Lindsay '302 patented design in its devices. We recognize that the Lindsay '302 patent in fact utilizes [**38] some kind of cutting wheels to apply pressure, and that Miller Pipeline's device appears to use a similar mechanism, but the importance of the cutting wheels themselves is unclear, and Miller Pipeline has not explained or supported its relevance adequately. In fact, British Gas points out certain differences between the Lindsay device's cutting wheels and the cutting wheels used in Miller Pipeline's device, for example, the fact that "Lindsay's pipe cutter (part 18) has twenty longitudinally spaced cutter discs (part 46) all in a single plane (See Figs. 9 and 10 of '302). In contrast, Miller's accused 1994 device uses a frame with three wings and mounts three or four disc-shaped blades per wing. Miller also uses three triangular fin-like blades which are not shown by Lindsay '302." Def. Prior Summ. Judg. Mot. Br. at 40.

The essence of Miller Pipeline's entire non-infringement theory appears to involve whether the Lindsay '302 patent covers fracturing crackable pipe into irregular pieces, rather than just cutting nonmalleable pipe into two halves, as British Gas contends. The only evidence that Miller Pipeline produces in support of its theory is the affidavit of Dr. Bowles, discussed [**39] above, while British Gas points to the language of the Lindsay '302 patent claims, which describe a "pipe splitter and spreader" and inventions for "a mechanism for replacing existing pipes with new pipes, the mechanism including means for slitting and spreading the existing pipe and then pulling a new pipe through the spread apart halves of the existing pipe, whereby the new pipe occupies the position of the existing pipe." Plaintiff Exh. 10, '302 patent, col. 1, lines 23-28; see also col. 1, lines 29-39; lines 52-60; col. 1, lines 70-72 through col. 2, lines 1-5 (describing similar mechanisms). This claim language of the '302 patent clearly describes slitting or cutting an existing pipe in half, rather than breaking the pipe into irregular fragments. While Dr. Bowles' affidavit may be enough to create a genuine issue of material fact as to the teachings of the Lindsay patented device,⁶ it is not adequate alone to support reasonably the conclusion that British Gas' claims are objectively baseless.

[**40] After thoroughly reviewing the evidence in the record and the parties' arguments with respect to British Gas' infringement claims presented in the motion currently before the Court as well as British Gas' prior summary judgment motion, we cannot conclude that British Gas' claims are objectively baseless. On the contrary, it appears that there is a genuine dispute between the parties as to the proper claim construction of British Gas' patents, as well as the teachings and limitations of the Lindsay '302 patent and the relation of Miller Pipeline's devices to the Lindsay '302 patent and British Gas' patents. In addition, we find that Miller Pipeline has failed to meet its heavy burden to overcome the presumption that patent infringement claims are brought in good [*1142] faith and create a genuine issue of material fact that British Gas' claims were objectively baseless. Miller Pipeline's arguments are aimed at the ultimate question of infringement and it repeatedly argues that its position is correct and that "there is no way for the claims of the '565 patent to be broad enough to cover the Miller devices and not be invalid due to prior art." Plaintiff Resp. Br. at 20. However, this is mere [**41] attorney argument, and Miller Pipeline does not present sufficient evidence or legal argument to support a jury determination that Miller Pipeline's interpretation is the only reasonable one or that no reasonable person would take the position British Gas has adopted, and we find

⁶ We do not need to decide whether Dr. Bowles' affidavit in fact creates a genuine issue of material fact about the teachings of the Lindsay '302 patent because it is not necessary to determine of the motion presently before the Court. However, we note that British Gas challenges Dr. Bowles' affidavit on many grounds, including inadmissible hearsay.

such a conclusion unlikely from our review of the legal arguments and evidence in this case. This is a relatively complicated patent infringement case with sophisticated legal and factual arguments. Although there may seem to be only a subtle difference between arguing that one's position is correct and presenting support for the argument that one's position is the only possible, objective, definitive result, this distinction is critical in the determination of whether a claim is objectively baseless. We acknowledge that objective baselessness is very difficult to prove, for a litigant's reasonable belief in its chance to achieve success on the merits is quite a low threshold.

While we do not need to decide at this point whether British Gas ultimately will prevail on its infringement claims (and success or failure on the merits is not determinative of the issue of objective baselessness in any event, see [\[**42\] PREI, 508 U.S. at 65, 113 S. Ct. at 1930-1931](#)), we find that Miller Pipeline's antitrust claim cannot survive because our independent review of the record reveals that British Gas' claims were not objectively baseless and further, because Miller Pipeline has not directed our attention to sufficiently compelling evidence or legal precedent from which a reasonable jury could conclude that British Gas' infringement claims were objectively baseless and asserted by British Gas without any reasonable belief in success on the merits. Because Miller Pipeline did not satisfy its admittedly steep burden as to the objective prong of the sham litigation test and we find that British Gas' claims were not objectively baseless, we do not need to examine British Gas' subjective motive in threatening to sue Miller Pipeline for infringement and filing its counterclaim and the other litigation-related activities about which Miller Pipeline complains.⁷ Accordingly, we grant British Gas' motion for partial summary judgment as to Miller Pipeline's claim under [§ 2](#) of the Sherman Act.

[**43] CONCLUSION

Defendant moves for partial summary judgment on Plaintiff's claim that Defendant enforced its patents against Plaintiff in an anticompetitive manner in violation of [§ 2](#) of the Sherman Act. Defendant argues that it is immune from antitrust liability for asserting and enforcing its patents because it had at least a reasonable belief that Plaintiff was infringing its patents. Plaintiff responds that Defendant is not entitled to immunity because Defendant committed fraud on the patent office [\[*1143\]](#) in the procurement of its patents and asserted its patents against Plaintiff in bad faith. Plaintiff also argues that Defendant's infringement claims were objectively baseless. For the reasons discussed in the Court's opinion above, we find that (1) there is insufficient evidence to support the claim of fraud on the patent office; (2) British Gas' patent enforcement activities, including pre-litigation infringement notices and threats to sue, are subject to the *Noerr-Pennington* "sham litigation" doctrine and (3) British Gas' infringement claims were not objectively baseless. Accordingly, we hold that British Gas is entitled to antitrust immunity under the *Noerr-Pennington* [\[**44\]](#) doctrine and grant British Gas' motion for partial summary judgment on Miller Pipeline's claim under [§ 2](#) of the Sherman Act.

It is so ORDERED this 27th day of July 1999.

SARAH EVANS BARKER, CHIEF JUDGE

United States District Court

Southern District of Indiana

⁷ Miller Pipeline relies upon [Kobe, 198 F.2d at 425](#), for the proposition that British Gas' activities, taken as a whole, support a finding of anticompetitive conduct. We note that the Tenth Circuit in *Kobe* did find that the patentholder's infringement lawsuit and related activities were unlawful because they were intended and designed to further and give effect to an overall monopolistic scheme. However, the court expressly stated, "The infringement action and the related activities, of course, in themselves were not unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused . . ." [198 F.2d at 425](#). The *Kobe* court found such activities illegal only in combination with the rest of the patentholder's anticompetitive scheme. Here, Miller Pipeline only complains about British Gas' activities related to its infringement notices and threats to bring suit and other litigation-related activities and does not identify any broader monopolistic scheme of which these activities constitute only a part. Thus, we find that *Kobe* does not speak to this case.

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South Milwaukee Sav. Bank v. Barczak

Court of Appeals of Wisconsin

May 12, 1999, Oral Argument ; July 27, 1999, Decided ; July 27, 1999, Opinion Filed

No. 97-3759

Reporter

229 Wis. 2d 521 *; 600 N.W.2d 205 **; 1999 Wisc. App. LEXIS 802 ***

South Milwaukee Savings Bank, Plaintiff-Appellant, v. Gary J. Barczak, in his official capacity as Clerk of Courts, unknown Clerk of Courts Docketing Clerk and Rod Lansen, Defendants-Respondents.

Prior History: [***1] APPEAL from an order of the circuit court for Milwaukee County: LEE E. WELLS, Judge.

Disposition: Reversed and cause remanded with directions.

Core Terms

docketed, statute of limitations, clerk's office, six-year, anti-trust, judgments, two-year, proper time, trial court, summary judgment, wage statute, twenty-four, circumstances, treble damages, courts, deeds

LexisNexis® Headnotes

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

Governments > Legislation > Interpretation

HN1[] Standards of Review, De Novo Review

The interpretation of a statute is a question of law which an appellate court reviews de novo without deference to the circuit court's decision.

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

Governments > Legislation > Statute of Limitations > Time Limitations

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 > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Statute of Limitations > General Overview

[HN2](#)[Summary Judgment, Entitlement as Matter of Law

An appellate court's review of a trial court's denial of summary judgment is de novo. Summary judgment should be granted if the evidence demonstrates 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. [Wis. Stat. § 802.08\(2\)](#).

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Governments > Courts > Judges

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

[HN3](#)[Defenses, Demurrs & Objections, Affirmative Defenses

[Wis. Stat. § 893.93\(1\)\(a\)](#) imposes a six-year statute of limitations on actions upon liabilities created by statute when a different limitation is not prescribed by law. [Section 806.10\(3\)](#) plainly creates and imposes liability upon any clerk who fails to docket a judgment at the proper time. By contrast, [Wis. Stat. § 893.93\(2\)\(a\)](#) imposes a two-year statute of limitations upon an action by a private party upon a statute penalty.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Courts > Judges

Governments > Legislation > Statute of Limitations > General Overview

[HN4](#)[Defenses, Demurrs & Objections, Affirmative Defenses

Although true that [Wis. Stat. § 806.10\(3\)](#) has some of the characteristics of anti-trust statutes, because it provides for treble damages which suggests a punitive intent, and the general public may derive some benefit from the statute's operation, [§ 806.10\(3\)](#) does not provide public and private enforcement mechanisms, and does not create criminal penalties like the anti-trust statutes. [Section 806.10\(3\)](#) provides an individual remedy for damages to an individual party caused by the acts and omissions of the clerk's office, thus leading to the application of the six-year statute of limitations.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Statutory Construction

Governments > Courts > Judges

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN5 Statute of Limitations, Statutory Construction

Unless the legislature clearly requires the application of a specific statute of limitations, case law requires application of the six-year statute of limitations. Reviewing courts must interpret statutes of limitations so that no person's cause of action will be barred unless clearly mandated by the legislature. Absent a clear legislative mandate, case law instructs that the two-year statute of limitations must be narrowly construed in favor of plaintiffs to avoid extinguishing otherwise meritorious claims. [Wis. Stat. § 806.10\(3\)](#) is covered by the six-year statute of limitations.

Governments > Legislation > Interpretation

HN6 Legislation, Interpretation

Ordinarily a court must apply statutes as they are written, unless to do so would lead to an absurd result that did not reflect the legislature's intent.

Governments > Legislation > Interpretation

Governments > Courts > Judges

HN7 Legislation, Interpretation

In determining if the docketing statute, [Wis. Stat. § 806.10\(3\)](#), has been violated the court needs to look at the individual circumstances presented in each case.

Counsel: On behalf of the plaintiff-appellant, the cause was submitted on the briefs of Mark E. Sostarich of Petrie & Stocking, S.C., of Milwaukee, with oral argument by Mark E. Sostarich.

On behalf of the defendants-respondents, the cause was submitted on the brief of Mark A. Grady, Principal Assistant Corporation Counsel, of the Office of Milwaukee County Corporation Counsel.

Judges: Before Wedemeyer, P.J., Schudson and Curley, JJ.

Opinion by: CURLEY

Opinion

[**206] [*524] CURLEY, J. South Milwaukee Savings Bank (South Milwaukee) appeals from the trial court's grant of summary judgment to the former Milwaukee County Clerk of Courts in South Milwaukee's suit alleging that an employee of the clerk of courts office violated [§ 806.10\(3\)](#), Stats., by failing to docket, at the proper time, a

judgment granting South Milwaukee money damages which, in turn, impaired South Milwaukee's collection attempts.¹

[***2] South Milwaukee argues that the trial court erred in deciding that: (1) the two-year statute of limitations found in [§ 893.93\(2\)\(a\)](#), Stats., not the six-year statute of limitations in [§ 893.93\(1\)\(a\)](#), Stats., applies to actions under [§ 806.10\(3\)](#); (2) South Milwaukee's cause of action accrued on September 27, 1994, the day after the clerk's office received the judgment, and not when South Milwaukee discovered the [*525] delayed docketing; (3) the requirement in [§ 806.10\(3\)](#) that judgments be docketed "at the proper time" was ambiguous in describing when a judgment should be docketed and that "at the proper time" meant "as soon as practicable" or "within a reasonable time";² [***4] and [**207] (4) the respondent complied with [§ 806.10\(3\)](#) by docketing the judgment the day after receipt of the judgment. In addition, South Milwaukee argues that the trial court improperly expanded the record without notice and that it was entitled to summary judgment. Because we agree with South Milwaukee that the six-year statute of limitations should govern actions under [§ 806.10\(3\)](#), and because we are satisfied that under the undisputed facts of this case, as a matter of law, the respondent violated [§ 806.10\(3\)](#) when [****3] the clerk failed to docket the judgment until the day after receipt, we reverse and [*526] remand and direct the trial court to enter partial summary judgment for South Milwaukee.³

[***5] [*527] I. Background.

On October 13, 1993, South Milwaukee filed an action against Nikolau-Rooney Real Estate Investment Corporation for a money judgment on a promissory note and guarantee of the note. South Milwaukee also sued John W.

¹ Also listed in the complaint as defendants are "unknown docketing clerk" and Rod Lansen. No clerk has ever been identified, and no claims are raised regarding Rod Lansen. Thus, we assume that the former Milwaukee County Clerk of Courts is the sole defendant in this suit.

² The respondent argued, and the trial court agreed, that [§ 806.10\(3\)](#)'s legislative history indicates that "at the proper time" means "as soon as practicable" and "reasonable." Respondent argued that an analysis of [§ 806.10\(3\)](#)'s legislative history revealed that in the 1800's our legislature passed two laws, which appeared to be overlapping or duplicative, requiring the clerk to docket judgments "as soon as practicable" and "at the proper time," respectively. The two statutes existed side by side until 1897 when a revisor's bill eliminated the former. The respondent argued that despite eliminating this section, the revisor did not, and could not, intend any substantive change in the statute's meaning. Because the revisor could not have intended any substantive change in the statute's meaning, the respondent argued that the two statutes must be interpreted together so that "at the proper time" means "as soon as practicable." The trial court agreed with the respondent that statutory history and "statutory common sense" dictate that "at the proper time" means "as soon as practicable," and the trial court then concluded that "as soon as practicable" is consistent with "reasonable."

³ As an initial matter, we decline to address an argument raised by the respondent for the first time on appeal that the docketing date is irrelevant because the unrecorded conveyances remain valid against a judgment creditor. The respondent concludes that the time of docketing is irrelevant because the unrecorded quitclaim deed executed by Rooney rendered the judgment obtained against him ineffective. The respondent concedes that under § 706.08(1)(a), Stats., conveyances that are not recorded are void against any subsequent good faith purchasers for value; however, the respondent argues that an unrecorded conveyance remains valid against a judgment creditor, because a judgment creditor is not a good faith purchaser for value. Because South Milwaukee is a judgment creditor, not a good faith purchaser, the respondent concludes that the unrecorded quitclaim deed is valid against South Milwaukee and precludes recovery. Therefore, the Respondent reasons, if the judgment itself is ineffective, the time that the clerk's office actually docketed the judgment is irrelevant and could not have harmed South Milwaukee.

As a general rule, we refuse to consider issues raised for the first time on appeal. See [Wirth v. Ehly](#), 93 Wis. 2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). The respondent acknowledges that it raises this argument for the first time on appeal but cites [Johnson v. Seipel](#), 152 Wis. 2d 636, 449 N.W.2d 66 (Ct. App. 1989), for the proposition that this court may affirm the circuit court's decision based on any ground contained in the record. We are satisfied that *Seipel* is distinguishable on its facts and does not allow respondent to raise this issue for the first time on appeal. Further, at oral argument, counsel for South Milwaukee asserted that had the respondent raised this argument at trial, South Milwaukee would have challenged the validity of the deeds as well as their authenticity. Thus, it would be premature for us to address this issue here.

Rooney, Jr., because he signed a personal guarantee for the corporation's loan. On September 26, 1994, the circuit court granted summary judgment in favor of South Milwaukee in its suit against both the corporation and Rooney, and awarded \$ 304,105.91 in damages.

After the hearing, South Milwaukee's attorney gave the trial court a proposed order and judgment which the trial court reviewed and signed. South Milwaukee's attorney then obtained the court file, went to the Milwaukee County judgment clerk's office at approximately 3:30 p.m., and paid the appropriate judgment and docketing fees. The clerk's office entered the judgment, but for reasons never explained, failed to docket the judgment until the [**208] following day despite the fact that the clerk's office was open until 5:00 p.m.⁴

[***6] The judgment encumbered two rental properties owned by Rooney. Although Rooney was out of the country when the trial court issued its judgment, his wife was present in the courtroom and heard the trial court's decision. After the trial court granted summary judgment in favor of South Milwaukee, Mrs. Rooney went home and retrieved two quitclaim deeds dated September 12, 1994, that allegedly conveyed Rooney's interest in the property to her. Mrs. Rooney, armed with her two quitclaim deeds, returned to the courthouse [*528] and went to the Register of Deeds office where she had the quitclaim deeds recorded. This occurred after the clerk's office entered South Milwaukee's judgment but before it was docketed.

Evidence submitted in support of the summary judgment motion revealed that in September of 1994, the clerk's office was in the process of implementing a computerized system for recording, entering, and docketing judgments. The old "manual system" required two steps: (1) the judgment would be presented, the appropriate fee paid, and the clerk would sign the judgment and formally enter it; and (2) the docketing clerk would type the judgment into what eventually became the Judgment Docket. [***7] Depending on the circumstances, the entire process could take between one and three days.⁵

Additionally, despite the statutory mandate that judgments be docketed "at the proper time," the clerk's office devoted only a few hours a day to docketing judgments. On the day South Milwaukee's judgment was entered the clerk's office stopped docketing judgments at 3:20 p.m. and did not begin again until the following day.

Unaware of the delayed docketing, South Milwaukee proceeded in its attempt to collect the debt owed to it by Rooney. To satisfy the debt, South Milwaukee obtained an execution on its judgment and purchased the [***8] Rooney rental properties at a Sheriff's sale for [*529] \$ 115,000. South Milwaukee then filed a collection action against the Rooneys. As a result, Mrs. Rooney and South Milwaukee entered into a stipulated judgment that stated that South Milwaukee's judgment was for debt incurred in the interest of the marriage or family and was subject to satisfaction from all marital assets. This judgment was taken to the clerk's office and entered on May 15, 1995. Although South Milwaukee paid the docketing fee, the Milwaukee County Clerk's Office *never* docketed this judgment.

Unbeknown to South Milwaukee, Mrs. Rooney borrowed \$ 78,000 from Wauwatosa Savings Bank (Wauwatosa) and gave the bank a mortgage on the rental properties as security. When it learned of the mortgage, South Milwaukee filed an action against Mrs. Rooney and Wauwatosa seeking a determination of the priority of South Milwaukee's lien as to Wauwatosa's mortgage; and if Wauwatosa held the superior position, a determination that the deed transfer was fraudulent; further, South Milwaukee requested the appointment of a receiver to sell the property to satisfy the mortgage and apply the balance to South Milwaukee's claim.

⁴ This court takes judicial notice of the fact that the filing clerk's office in the Milwaukee County Clerk of Courts' office closes at 5:00 p.m. This has been the practice for many years.

⁵ We are advised that under the current computerized system, the judgment is entered and docketed at the same time by the same clerk. The clerk's office did not switch to the new system until January of 1995. At the time at issue in this case, both systems were in place and the old system was being phased out. The judgment in question was entered and docketed using the old manual process.

In the priority [***9] lien suit, summary judgment was granted in favor of Wauwatosa because Wauwatosa held a priority lien interest as a good faith purchaser. South Milwaukee contends that if the original [**209] judgment would have been docketed before Mrs. Rooney filed the quitclaim deeds, South Milwaukee would have had a priority position over Wauwatosa. South Milwaukee started this action against the respondent arguing that pursuant to [§ 806.10\(3\)](#), Stats., the clerk's office failed to docket the judgment "at the proper time" and South Milwaukee was entitled to treble damages. The statute in question reads:

[*530] Every clerk of circuit court who enters a judgment or decree and enters upon the judgment and lien docket a date or time other than that of its actual entry or *neglects to enter the same at the proper time shall be liable in treble damages to the party injured.*

[Section 806.10\(3\)](#), Stats., 1995-96 (emphasis added). The trial court granted the respondent's motion for summary judgment on several grounds. It found that: (1) the two-year and not the six-year statute of limitations applied; (2) South Milwaukee's cause of action accrued on September 27, 1994 and not at a later date; therefore, the [***10] statute of limitations had run on this claim; (3) the wording of [§ 806.10\(3\)](#), Stats. that docketing be done "at the proper time" was ambiguous and actually meant "as soon as practicable" and within a "reasonable" time; and (4) applying this interpretation of the language, the respondent complied with the statute by docketing the South Milwaukee judgment on September 27, 1994. This appeal follows.

II. Analysis.

South Milwaukee's appeal requires this court to determine the proper interpretation and application of a Wisconsin statute. [HN1](#)[ The interpretation of a statute is a question of law which we review *de novo* without deference to the circuit court's decision. See [Erdman v. Jovoco, Inc.](#), 181 Wis. 2d 736, 748, 512 N.W.2d 487, 491 (1994); [In re I.V.](#), 109 Wis. 2d 407, 409, 326 N.W.2d 127, 128 (Ct. App. 1982).

Because our interpretation of the statute requires us to reverse the trial court and apply the six-year statute of limitations, South Milwaukee has stated a [*531] viable cause of action and its motion for summary judgment must be considered. [HN2](#)[ Our review of a trial court's denial of summary judgment is *de novo*. See [Green Spring Farms v. Kersten](#), 136 Wis. 2d 304, 315-16, 401 N.W.2d 816, 820 (1987). [***11] Summary judgment should be granted if the evidence demonstrates "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." Rule 802.08(2), Stats.

A. The six-year statute of limitations applies to actions brought

under § 806.10(3), Stats.

South Milwaukee maintains that the circuit court erred in finding that the two-year statute of limitations contained in [§ 893.93\(2\)\(a\)](#), Stats., governs actions under [§ 806.10\(3\)](#), Stats. Instead, it argues the six-year statute of limitations should apply. We agree.

In [Jovoco](#), the Wisconsin Supreme Court addressed the issue of whether a two-year, or a six-year statute of limitations governed a Wisconsin statute that prohibited employers, except under certain conditions, from deducting amounts from an employee's wages, absent written authorization from the employee. In deciding that the six-year statute of limitations applies here, we replicate the supreme court's analysis in [Jovoco](#) in which the supreme court determined that the six-year statute of limitations applied to a wage statute. This analysis requires us to interpret the statute in question, [***12] to ascertain its intended purpose, and to decide whether the statute redressed a public wrong or remedied an individual harm. See [Jovoco](#), 181 Wis. 2d at 761-63, 512 N.W.2d at 495-97. After applying the [Jovoco](#) analysis, we conclude that [§ 806.10\(3\)](#), Stats., its intended purpose, and, in particular, [*532] its effect on individuals, requires [**210] the application of the six-year statute of limitations.

1. The plain language of § 806.10(3), Stats., does not indicate

which statute of limitations to apply.

HN3[[↑]] The plain language of [§ 806.10\(3\)](#), Stats., as applied to the statutes of limitations found in [§ 893.93](#), Stats., creates a legitimate debate over which is the proper statute of limitations. [Section 893.93\(1\)\(a\)](#) imposes a six-year statute of limitations on actions upon liabilities "created by statute when a different limitation is not prescribed by law." [Section 806.10\(3\)](#) plainly creates and imposes liability upon any clerk who fails to docket a judgment at the proper time. By contrast, [§ 893.93\(2\)\(a\)](#) imposes a two-year statute of limitations upon an action by a private party upon a statute penalty. Since South Milwaukee is a private party and [§ 806.10\(3\)](#) [***13] imposes treble damages, these facts make [§ 806.10\(3\)](#) a statute penalty. Therefore, the plain language of [§ 806.10\(3\)](#) is of little help in deciding which statute of limitations must be applied. Because the statutory language does not indicate which statute of limitations to apply, we next consider the statute's intended purpose, and determine whether it redresses a public wrong or remedies an individual harm.

2. [Section 806.10\(3\)](#), Stats., like the wage statute at issue in *Jovoco*,

remedies an individual harm.

In *Jovoco*, the supreme court noted that the two-year statute of limitations under [§ 893.93\(2\)\(a\)](#), Stats., had previously only been interpreted to apply to state anti-trust actions. See *Jovoco*, 181 Wis. 2d at 760, 512 N.W.2d at 495 (citing *Open Pantry Food Marts v. Falcone*, [*533] 92 Wis. 2d 807, 286 N.W.2d 149 (Ct. App. 1979); *Segall v. Hurwitz*, 114 Wis. 2d 471, 339 N.W.2d 333 (Ct. App. 1983)). Further, the supreme court characterized the anti-trust laws as remedial provisions intended to "preserve the free enterprise system." See *Jovoco*, 181 Wis. 2d at 761, 512 N.W.2d at 496 [**14] (quoting *City of Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 373, 243 N.W.2d 422, 427 (1976)); see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972) ("Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress."). Finally, the supreme court articulated that the anti-trust law is punitive in nature because it provides for treble damages which amounts to a statutory penalty. See *Jovoco*, 181 Wis. 2d at 761, 512 N.W.2d at 496. For all these reasons, the supreme court found that the two-year statute of limitations governs actions brought under the anti-trust statutes. See *Jovoco*, 181 Wis. 2d at 760-761, 512 N.W.2d at 495-496. However, in *Jovoco*, the Wisconsin Supreme Court asserted that the statute of limitations analysis was not complete until the court considered the purpose behind the substantive statute being analyzed. See *id. at 761, 512 N.W.2d at 496* ("We are not persuaded by the defendants' analogy ... because the defendants do not acknowledge the different purposes of the two [***15] statutes.").

The *Jovoco* court found that anti-trust statutes were designed to benefit the public; whereas the wage statute was designed to benefit individuals. See *181 Wis. 2d at 761-762, 512 N.W.2d at 496*. Also, it observed that anti-trust laws "encourage private enforcement in an area where government regulation alone would not be adequate." *Id. at 761, 512 N.W.2d at 496*. By contrast, the supreme court stated that the wage statute provided only a remedy for individuals rather than the public as [*534] a whole. See *id. at 762, 512 N.W.2d at 496*. Ultimately the supreme court applied the six-year statute of limitations, concluding that insufficient similarity existed between the wage statute and the anti-trust statutes to apply the two-year statute of limitations. See *id.* ("There is not enough similarity between [the wage statute at issue] and the state anti-trust law to extend the applicability [**211] of the two year statute of limitations to claims brought under [the wage statute].").

Using the teachings of *Jovoco*, the parties draw an elaborate set of contrasts and comparisons between [§ 806.10\(3\)](#), Stats., [***16] and the Wisconsin anti-trust laws and wage statutes in arguing that [§ 806.10\(3\)](#) either redresses a public wrong or remedies an individual harm. South Milwaukee contends that [§ 806.10\(3\)](#), like the wage statute, attempts to remedy a harm to the individual and thus the six-year statute of limitations should apply. Conversely, the respondent submits that [§ 806.10\(3\)](#) is punitive-remedial and exclusively statutory, like the anti-trust laws, and the two-year statute of limitations should apply.

Following the court's reasoning in *Jovoco*, we find insufficient similarities between [§ 806.10\(3\)](#), Stats., and Wisconsin anti-trust law to apply the two-year statute of limitation which governs anti-trust lawsuits. We find South Milwaukee's comparison of [§ 806.10\(3\)](#) to the wage statute at issue in *Jovoco* to be more persuasive than the respondent's. **HN4**[[↑]] Although true that [§ 806.10\(3\)](#) has some of the characteristics of anti-trust statutes, because it provides for treble damages which suggests a punitive intent, and the general public may derive some benefit from the statute's operation, [§ 806.10\(3\)](#) does not provide public and private enforcement mechanisms, and does

not create [***17] criminal penalties like the anti-trust statutes. In addition, we [*535] find that the benefit derived by the general public from the operation of the statute, specifically society's interests in the regulation of property, is substantially outweighed by the benefit derived by individuals. Therefore, we conclude that [§ 806.10\(3\)](#), like the wage statute, provides an individual remedy for damages to an individual party caused by the acts and omissions of the clerk's office, thus leading to the application of the six-year statute of limitations.

3. *The two-year statute of limitations must be narrowly construed.*

Moreover, [HN5](#) unless the legislature clearly requires the application of a specific statute of limitations, case law requires application of the six-year statute of limitations. Reviewing courts must interpret statutes of limitations so that "no person's cause of action will be barred unless clearly mandated by the legislature." [Saunders v. DEC International, Inc., 85 Wis. 2d 70, 74, 270 N.W.2d 176, 177 \(1978\)](#). Absent a clear legislative mandate, case law instructs that the two-year statute of limitations must be narrowly construed in favor of plaintiffs to avoid [***18] extinguishing otherwise meritorious claims. See [Lovett v. Mt. Senario College, Inc., 154 Wis. 2d 831, 836, 454 N.W.2d 356, 358 \(Ct. App. 1990\)](#). Here, the Wisconsin legislature has not clearly mandated the application of either statute of limitations to the facts of cases like the instant one. Noting that the two-year statute of limitations must be narrowly construed, and observing that the application of the two-year statute of limitations would extinguish South Milwaukee's claim, we therefore determine that [§ 806.10\(3\)](#), Stats., is covered by the six-year statute of limitations. Thus, [*536] we reverse the circuit court's ruling and find that the six-year statute of limitations contained in [§ 893.93\(1\)\(a\)](#), Stats., governs actions under [§ 806.10\(3\)](#), Stats.⁶

[***19] B. The clerk's office violated § 806.10(3), Stats., when it received

South Milwaukee's judgment and failed to docket it until the following day.

Next, we address the issue of whether the clerk's office violated [*212] [§ 806.10\(3\)](#), Stats. The trial court found that the language, "at the proper time," was ambiguous because it was capable of more than one interpretation, and resorted to outside rules of construction and legislative history in determining that the statute permitted docketing "as soon as practicable," or within a "reasonable" time.⁷ South Milwaukee claims that "at the proper time" is unambiguous, and means that the clerk's office is required to docket judgments "immediately." We need not decide whether the statute is ambiguous because, under either interpretation, we conclude that, under the facts of this case, the delayed docketing violated the statute.

[HN6](#)

Ordinarily a court "must apply statutes as they are written, unless to do so would lead to an absurd result [***20] that did not reflect the legislature's intent." [State v. \[*537\] Young, 180 Wis. 2d 700, 704, 511 N.W.2d 309, 311 \(Ct. App. 1993\)](#); see also [DNR v. Wisconsin Power & Light Co., 108 Wis. 2d 403, 408, 321 N.W.2d 286, 288 \(1982\)](#) ("When statutory language is clear and unambiguous, no judicial rule of construction is permitted, and the court must implement the express intention of the legislature by giving the language its ordinary and accepted meaning.").

There can be no doubt that if we accept South Milwaukee's interpretation, the clerk's office violated the statute because the judgment was not docketed immediately. On the other hand, the respondent urges us to find that the statutory language, "at the proper time," allows the clerk twenty-four hours to docket a judgment. The respondent

⁶ Because we find that South Milwaukee's action is governed by the six-year statute of limitations and the instant action was timely filed, we need not determine exactly when South Milwaukee's cause of action accrued. Accordingly, we will not consider whether the application of the discovery rule is proper. Cf. [Gross v. Hoffman, 227 Wis. 296, 300, 277 N.W. 663, 665 \(1938\)](#) (holding that if a decision on one point disposes of an appeal, the appellate court need not decide other issues raised).

⁷ See *supra* n.2.

relies on the Office of Court Operations in the Director of State Courts' Office (Office) for this contention, and argues that the Office's interpretation must be afforded great weight. We disagree.

The Office has not interpreted [§ 806.10\(3\)](#), Stats. In several reports and in the model record keeping procedures generated by the Office there is a recommendation that [***21] judgments be docketed "within twenty-four hours (same day preferred)." However, nowhere in the reports or the model procedures is there a specific mention of [§ 806.10\(3\)](#), nor do the reports or the model procedures interpret this statute. We view the Office's suggestion that courts docket judgments within twenty-four hours "to avoid being sued for treble damages" to be merely a warning to clerks with no precedential value.⁸ [***22] We do not read the "twenty-four [*538] hour (same day preferred)" standard recommended by the Office and included in the technical assistance project report as a grant of immunity to the clerk's office for every judgment docketed within twenty-four hours of receipt of the judgment. We read the recommendation as a caveat to the clerk's office of the increasing likelihood of liability for treble damages if a judgment is not docketed within twenty-four hours. The twenty-four hour standard is not both sword and shield that imposes liability on the clerk's office for judgments docketed after the twenty-four hours have passed and protects the clerk's office from all liability for judgments docketed within twenty-four hours.⁹

[**213] [***23] 1. *In determining if the docketing statute, [§ 806.10\(3\)](#), Stats., has*

been violated, we look at all of the individual circumstances in

each case.

[*539] The circumstances in this case indicate that South Milwaukee's judgment was not docketed "at the proper time." The judgment was presented at 3:20 p.m. The clerk's office did not close until 5:00 p.m. The respondent has offered no explanation for why the clerk could not docket the judgment in the hour and a half between its receipt and the close of business.¹⁰ Indeed, evidence was submitted that revealed that the deputy clerks were never informed that the date and time a judgment was docketed carried any legal significance. The failure of the clerk's office to ever docket South Milwaukee's judgment against Mrs. Rooney suggests that the Milwaukee County Clerk of Courts Office did not give docketing a high priority. Further, the clerk's office did not docket judgments throughout the day, or at set times during the day, but docketed judgments sporadically. For example, on September 22, 1994, the clerk's office docketed judgments from 9:55 a.m. until 10:50 a.m.; on September 26, 1994, from 11:20 a.m. until 3:20 p.m.; and on September 28, 1994, from [***24] 11:46 a.m. until 11:54 a.m.

We conclude that [HN7](#) in determining if the docketing statute has been violated we need to look at the individual circumstances presented in each case. Thus, we next consider the trial court's and the respondent's interpretation of the language, "reasonable" or "as soon as practicable," to the circumstances present here to determine whether there is a violation under this interpretation.

[*540] 2. *Under either interpretation of the docketing statute, [§ 806.10\(3\)](#),*

⁸ In addition, we see limited relevance to reports written by the Office that involve suggested docketing practices in Rock and Clark Counties, counties significantly smaller than Milwaukee County.

⁹ Further, we observe that the twenty-four hour rule must have been only a suggested practice and not a statutory interpretation because the "rule" would be certain to be violated over weekends and holidays when judgments are filed in the clerk's office at the close of the business day. In addition, the respondent has argued that the judgment was docketed at 9:01 a.m. the morning after it was entered, "within one working hour (or at most two) of its entry." Counting only "working hours" against the twenty-four hour rule avoids the problem created by weekends and holidays; however, considered together, the respondent's arguments would render [§ 806.10\(3\)](#), Stats., nearly meaningless. If we are required to afford the clerk's office a twenty-four hour window in which to docket judgments, and we may only count working hours in determining whether a judgment was docketed at the proper time, the clerk's office would have three working days to docket the judgment. We conclude that such an interpretation is overly broad and unreasonable, given the legal significance attached to docketed judgments.

¹⁰ During the time left in the day, we note that Mrs. Rooney had ample time to go home from the courthouse, retrieve her quitclaim deeds, return to the courthouse, and have the deeds recorded before 5:00 p.m.

Stats., suggested by the respondent, the circumstances indicate

that the Milwaukee County Clerk's Office violated the statute.

Whether we interpret § 806.10(3), Stats., to require the clerk's office to docket judgments as soon as practicable or within a reasonable time, as posited by the respondent, here the clerk's office [***25] did neither. To determine whether the clerk's office docketed South Milwaukee's judgment within a "reasonable" time or "as soon as practicable," we must give those words their commonly understood meaning. Greenebaum v. Department of Taxation, 1 Wis. 2d 234, 237, 83 N.W.2d 682, 684 (1957); Lawver v. Boling, 71 Wis. 2d 408, 414, 238 N.W.2d 514, 517 (1976) (construing the term "employee" in an insurance policy). The respondent has not offered any evidence explaining the delay in docketing South Milwaukee's judgment that would allow us to determine that the clerk's office docketed South Milwaukee's judgment as soon as practicable, or within a reasonable time. There was no evidence presented as to why the judgment was not docketed on the same day it was entered. If there were no intervening circumstances that caused the delay, we must conclude that the judgment was not docketed as soon as practicable, or within a reasonable time. Therefore, even if we accept the trial court's and the respondent's interpretation of § 806.10(3), Stats., the circumstances indicate that the clerk did not docket the judgment within a "reasonable" time, or as "soon [***26] as practicable." For all of these reasons, we conclude that the clerk's office failed to docket South Milwaukee's judgment within the [*541] proper time in violation of the statute.¹¹ Having [**214] reversed the circuit court's decision with regard to the statute of limitations issue, and having found a violation of the docketing statute, § 806.10(3), we remand this case to the trial court and direct the trial court to enter partial summary judgment in favor of South Milwaukee on its claim that the clerk of courts office violated § 806.10(3).

By the Court.-Order reversed and cause remanded with directions.

End of Document

¹¹ Finally, we decline to address South Milwaukee's argument that the trial court improperly expanded the record without notice because that issue is now moot.



Long v. Abbott Labs.

North Carolina Superior Court, Mecklenburg County

July 30, 1999, Decided

97-CVS-8289

Reporter

1999 NCBC 10 *; 1999 NCBC LEXIS 10 **

STACY LEE LONG, on Behalf of Himself and all Other Similarly Situated Individuals, Plaintiff v. ABBOTT LABORATORIES; AMERICAN HOME PRODUCTS CORPORATION; BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.; BRISTOL-MYERS SQUIBB COMPANY; BURROUGHS-WELLCOME CO.; KNOLL PHARMACEUTICAL COMPANY; ELI LILLY AND COMPANY; FOREST LABORATORIES, INC.; GLAXO, INC.; HOFFMANN-LAROCHE, INC.; JOHNSON & JOHNSON PHARMACEUTICAL TRADING CO., INC.; MERCK & CO., INC.; MARION MERRELL DOW, INC.; PFIZER, INC.; NOVARTIS PHARMACEUTICALS CORPORATION; THE PERDUE FREDERICK COMPANY; RHONE-POULENC RORER PHARMACEUTICAL INC.; SCHERING CORPORATION; SCHERING-PLough CORPORATION; G.D. SEARLE & CO.; SMITHKLINE BEECHAM PHARMACEUTICALS CO.; THE UPJOHN COMPANY; WARNER-LAMBERT COMPANY; and ZENECA, INC., Defendants

Core Terms

settlement, cases, class member, purchaser, class action, attorney's fees, lawyers, indirect, expenses, percent, million dollars, lodestar, common fund, litigation costs, certification, retail, class certification, fee request, state court, coordinated, multidistrict litigation, courts, common fund case, community health, equitable, Centers, cy-pres, premium, merits, rates

LexisNexis® Headnotes

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN1[] Basis of Recovery, American Rule

The fact that a fund calls for a cy-pres distribution does not prevent classifying the settlement fund as a common fund for the purposes of deciding if attorney fees may be awarded and, if so, how much. The use of cy-pres distributions should not be discouraged. Often they provide the only feasible means of reaching a settlement. Thus, although a settlement does not provide a benefit for every member of the class which can be determined with mathematical certainty, the use of the cy-pres distribution compensates for that deficiency. Attorney fees can be allowed in cases which result in the preservation, protection or increase of a common fund. A court of equity, or a

court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into a court a fund which others may share with him.

[Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement](#)

[Legal Ethics > Client Relations > Attorney Fees > General Overview](#)

[Civil Procedure > ... > Class Actions > Class Attorneys > General Overview](#)

[Civil Procedure > ... > Class Actions > Class Attorneys > Fees](#)

[Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion](#)

[Civil Procedure > Settlements > Settlement Agreements > General Overview](#)

[Civil Procedure > Remedies > Costs & Attorney Fees > General Overview](#)

[Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule](#)

[HN2](#)[] Class Actions, Compromise & Settlement

The determination of attorney fees in common fund cases involves issues of equity and requires the application of equitable principles. The North Carolina Supreme Court has directed trial courts to exercise their discretion in awarding fees from common funds with jealous caution, lest the administration of justice be brought into disrepute. In making its fee determination, the court must protect the public interest, the interests of the absent class members and the interests of class counsel. In common fund cases, the North Carolina trial courts have routinely adopted a multiple factor or hybrid approach to determining attorney fees which uses both the percentage of the fund method and the lodestar method in combination with a careful consideration of the fee factors set forth in the Rules of Professional Conduct of the North Carolina State Bar. This approach is also supported by the Attorney General of North Carolina. North Carolina does not impose mechanical guidelines in applying equitable principles to these determinations. Trial courts should also correlate the attorneys' compensation with the structure of the settlement benefits the attorneys negotiated for the class.

[Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement](#)

[Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion](#)

[Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview](#)

[HN3](#)[] Class Actions, Compromise & Settlement

Equity should not condone use of the class action procedure simply for leverage in settlement. Courts have historically guarded against use of the class action process solely as a lever to induce settlement.

[Civil Procedure > Remedies > Costs & Attorney Fees > General Overview](#)

[Legal Ethics > Client Relations > Attorney Fees > Fee Agreements](#)

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN4 Remedies, Costs & Attorney Fees

The factors which North Carolina trial courts must consider in determining fee requests in common fund cases are each important, and the court must have full information on all factors, including details of services provided, rates, and experience of counsel, in order to reach an equitable result. In some cases where multiple class counsel from separate jurisdictions are seeking fees in one jurisdiction, it might prove beneficial to the court to have a copy of any fee agreements among counsel for in camera inspection. Full disclosure promotes public confidence in the process and insures against the abuses the North Carolina Supreme Court warned against.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Legal Ethics > Client Relations > Attorney Fees > General Overview

HN5 Class Members, Absent Members

Class actions that create common funds are by their very nature contingency fee cases. The fee in such cases is always subject to court approval. Absent class members may not be bound by the agreement between a class representative they did not choose and an attorney or group of attorneys they did not choose. In multidistrict litigation, they may not be bound by the fee decisions in other jurisdictions. Each jurisdiction must resolve its own case on its own terms. Nor do common fund cases fit the usual contingency fee analysis. In the usual contingency fee case the lawyer and client have negotiated a fee arrangement, with each choosing the risk they are willing to take and the expense they are willing to incur for a specific reward. Therefore, in common fund cases it is more useful to look at percentage awards in other common fund cases than the contingency fee arrangement that might be negotiated between an individual client and an attorney. Even that approach poses difficulty because each case is decided on its own facts and any number of factors could cause a shift in the percentage applied by the court in a particular case. Mechanical rules simply do not apply when making equitable determinations. The fee should correlate with the structure of the settlement negotiated by class counsel.

Governments > Courts > Court Personnel

Legal Ethics > Client Relations > Attorney Fees > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Governments > Courts > Judges

HN6 Courts, Court Personnel

There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently and

expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Legal Ethics > Client Relations > Attorney Fees > General Overview

HN7 [down arrow] **Private Actions, Costs & Attorney Fees**

The award of substantial attorneys' fees to the lawyers for the plaintiffs in a successful antitrust class action is important in order to encourage the bringing of such actions. Necessarily, these lawsuits are handled on a contingent-fee basis, and the uncertainty of antitrust law and the complexity of the facts in most antitrust cases create a substantial risk that the lawsuit will fail and the lawyers for the class therefore receive no fee. Because these are big cases, the investment of the attorney's time and effort -- an investment that he loses entirely if the suit is unsuccessful -- is very large; and payment of his fee may be long postponed due to the length of the typical antitrust case. In addition, the successful prosecution of an antitrust case requires highly specialized legal skills and aptitudes that are in great demand by conventional clients. Substantial fees are necessary if the lawyers having these skills are to be induced to devote their attention to the plaintiffs' side in antitrust class actions, rather than to the more secure forms of practice for which their skills equip them.

Opinion

[1] ORDER ON PETITION FOR ATTORNEY FEES**

[*P1] This matter is before the Court on class counsel's petition for attorney fees. For the reasons set forth below, class counsel are awarded, in the Court's discretion, fees and expenses totaling \$ 961,117.92.

I.

A.

[*P2] This class action is one of eleven separate class actions filed in eleven separate jurisdictions. The actions are listed on Appendix A attached hereto and will hereinafter be referred to as the "Actions," or "Action" when referring to an individual case. The Actions were virtually identical and prosecuted on a coordinated basis. (Affidavit of Bernard Persky Applicable to Indirect Purchaser Actions, para. 1, hereinafter "Persky Affidavit.") The class representatives in each Action sought to represent the same class: consumers in each jurisdiction who purchased (indirectly from defendants) brand name drugs at retail drugstores.

[*P3] Each separate class action is based upon the same allegations: that the defendants violated either antitrust laws, consumer protection laws or both in each jurisdiction by selling brand name drugs to health maintenance organizations (HMOs) and mail order pharmacies at a discount **[**2]** to the price at which the same drugs were sold to retail pharmacies (the "two tiered pricing system"). The defenses in each jurisdiction were the same. First, defendants asserted that the class representatives lacked standing to bring the Actions since they were indirect

purchasers. Second, defendants asserted that no conspiracy to fix prices existed and that their two tiered pricing system was justified by market conditions based on the differing leverage asserted in the purchasing process by their respective kinds of customers. HMOs could control what prescriptions were written, while retail pharmacists only filled the prescriptions brought to them. HMOs had leverage because of their power to control the prescription process. That leverage had expanded as HMOs and mail order pharmacies grew in size and control of the health services market. The two tiered pricing system has been in effect for many years.

[*P4] Since each Action sought class treatment, class certification issues existed in all cases.

[*P5] The Actions were not the first claims asserted against these defendants for violation of the antitrust laws arising out of the two tiered pricing system. Prior to any [**3] of the Actions being filed, retail pharmacies and other direct purchasers from the defendants filed many cases in various federal courts alleging that the two tiered pricing system violated the *Sherman Anti-Trust Act*, [15 U.S.C. § 1 \(1994\)](#). No similar cases were brought on behalf of indirect purchasers because the federal courts do not recognize indirect purchaser standing to assert violations of federal antitrust laws. See *Illinois Brick Co. v. Illinois*, [431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 \(1977\)](#). Under federal case law, only the direct purchaser (the retail drug store in this case) could recover for alleged violations, and defendants could not plead that the increased costs were passed through to another level in the distribution chain. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, [392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 \(1968\)](#). The federal cases were consolidated by the Judicial Panel for Multidistrict Litigation and assigned to one judge, the Honorable Charles P. Kocoras, for management (the "MDL Litigation"). See *In re Brand Name Prescription Drug Antitrust Litigation*, [No. 94 C 897, MDL No. 997, 1994 U.S. Dist. LEXIS 16658](#) [*4] (N.D. Ill. Nov. 15, 1994). Part of the litigation before Judge Kocoras included a class action brought on behalf of indirect purchasers in Alabama. Judge Kocoras refused to certify the Alabama Action as a class action, citing the complications arising from tracing the "pass on" of overcharges to customers through the various levels of the chain of distribution. *Id. at *19*. Judge Kocoras did certify a class of retailers who were direct purchasers.

[*P6] Thus, at the end of 1994, a retailer class action was proceeding in federal court, and in the only state-based indirect purchaser case, the court had declined to certify a class.

B.

[*P7] Beginning in January 1995, class counsel filed "the first wave of coordinated indirect purchaser actions." (Persky Aff. para. 12.) In this context, "class counsel" consisted of six law firms that affiliated for the purpose of pursuing indirect purchaser cases against the defendants. (Persky Aff. para. 8.) Where necessary, the six firms then associated local counsel in each jurisdiction. Appendix C attached hereto details the law firms involved, whether they were class counsel or local counsel, and the time devoted by each to the coordinated [*5] effort in all jurisdictions. As Mr. Persky stated in his affidavit: "This coordination of effort, in practice, was intended to, and did, work in much the same manner as in federal actions coordinated by orders of the Judicial Panel on Multidistrict Litigation, with the informal appointment of 'lead counsel' and division of duties, responsibilities and expenses among the counsel involved." (Persky Aff. para. 1.) Unlike federal multidistrict litigation, no state court had jurisdiction to order anything done in any other jurisdiction, and, unlike federal multidistrict litigation, the process of determining lead counsel and allocation of responsibilities and expenses was by self-selection of class counsel, not by order of any court. In addition, unlike most federal multidistrict antitrust cases, the legal basis of each state action was different.

[*P8] Actions were filed in those jurisdictions in which indirect purchasers had been granted standing by statute or case law and those jurisdictions where it was unclear whether indirect purchasers had standing to sue for violations of state antitrust laws. Thus, Actions were initially filed in eight states and the District of Columbia. [*6] North Carolina was not in the first wave.

[*P9] The "second wave" consisted of Actions in Kansas (1996), Tennessee (1997) and Florida (1997). (Persky Aff. para. 40.) These Actions became mired in a procedural battle over whether they would be tried as part of the federal multidistrict litigation or as individual state cases. The cases were removed to federal court, consolidated with the multidistrict litigation, appealed to the Seventh Circuit Court of Appeals, remanded to the federal district

court and subsequently back to the respective state courts. The protracted procedural battles over jurisdiction in the second wave cases had already ended when this settlement was reached.

[*P10] Last, but not least, was the North Carolina Action. It was filed in 1997 after the 1996 decision of the North Carolina Court of Appeals in [Hyde v. Abbott Labs, 123 N.C. App. 572, 473 S.E.2d 680 \(1996\)](#). That decision was the first in North Carolina to hold that indirect purchasers can have standing under the North Carolina antitrust laws. The class certification and standing issues were never ruled upon in this North Carolina Action.¹

[**7] [*P11] The status of the Actions at the time of settlement is set forth in Appendix A attached hereto. As that chart and Mr. Persky's affidavit (paras. 57-61) make clear, when settlement discussions finally reached a serious stage, class counsel had been largely unsuccessful in winning both standing and certification challenges. Class counsel had prevailed on both issues in the District of Columbia (the least populous jurisdiction), but had lost certification battles in New York (the most populous jurisdiction) and several other large states. (See Appendix A.) Standing and certification loomed as big hurdles for class counsel, particularly if they were to conduct the litigation as one class action as opposed to eleven separate actions.

C.

[*P12] However, standing and certification issues were not the only hurdles facing class counsel. Even if they prevailed on standing and certification, they still had to prove a very difficult case on the merits. In fact, class counsel for the retailers failed to establish the very conspiracy that was at the heart of the Actions being pursued on behalf of the indirect purchasers. The retailer class action has been tried, and Judge Kocoras [**8] dismissed the plaintiffs' case at the close of the plaintiffs' evidence (which lasted ten weeks), finding that there was insufficient proof of conspiracy to get beyond the motion for a directed verdict. [In Re Brand Name Prescription Drug Antitrust Litigation, No. 94 C 897, MDL No. 997, 1999-1 Trade Cas. \(CCH\) P84,118 \(N.D. Ill. Jan. 19, 1999\), 1999 U.S. Dist. LEXIS 550, 1999 WL 33889 \(Kocoras, J.\)](#). Fortunately for class counsel, but perhaps not coincidentally, they had reached a settlement agreement with most of the defendants just a few months before the retailer class action went to trial.

[*P13] *In summary, at the time of settlement, class counsel had experienced little success in establishing both standing and class certification in other jurisdictions and faced opposition on both issues in North Carolina. Even if they prevailed on the procedural issues they still faced a high risk of loss on the merits. The North Carolina Action was settled before any of the issues posing a high risk were heard.*

D.

[*P14] This settlement encompasses all eleven Actions and resolves the claims against defendants representing 98.94 percent of the market. Only Forest [**9] Laboratories, Inc. and The Purdue Frederick Company declined to participate. The settlement fund totaled \$ 64,311,000. North Carolina's share was \$ 8,904,600 before notice costs and administrative expenses. Rather than being divided among the class members, the fund is being distributed to a national organization for use by North Carolina Community Health Centers, which provide medical care in underserved communities. The vast majority of settlement class members in North Carolina will not see a penny from this settlement. This Court has no quarrel with the way the settlement fund was divided among the Actions. There was no single right way to divide the fund given the various stages of litigation in different jurisdictions and the differing laws of each state. Nor does the Court quarrel with the *cy-pres* distribution of the funds. It is apparent that just the cost of administration of distribution of the fund to the full range of actual class members in North Carolina would have far exceeded the resources of the fund and that the amount to be distributed would have been so paltry that few class members would have even bothered to file a claim if given the opportunity. *For all [**10] practical purposes, this was a cost of litigation settlement for such a small sum of money per class member that administration of the settlement fund could only be accomplished by means of a cy-pres distribution.*

¹ Separate state court class actions in which class counsel are not involved may be pending in California and Alabama.

[*P15] In the North Carolina Action, the settlement represents a \$ 1.23 benefit per person after deductions for notice and administrative fees, but before deductions for attorney fees and expenses. With the award made by this order, the North Carolina common fund drops well below eight million dollars. When \$ 1.23 is divided by the number of years in the class period (approximately 4.8), the recovery becomes approximately 26 cents per person for each year claimed. See Persky Aff. para 70.

[*P16] There can be little doubt that this is a cost of litigation settlement. There are twenty-three settling defendants. Each had expenses associated with defending class actions in eleven jurisdictions, including the cost of national and local counsel. The allegations covered over eight hundred brand name drugs. Each defendant would also incur internal costs for its in-house counsel and business associates. These costs would have increased had these Actions gone [**11] forward. The cost of all the trials, if eleven occurred, would have been tremendous. The cost of one trial might well have been high enough to justify this settlement. (The simpler retailer case took ten weeks for the plaintiffs' evidence alone!) If each defendant has incurred costs similar to those being experienced by class counsel (class counsel's lodestar figure was \$ 6,532,537.75), and that figure is multiplied by 25, the cost already associated with defending these Actions to date could be over 160 million dollars. Even if each defendant has only incurred half of class counsel's time and expense, the cost of defense prior to settlement exceeds the amount of the settlement. Moreover, most of the cases were still in the early procedural stages. There is no question that the total cost to defendants of litigating these Actions through the balance of the procedural issues and trial would have been far in excess of the settlement. *This was expensive litigation that consumed tens of millions of dollars in fees and expenses.*

[*P17] The settlement must also be valued against the potential recovery. In the North Carolina Action, class counsel indicated that the potential base [**12] recovery for compensatory damages was 19.3 million dollars a year. The class period alleged covered 4.8 years. Therefore, the potential recovery for North Carolina class members, including treble damages and excluding attorney fees, would have exceeded 277 million dollars. Defendants paid roughly 9 million dollars (or about three cents on the dollar) for their peace and a release. See Appendix B. Considering the potential costs of litigation and potential liabilities eliminated, this was a good bargain for defendants.

[*P18] Thus, defendants had a strong financial incentive to settle. However, a cost-effective settlement was not the only motivation for defendants to settle. Not only did the defendants escape further cost, they obtained a full and complete release and an agreement that no class member could sue them for continuing the pricing policies which were the subject of the Actions. See the Agreement of Settlement and Release of April 24, 1998 (hereinafter "Settlement Agreement") para. 15. They obtained assurance that no class member could challenge their historic pricing methodology in the future. *No defendant has made, was required to make or will in the future [**13] be required to make any change in any business practices that would arguably benefit the class.*

[*P19] Other courts seem to have focused on the total dollar amount of the settlement, not the overall "success" of class counsel. In every other Action, class counsel have been awarded a 25 percent contingency fee for obtaining this settlement, or approximately fourteen million dollars (\$ 14,000,000) in total. Since this Court will depart from the approach taken by the other courts in which Actions were pending, a detailed explanation of this Court's decision is in order.

II.

[*P20] Even though most class members will receive no benefit from this settlement, a fund has been created which constitutes a "common fund" under North Carolina law. *Horner ex rel. City of Burlington v. Chamber of Commerce of the City of Burlington, Inc.*, 236 N.C. 96, 72 S.E.2d 21 (1952). HN1↑ The fact that the fund calls for a *cy-pres* distribution does not prevent classifying the settlement fund as a common fund for the purposes of deciding if attorney fees may be awarded and, if so, how much. The use of *cy-pres* distributions should not be discouraged. Often they provide the only [**14] feasible means of reaching a settlement, as was the situation in this case. Thus, although the settlement does not provide a benefit for every member of the class which can be determined with mathematical certainty as specified in *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), the use

of the *cy-pres* distribution compensates for that deficiency. In *Horner*, the Supreme Court held that attorney fees could be allowed in cases which result in the preservation, protection or increase of a common fund.

The rule is well established that a court of equity, or a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into a court a fund which others may share with him.

Horner, 236 N.C. at 97-98, 72 S.E.2d at 22.

III.

[*P21] This Court has concluded on previous occasions that *HN2* the determination of attorney fees in common fund [**15] cases involves issues of equity and requires the application of equitable principles. *In re Senergy & Thoro Class Action Settlement, 1999 NCBC 7, paras. 18-19, (No. 96 CVS 5900, New Hanover County Super. Ct. July 14, 1999) (Tennille, J.)* The North Carolina Supreme Court has directed trial courts to exercise their discretion in awarding fees from common funds with "jealous caution, lest the administration of justice be brought into disrepute." *Horner, 236 N.C. at 101, 72 S.E.2d at 24.* In making its fee determination, the Court must protect the public interest, the interests of the absent class members and the interests of class counsel.

[*P22] In common fund cases, the North Carolina trial courts have routinely adopted a multiple factor or hybrid approach to determining attorney fees which uses both the percentage of the fund method and the lodestar method in combination with a careful consideration of the fee factors set forth in the Rules of Professional Conduct of the North Carolina State Bar. This approach is also supported by the Attorney General of North Carolina.²

[**16] [*P23] North Carolina does not impose mechanical guidelines in applying equitable principles to these determinations. Trial courts should also correlate the attorneys' compensation with the structure of the settlement benefits the attorneys negotiated for the class. See *In re Senergy, 1999 NCBC 7; Goodrich v. E.F. Hutton Group, Inc., 681 A.2d 1039 (1996)*. This Court will apply the multiple factor approach in this case as it endeavors to correlate the attorneys' compensation to the structure of the benefits the attorneys negotiated for the class.

IV.

A.

[*P24] *Benefit to the Class.* Any assessment of the relevant factors begins with an analysis of the benefit created for the class by the efforts of class counsel. In this case, the class representative, Stacy Lee Long, did not ask for and did not receive any benefit from the settlement. The vast majority of absent class members will not receive any benefit from the settlement. The settlement class consisted of:

All persons who, at any time during the period commencing June 27, 1993 through April 24, 1998, purchased or obtained brand name prescription drugs from any retail drug [**17] store or pharmacy in the State of North Carolina (excluding purchases paid for or reimbursed by Medicaid), which were manufactured, marketed,

² In a letter to the Court dated January 14, 1999, submitted at the request of the Court, the Attorney General offered the following comment on class counsel's fee petition:

Consistent with our comments in *Ruff v. Parex, 1999 NCBC 6 (96 CVS 0059, New Hanover County)*, we believe that the simplistic percentage-of-the-fund approach suggested by plaintiff's counsel is inappropriate in this type of case. Instead, we recommend the multi-factor approach for determining the reasonableness of attorney's fees that the State Bar outlined in its Rule 1.5 (1998) as a more accurate means to assure that the attorney's fees are reasonable and not excessive. This framework was adopted by Judge Howard Manning in *Smith et al. v. State of North Carolina et al.* (95 CVS 6715, Wake County), by Judge Robert L. Farmer in *Faulkenbury v. Teachers' and State Employees' Retirement System, et al.* (90 CVS 12090, Wake County), and by this Court in *Byers et al. v. Carpenter et al., 1998 NCBC 1 (94 CVS 04489, 96 NCB 103, Wake County)*.

distributed or sold (directly or indirectly) by any defendant, for consumption by themselves and/or their families and not for resale.

(Settlement Agreement para. 1.)

[*P25] The only class members who will receive a benefit are class members who qualify for assistance at North Carolina community health centers. There is no evidence in the record that any significant percentage of the absent class members will participate in the programs of the community health centers. No policy or practice of the defendants was changed in any way that benefited the class. To the contrary, defendants got a retroactive and prospective release.

[*P26] The amount of the settlement per person was so small that if this were not presented as a *cy-pres* settlement, it is doubtful that the court would approve a class certification for such a small amount of money per beneficiary. See, e.g., [*Maffei v. Alert Cable T.V. of N.C., 316 N.C. 615, 342 S.E.2d 867 \(1986\)*](#). The recovery for North Carolina residents was \$ 1.23 per person (26 **[**18]** cents per year), after the costs of notice and administration expenses, but before attorney fees and expenses are deducted.

[*P27] Further, the amount of the settlement (less than 8 million dollars net of expenses) was unimpressive compared with the potential recovery of 277 million dollars. (Appendix B.) This was a cost of litigation result that was outstanding only in the sense that class counsel were able to create such an expensive problem that they were able to get an expensive cost of litigation settlement. According to Mr. Persky's affidavit, the value of the settlement was declining as class certification contests were lost in the bigger states. See Persky Aff. paras. 59-62.

[*P28] Class counsel did not accomplish anything of significance for the class in this litigation. In other cases, this court has recognized the efforts of class counsel when they have overcome difficult odds to achieve an unexpected result for class members. See this Court's fee award in [*Byers v. Carpenter, 1998 NCBC 1, No. 94 CVS 04489 \(Wake Co. Sup. Ct. \(1998\)\) \(Tennille, J.\)*](#) (where class counsel turned the proverbial sow's ear into a silk purse). In this case, what was a sow's ear at the **[**19]** outset remained mammalian in composition through settlement.

[*P29] In summary, the net settlement figure of under 8 million dollars for the North Carolina Action was a relatively poor result for the majority of North Carolina class members, but one which probably accurately reflected (1) the merits of the case and (2) North Carolina's share of the enormous cost associated with twenty-three defendants defending eleven class actions. See [*In re Brand Name Prescription Drug Antitrust Litigation, No. 94 C 897, MDL No. 997, 1994 U.S. Dist. LEXIS 16658 \(N.D. Ill. Nov. 15, 1994\)*](#).

[*P30] A public benefit was achieved by the settlement to the extent that some North Carolina residents will benefit from the distributions to community health centers. That factor helped to justify the settlement and serves as a justification for the fee awarded herein.

[*P31] Time and Labor Involved. Analysis of this factor raises a number of questions for which there is little or no guidance in the appellate cases.

[*P32] 1. Under what circumstances may class counsel in an individual state case be credited with work on other cases in other jurisdictions? In this **[**20]** action, class counsel have not filed any fee request based upon the actual time spent on the North Carolina Action. They have filed information setting forth the total time spent on all the Actions (although that time is not detailed in any fashion from which the court could discern the actual work done or, in the case of many of the firms, by whom). Thus, the fee request in this case raises the questions of when, whether and how individual state courts should treat a "multidistrict litigation" approach to litigation when setting fees in individual state common fund cases. That question cannot be avoided in this situation because it is clear that the amount of time expended in the North Carolina case was insignificant compared to the time spent in other jurisdictions.³ The nature of the settlement and the fees awarded in other jurisdictions also demand that this question be faced in this case. Indirect purchaser actions are typical of situations where class counsel treat a

³Local North Carolina counsel's time accounts for approximately three-tenths of one percent of the total lodestar submitted by class counsel. (Appendix C.)

combination of state court class actions as if they had been assigned as lead counsel in consolidated federal actions by the Judicial Panel on Multidistrict Litigation. (See Persky Aff. para. 1.)

[**21] [*P33] The use of multidistrict class action litigation coordinated across state lines is a developing trend hastened by the retreat from certification of nationwide class actions in the federal courts, particularly in mass tort cases. See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 144 L. Ed. 2d 715, 119 S. Ct. 2295, 67 U.S.L.W. 4632 (U.S. June 23, 1999), 1999 U.S. Lexis 4373, 1999 WL 412604; *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998); and *In re Stucco Litigation*, 175 F.R.D. 210 (E.D.N.C. 1997). Publicity attendant to megafees in megafund cases may also have contributed to the interest in creating even larger lawsuits. *In re Nasdaq Market-Makers Antitrust Litigation*, 187 F.R.D. 465, 1998-2 Trade Cas. (CCH) P72,337, 1998 WL 782020 (S.D.N.Y.) at *24-27, 1998 U.S. Dist. LEXIS 17557 (S.D.N.Y.) at *57-69. At the same time, technology has made coordination of multiple cases in multiple jurisdictions more manageable for class counsel, thereby permitting them to expand the "class" they represent [**22] beyond state borders.

[*P34] It is that unofficial, class counsel-generated expansion of the class beyond jurisdictional borders that creates the most problems for state courts. Most state courts do not have an equivalent to 28 U.S.C. § 1407, which authorizes the Judicial Panel on Multidistrict Litigation. State court jurisdiction seldom extends beyond the state borders. No state court is in a position to manage litigation in other states except, possibly, to coordinate discovery. Forum shopping can become significant, either for trial or settlement purposes. State courts are generally not as experienced or equipped as the federal courts to handle massive cases. State court endorsements of nationwide settlements are more susceptible to challenge in other jurisdictions than federally endorsed settlements because each state has a duty to guard the rights of its citizens and insure that they are not abridged by other state courts. In addition, the substantive law issues are different in each state. That creates a fundamental, unavoidable tension when class counsel attempt to try multiple jurisdiction class action cases as one lawsuit.

[*P35] As this [**23] Court has previously indicated, the most difficult problem created by this multiple state class action approach is the heightened scrutiny required to protect absent class members.

In the typical class action, absent class members have their interests represented by parties and attorneys that they have not selected. Class representatives and their counsel must not have a conflict of interest if they are to adequately and fairly represent absent class members. The additional blending of the state class members' claims with claims of class members or individuals in other states adds another layer of difficulty. Now, absent class members have the added worries that their claims might be compromised or the amount of their attorney fees from a common fund affected by claims of other parties in other jurisdictions. While there can be many similarities in the causes of action and proof required to establish liability, state laws differ in many respects.

In re Senergy, 1999 NCBC 7.

[*P36] Those difficulties are well demonstrated here where issues of standing and class certification resulted in differing results in different jurisdictions (Appendix A) [*24] and different settlement amounts (Appendix B).

[*P37] The impact of the multidistrict approach is also important in this litigation because class counsel candidly acknowledged in one of the hearings in this matter that the settlement of the North Carolina Action was achieved because of the leverage created by the existence of multiple state cases. Given the failure to obtain favorable rulings on standing or certification in some jurisdictions that participated in the settlement, it is clear that each case was not settled individually, but as a part of the larger whole. Indeed, both defendants and class counsel appear to have insisted on a global settlement, rather than settling each case individually. (Persky Aff. paras. 57-66.) The settlement division between the states attempts in some way to allocate funds based upon the past history or future chances of success on the merits. (Persky Aff. paras. 68-71.) See also Appendix B. What is clear is that the interests of North Carolina class members were inextricably intertwined with the interests of other class members from other states who had differing causes of action and differing potential for success. That entanglement [**25] was not voluntary, but imposed upon the class members by the strategy of class counsel. Where class counsel have created multiple jurisdiction class actions, the settlement of which must of necessity be approved in individual state class actions, it is appropriate for each individual state court to look at the contribution which the effort in the

other litigation made towards the benefits received by the class members in that individual state. The court is not required to accept all of class counsels' time in other jurisdictions as the lodestar for assessing the appropriateness of the fee request. Each case in each jurisdiction must be decided on its own.

[*P38] There are clearly instances where work done in a case in one jurisdiction benefits class members in another jurisdiction. Use of discovery conducted in other cases is a good example. Actual judgments obtained in other jurisdictions that facilitate a favorable outcome in another state would be important. Efforts that create estoppel arguments or res judicata rulings are other examples of time and expense that could favorably impact other cases.

[*P39] In this case, the procedural battles over standing and class certification [**26] in other jurisdictions must have consumed much of class counsel's time and expense. The issues in those procedural battles were solely related to application of the laws and legal principles applicable to those jurisdictions and the members of the class in each separate state.

[*P40] The settlement in this case, which was reached with the twenty-three defendants in eleven jurisdictions on a cost of litigation basis, was driven by the enormous expense resulting from the complexity created by class counsel's multiple jurisdiction approach. By including all their time and expense in the lodestar, class counsel seek credit for creating the complex situation that spawned the settlement and impacted its amount. As Mr. Persky stated at the hearing before this Court on July 23, 1998,

So we presented to them, by having these states, having these actions in those states with indirect purchases, and we presented them with a great problem. And we believe we've negotiated a settlement in an amount which is worth in total more than the sum of its parts, because what they're getting with this settlement, although they're not interrelated expressly, in other words, if your Honor [**27] unfortunately chose not to approve it, that doesn't mean the other settlements would fall. They're not expressly interrelated. But the amounts that ultimately came out, the total was influenced by the fact that we presented this challenge to them nationwide and it was litigated in a coordinated way by Plaintiff's counsel with that intent. So we did reach an overall settlement in an amount that was a compromise between zero and the hundreds and hundreds of millions of dollars that we would have won had we been successful.

(Hearing transcript of July 23, 1998 at 35) (emphasis supplied).

[*P41] This Court declines to extend credit to class counsel for using the strategy of multiple coordinated class actions where only a cost of litigation result or its equivalent was achieved.

[*P42] The policy behind the Court's decision is based upon the equitable nature of the class action proceeding. HN3  Equity should not condone use of the class action procedure simply for leverage in settlement. Courts have historically guarded against use of the class action process solely as a lever to induce settlement. See, e.g., Cohen v. Beneficial Loan Corp., 337 U.S. 541, 549-550, 69 S.Ct. 1221, 1227, 93 L.Ed 1528 (1949); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970); Surovitz v. Hilton Hotels Corp., 383 U.S. 363, 371-72, 15 L.Ed. 2d 807, 86 S.Ct. 845 (1966).

[*P43] The procedural history of the Actions, as well as the nature of the settlement and the amount in this action, dictate that class counsel not be given credit on a lodestar analysis for all the time spent in all the Actions or for creating the complexity which impacted the settlement. To do so would be inequitable and encourage misuse of multistate class actions.

[*P44] 2. Is the court required to solicit additional, more detailed information from class counsel regarding the breakdown of their time and expenses for purposes of analysis of their fee request?

[*P45] Class counsel in this case elected to file a fee request that provided only total hours and some rates for individual attorneys. Little information was provided for the nature of the services or the years of experience of counsel. Instead, class counsel based their fee request upon a theory that the Court should consider all of the time that every lawyer spent in every case in determining the appropriate fee in dividing the North Carolina

common [**29] fund between the North Carolina beneficiaries of the settlement and class counsel. Class counsel contend that the *nature of the work* done in other jurisdictions is not relevant to the Court's determination, since the settlement covered all jurisdictions and the effort of class counsel was (by election of counsel) coordinated. Class counsel contend that the *amount of the work* is relevant for lodestar purposes. The Court has rejected class counsel's approach.

[*P46] Should the Court then be required to engage in discovery from class counsel to make further inquiry of the details of their time and expenses? The Court does not believe that it is required to do so in this situation. While the role of class counsel shifts from fiduciary to the class to claimant against the fund when a settlement is reached, the decision with respect to fees is still part of an equitable process. In general, and particularly in this case where there is a *cy-près* distribution, no attorney is present to represent the beneficiaries of the common fund in the division of the fund between beneficiaries and counsel. It is left to the Court to make the equitable division. Class counsel have an obligation [**30] to the Court to provide full and complete details of the time and expenses incurred in representing the class and to do so in an understandable and usable format. If they desire the protection of a confidentiality order they would be entitled to it. They may not simply advocate a theory of compensation and provide only the information that supports their theory. [HN4](#)[] The factors which North Carolina trial courts must consider in determining fee requests in common fund cases are each important, and the court must have full information on all factors, including details of services provided, rates, and experience of counsel, in order to reach an equitable result. In some cases where multiple class counsel from separate jurisdictions are seeking fees in one jurisdiction, it might prove beneficial to the court to have a copy of any fee agreements among counsel for in camera inspection. Full disclosure promotes public confidence in the process and insures against the abuses the North Carolina Supreme Court warned against in *Horner*.

[*P47] However, the Court has determined that it has sufficient information about the time and expenses of class counsel in this case that supplementation [**31] of the record with more detail is not required. More detail is not required because the Court has used the lodestar or time involved only as a check on the appropriateness of fee determined. This is not a case in which the fee should be determined on a lodestar basis.

[*P48] Using the lodestar as a basis against which the fee determination can be measured does not require more detailed information in this case. In his letter to the Court of January 14, 1999, the Attorney General suggested determining the amount of the lodestar attributable to North Carolina in the following manner:

Counsel for plaintiff represent that, at their usual billing rates (which reach as high as \$ 490 per hour (Affidavit of Bernard Persky Applicable to Indirect Purchaser Actions, Exhibit V-1)), they have rendered legal services in pursuing the various actions (including the North Carolina action) worth \$ 6,532,537.75 through July 31, 1998 (Persky Affidavit, p. 49), and \$ 7,527,989 through November 30, 1998 (Plaintiff's Memorandum in Support of Final Approval of Partial Class Action Settlement, p. 41). Applying the same factor (13.85%) used by plaintiff's counsel for allocating litigation costs [**32] and expenses among the actions (Persky Affidavit, p. 50), the portion of the attorneys' fees lodestar amount attributable to the North Carolina action is \$ 904,756.47 as indicated in the Persky Affidavit, or \$ 1,042,626.40, as suggested by plaintiff's memorandum.

[*P49] The Court is convinced that the Attorney General's approach is appropriate in this case because the lodestar claimed includes time spent on other Actions and at billing rates higher than the North Carolina average. (See discussion below). The total fees and expenses awarded by the Court approximate the lodestar amount attributable to North Carolina as determined by the Attorney General. Thus, even if they had not already received 14 million dollars, class counsel are being fully compensated for all of their time and expense allocable to North Carolina. Since the North Carolina Action was the last one filed, the pro rata allocation proposed by the Attorney General is fair.

[*P50] The novelty and difficulty of the questions involved and the skill requisite to perform the legal services. The North Carolina Action involved both novel and difficult issues. The question of standing was not fully resolved. [**33] Class certification issues would have required significant expertise, both legal and financial. The case on the merits would have posed issues requiring significant expertise and an advanced understanding of economics and pricing. The trial of an antitrust case would have been long and difficult. As stated earlier, this case involved pricing

of over eight hundred brand name drugs. Garnering proof of pricing policies and establishing a conspiracy among multiple defendants would have required a great deal of expertise. The Court believes class counsel possessed the requisite expertise to address those issues had they been required to do so. However, since the case was settled before those issues were addressed under North Carolina law, no such requirement arose.

[*P51] The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer. This factor is not significant in this case. The North Carolina Action was an add-on to the already pending actions in other states. It did not pose a situation which would preclude other employment. Rather, it supplemented a strategy which was already in place.

[*P52] [**34] The customary fee charged in the locality for similar legal services and whether the fee is fixed or contingent. This factor involves Court review of the fee request by comparing it to the customary fee that would be charged in North Carolina for similar services if the fee were determined on both an hourly basis and a contingency basis.

[*P53] Hourly rates. The first difficulty in making this assessment is the fact that no detail of the services provided can be found in the submission of counsel. Class counsel have approached their fee request from the singular standpoint that it should be decided on the basis of the total dollar amount recovered in all the Actions. Therefore it is difficult to determine the services to which comparison should be made. Did the services include preparation of the fee request? Was the work properly allocated among the lawyers based upon their expertise and billing rates? Was there redundancy resulting from the use of multiple law firms? Those questions cannot be answered from the information supplied by counsel. However, there is information from which the court can compare the rates charged to those customarily charged in the locality. [**35] Appendix D attached sets forth the rates charged for certain services as determined by the North Carolina Bar Association Economic Survey 1998, and Appendix C contains class counsels' rates which can be determined from their submission. It is clear from that comparison that North Carolina lawyers would have received far less for the services provided by class counsel. That is not to say that the rates charged by New York counsel for work done in the New York Action were not commensurate with rates charged in that location for similar work. Absent North Carolina class members did not choose to have that work done for them in New York by New York attorneys. The reasonableness of the fee to be charged to North Carolina class members should be evaluated based upon the fees normally charged by North Carolina lawyers for similar services. That comparison indicates that the reasonable charge for similar services by North Carolina lawyers would have been significantly less than that charged by out of state counsel in this case. It is instructive to look at the chart on Appendix C. It shows that the charges by local counsel in the Actions generally fall within the same range as the fees charged [**36] by North Carolina lawyers. It is only the charges of class counsel that appear to be substantially in excess of those charged by North Carolina lawyers and local counsel in the Actions. The Court concludes that the lodestar suggested by class counsel has already been enhanced when compared to the customary North Carolina rates.

[*P54] Contingency analysis.  Class actions that create common funds are by their very nature contingency fee cases. The fee in such cases is always subject to court approval. Absent class members may not be bound by the agreement between a class representative they did not choose and an attorney or group of attorneys they did not choose. In multidistrict litigation, they may not be bound by the fee decisions in other jurisdictions. Each jurisdiction must resolve its own case on its own terms. Nor do common fund cases fit the usual contingency fee analysis. In the usual contingency fee case the lawyer and client have negotiated a fee arrangement, with each choosing the risk they are willing to take and the expense they are willing to incur for a specific reward. Therefore, in common fund cases it is more useful to look at percentage awards in other [**37] common fund cases than the contingency fee arrangement that might be negotiated between an individual client and an attorney. Even that approach poses difficulty because each case is decided on its own facts and any number of factors could cause a shift in the percentage applied by the court in a particular case. Mechanical rules simply do not apply when making equitable determinations. *Goodrich, 681 A.2d at 1048-49*. The fee should correlate with the structure of the settlement negotiated by class counsel. In this case, the result was a *cy-pres* distribution that did not benefit the majority of class members and did not result in the change of any business practice which benefited the class. All the settlement did was to put an end to expensive and meritless litigation.

[*P55] In general, fees range from 6 percent to 35 percent in those cases using a percentage of the fund method. It is also true that the percentage usually decreases as the size of the fund increases. See [In re NASDAQ Market-Makers Antitrust Litigation, 187 F.R.D. 465, 1998-2 Trade Cas. \(CCH\) P72,337, 1998 U.S. Dist. LEXIS 17557, 1998 WL 782020 \(**38\)](#) (S.D.N.Y. 1998). In Nasdaq, the Court found, after a thorough review of extensive case law, that in common fund cases the percentage should decrease as the size of the fund increases. The court noted that fund recoveries in the range of 51-75 million dollars "usually" generate fees in the 13 percent to 20 percent range. Fees drop to a range of 6 percent to 10 percent in larger cases. Some courts have used sliding scales to determine fees. See, e.g., *Branch v. FDIC*, No. Civ.A. 91-CV-1327ORGs., 1998 WL 151249 (D.Mass. March 24, 1998) (memorandum order) (applying 14 percent up to \$ 22 million; 12 percent of the next \$ 10 million, and 5 percent over and above \$ 32 million). There are at least three justifications for altering the percentage as the fund gets bigger. First, it is generally not fifty times more difficult to try a case with a verdict of fifty million dollars than it is to try a case with a one million dollar verdict. See [Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237 \(1985\)](#). Second, the margin for error increases with the size of the fund, requiring courts to exercise their discretion with caution [***39] to avoid unjust enrichment of either counsel or the beneficiaries. See [Edwards v. Alaska Pulp Corp., 920 P.2d 751 \(Alaska 1996\)](#). Third, and most importantly, the awarding of attorney fees in common fund cases can impact the credibility of the judicial system and the legal profession. See [Horner, 236 N.C. at 101, 72 S.E.2d at 24; Kuhnlein v. Department of Revenue, 662 So. 2d 309 \(1995\)](#) (a case heavily relied upon by Judge Manning in his fee decision in the Smith case cited above). In *Kuhnlein*, the Florida Supreme Court articulated its concerns as follows:

Some time ago, this Court recognized the impact of attorneys' fees on the credibility of the court system and the legal profession when we stated: [HN6](#) [↑] There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently and expeditiously. The attorney's fee is, therefore, a very important factor in the administration [***40] of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.

[Id. at 313](#) (citations omitted).

[*P56] The storm of public protest recently created by the fee request in the Smith case in this state and the national controversy and adverse media coverage surrounding the fees in the tobacco industry litigation demonstrate the public's interest in and concerns about attorney fees and the administration of justice.

[*P57] Balanced against the public concern over fee abuse is the strong public interest in encouraging attorneys to take contingency fee cases, particularly in antitrust cases. The Court is fully aware of the chilling effect fee decisions can have on plaintiffs' counsel. As Judge Richard Posner of the Seventh Circuit Court of Appeals stated so clearly:

[HN7](#) [↑] The award of substantial attorneys' fees to the lawyers for the plaintiffs in a successful antitrust class action is important [***41] in order to encourage the bringing of such actions. Necessarily, these lawsuits are handled on a contingent-fee basis, and the uncertainty of antitrust law and the complexity of the facts in most antitrust cases create a substantial risk that the lawsuit will fail and the lawyers for the class therefore receive no fee. Because these are big cases, the investment of the attorney's time and effort -- an investment that he loses entirely if the suit is unsuccessful -- is very large; and payment of his fee may be long postponed due to the length of the typical antitrust case. In addition, the successful prosecution of an antitrust case requires highly specialized legal skills and aptitudes that are in great demand by conventional clients. Substantial fees are necessary if the lawyers having these skills are to be induced to devote their attention to the plaintiffs' side in antitrust class actions, rather than to the more secure forms of practice for which their skills equip them.

(Emphasis added.) [Pchemister v. Harcourt Brace Javanovich, Inc., 1984 U.S. Dist. LEXIS 23595, 1984-2 Trade Cas. \(CCH\), No. 77 C 39, P66, 234 \(N.D. Ill. Sept. 14, 1984\)](#).

[*P58] In the case before this [**42] Court, the Court and class counsel have a different perception of success. In this case, the lawsuit essentially failed, but the lawyers have asked for a premium. When class counsel win, they should be rewarded. There must be incentives in order to induce lawyers to take difficult cases. However, when class counsel settle on a cost of litigation basis prior to any test of the merits of their case and do not create any significant benefit for the class, they should not receive the same premium for their work as if they had won. They should be paid reasonably for what they achieved for the class. The Court believes the fee awarded in this case does just that. To award a premium fee for the results in this case might encourage other lawyers to bring meritless but multiple lawsuits in hopes of getting a premium fee for a cost of litigation settlement before achieving any real benefit for the class.

[*P59] The time limitations imposed by the client or circumstances. This does not appear to be a significant factor in this case.

[*P60] The nature and length of the professional relationship with the client. This does not appear to be a significant factor. Stacy Lee Long, [**43] the class representative, never even appeared at any hearing before this court in the North Carolina Action, which was the last of the actions to be filed.

[*P61] The experience, reputation and ability of the attorneys. In this case, the Court has found the skills, reputation and abilities of the attorneys who have appeared before it in the North Carolina Action to be excellent. The Court is obviously without the ability to make any judgment with respect to the work of counsel in the other cases.

[*P62] Risk. This factor is important in this case. Class counsel undertook the first wave of litigation after direct purchaser actions had already begun. By obtaining access to the discovery in the federal MDL action, the potential burden of massive discovery in the indirect purchaser actions was significantly reduced. This is set forth in Mr. Persky's affidavit: "The discovery stipulation gave Class Counsel access to -- and the right to use -- a voluminous amount of discovery that would have literally cost millions of dollars to generate independently." (Persky Aff. para. 30.) In addition, the existence of the MDL action even facilitated class counsel in finding an expert. [**44] (Persky Aff. para 30.) The MDL action was obviously going to trial before any of the indirect purchaser cases, thus insuring that class counsel would know the outcome if they were willing to wait on trial of the federal action before settling. There was a risk that no violation of the antitrust laws could be proven. This case was settled before the risk of failure on the merits was incurred in either the MDL action or any state Action.

[*P63] There was also a risk that class certification could not be obtained in the individual Actions. That risk was significant. It took employment of an expert to establish that a class or classes could be defined to support the certification request. Certification had been denied in New York, Maine, Michigan and Minnesota. It was uncertain or unlikely in six other jurisdictions and had only been upheld in the District of Columbia. See Appendix A. In North Carolina, class certification had not been ruled upon.

[*P64] There was also a risk that standing would not be allowed in those states that had not adopted an *Illinois Brick* repealer statute. See Appendix A. In North Carolina, standing was more likely because of the decision [**45] in *Hyde*, but the Supreme Court had not addressed the issue.

[*P65] Had class counsel shouldered the burden of the obstacles described above and overcome them, they would have been entitled to a premium for taking the risks. In this case class counsel avoided the future risks and minimized the losses already incurred in the largest states by settling before the trial in the MDL action and before facing class certification contests in other states. They should not be rewarded for a cost of litigation settlement on the same basis as if they had taken the risks associated with certification and trial of the merits and prevailed, or at least obtained a significant settlement compared to the litigation costs or the potential recovery.

[*P66] The amount involved and the results obtained. The Court has already discussed many of the facts relevant to this factor. A summary of the key facts follows. This was a cost of litigation settlement that was entered into after class counsel had sustained key losses in certification fights in the largest jurisdictions. It was entered into before the trial in the MDL action, thus avoiding the risks associated with a decision on the merits. [**46] The amount

received, though large, was small when compared to the potential recovery if the case had been tried and won. As the MDL case established, the underlying substantive claims were meritless, and the settlement reflected that fact. The settlement was so meager from the standpoint of benefit to each class member that a *cy-pres* distribution had to be used to dispense the settlement fund. Defendants got a complete release and covenant not to sue, ensuring that they would not have to make any change to their pricing policies which would benefit the class members. The settlement was remarkable in its total amount, but that figure can be attributed to the complexity and costs of the legal entanglement created by pressing eleven class action cases in different jurisdictions against twenty-five large corporations covering eight hundred brand name drugs. To reward class counsel with a premium fee simply for creating a massive legal entanglement would not be in keeping with the equitable principles which apply to use of the class action procedure. Certainly, a cost of litigation settlement entered into before any significant risks are taken in a case does not warrant payment of any **[**47]** premium for class counsel's services.

[*P67] Ten other jurisdictions have awarded class counsel a premium for the result in this case. While it would be simpler to either say that the 14 million dollars class counsel has already received is more than sufficient for the value created or blindly follow the other jurisdictions and award 25 percent, the decision on the division of the North Carolina common fund should be made independently. This was a separate action brought in the state courts of North Carolina, and it is the benefits received by and work performed for North Carolina class members that are most important.

V.

[*P68] The fee decision that the court has made in its discretion has the practical effect of fully reimbursing class counsel for all of North Carolina's prorated share of expenses incurred in all the Actions. Class counsel are also almost fully reimbursed for North Carolina's prorated share of the lodestar fees incurred in all the Actions, even though those fees are generally at a much higher rate than would be found in North Carolina and cover activities in other jurisdictions that related solely to legal issues exclusive to those jurisdictions. On **[**48]** a percentage of the fund basis, the fee award amounts to approximately 10 percent of the North Carolina fund remaining after payment out of the fund for notice costs and administration expenses, but before attorney fees and expenses. That percentage is slightly below the low end of the range of fees awarded nationally in cases involving amounts between fifty and seventy-five million dollars. Use of the lower percentage in this case is justified because, among other reasons cited above: (1) the majority of class members did not benefit in any way from the settlement; (2) the case was settled before success on the merits was achieved and after procedural battles had been lost in large states; (3) class counsel's ability to piggy-back the discovery in the direct purchaser actions made it less risky; and (4) the underlying substantive claims lacked merit. No factors justifying a premium were present in this case.

[*P69] The Court has been informed by class counsel that despite the cap on the fee request, no funds at all have been distributed to community health centers in North Carolina, but all funds have been held in an interest bearing escrow account pending the Court's ruling **[**49]** on attorney fees. The highest interest rate paid on those funds was 4.5 percent. Accordingly, class counsel will be entitled to interest on the amount of the award for fees and expenses at the rate of 4.5 percent from the date of the final order approving settlement in this case to the date of payment.

[*P70] Based upon the foregoing, and in the Court's exercise of its discretion, it is hereby **ORDERED, ADJUDGED AND DECREED:**

1. Within thirty days class counsel shall be paid from the common fund fees in the amount of \$ 870,000.00 and expenses in the amount of \$ 91,117.92.
2. Within thirty days class counsel shall also be paid from the common fund interest at the rate of 4.5 percent on the total amount of \$ 961,117.92 from the date of the final order approving settlement through the date of payment.
3. Within ten days of the disbursement to class counsel the balance of the common fund shall be distributed to the National Association of Community Health Centers.
4. Within sixty days of this order, the National Association of Community Health Centers shall file with the Court a report containing its specific plans for distribution of the funds to North **[**50]** Carolina Community Health

Centers and a timetable showing when the funds will be distributed. The National Association shall make every effort to reduce the paperwork and bureaucratic delays in the process while insuring the funds are properly allocated.

5. In the event class counsel appeal from this order, an initial distribution shall still be made to the National Association of Community Health Centers in the amount of \$ 6,000,000.00.

6. The Court shall retain jurisdiction of this case to oversee any additional issues concerning attorney fees and expenses or disbursement of the settlement fund.

This the 30th day of July, 1999.

APPENDIX A *

JURISDICTION	DATE FILED	INDIRECT PURCHASER	CLASS	PROCUDURAL
			STANDING	
New York	7/13/95		No	No Case dismissed for lack of standing. Appeal pending
Arizona	8/29/95	Def.'s mtn to dismiss for lack of standing denied	Uncertain	Def.'s mtn to dismiss for lack of standing denied
Maine	11/3/95		No	Denied Appeal Pending
Michigan	1/20/96		No	Denied P's petition for permission to file interlocutory appeal denied
Minnesota	2/21/96		No	Denied P's petition for permission to file interlocutory appeal denied
D.C.	2/22/96	Allowed; III. Brick repealer	Granted	
Wisconsin	2/22/96	Allowed; III. Brick repealer	Uncertain	
Kansas	12/6/96	Allowed; III. Brick repealer	Uncertain	
Florida	1/16/97	Uncertain	Unlikely	
Tennessee	2/24/97	Uncertain;	Uncertain	

* See Affidavit of Bernard Persky of September 14, 1998, at 5-6, 8-13, 16-25, 33-37.

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JURISDICTION	DATE FILED	INDIRECT PURCHASER	CLASS	PROCUDURAL
		STANDING	CERTIFICATION	POSTURE
North Carolina	6/27/97	Uncertain; favorable lower ct. ruling	Uncertain	
TOTALS		4 ALLOWED,TED, 4 NOT ALLOWED, 3 UNCERTAIN	1 GRANTED, 4 DENIED 6 UNCERTAIN	

[51] APPENDIX B**

			Actual Per
		Capita	
		Amount of	
		Net	
		Net	Settlement
		Settlement	
	Settlement	Amount	
	Amount		
Jurisdiction			
AR		\$ 8,131,329	\$ 2.06<5>
	\$ 8,409,900		
D.C.	6,925,800	6,678,753	3.34<5>
FL	8,904,600	8,465,521	.62
KA	5,441,700	5,226,177	2.06<5>
ME	989,400	868,384	.70<6>
MI	3,166,080	2,948,881	.31<6>
MN	1,978,800	1,836,833	.41<6>
NY	1,978,800	1,686,833	.09<6>

	Actual Per Capita		
	Amount of Net	Settlement	Net
	Settlement	Amount	Settlement
	Amount		Amount
Jurisdiction			
NC	8,904,600	8,565,521	1.23
TN	7,420,500	7,162,945	1.41
WI	10,190,820	9,874,434	1.96<5>
Potential Damages			Relationship of
	in millions		Actual to
		Per Capita	Potential Per
	Over 4.8	Potential	Capita Value
			Value
	years		
Jurisdiction			
AR	\$ 157.68	\$ 39.92	5.16%
D.C.	23.18	11.59	28.82%
FL	548.93	39.99	1.55%
KA	101.38	39.99	5.15%
ME	49.54	39.95	1.75%

		Potential		Relationship of Actual to Potential Per Capita Value	
		Damages			
		in millions			
		Over 4.8	Per Capita		
		Potential	Capita Value		
			Value		
			years		
Jurisdiction					
MI		378.29	39.98	.78%	
MN		180.86	39.98	1.03%	
NY		725.90	39.99	1.03%	
NC		277.92	39.98	3.08%	
TN		203.76	40.00	3.53%	
WI		201.74	40.00	4.90%	

APPENDIX C ***[**52] LODE* ANALYSIS****CLASS COUNSEL**

FIRM	State	Hrs	fee	% tOT FEE	RATE¹
Goodkind	New York	7781.65	2,664,541	40.8	\$ 342.41
Miller	Illinois	2212.5	779,095.25	11.9	352.13
Zwerling	New York	3940.1	1,219,494	18.7	309.51
Elwood	Michigan	2151.25	740,785	11.3	344.35
Bainbridge	Ala., Va.	2157.8	639,908.5	9.8	296.56
Zimmerman	Minnesota	1027	199,111	3	186.09
TOTAL		19,270.3	6,242,934.8	95.5	323.97

NORTH CAROLINA COUNSEL

* See Appendix of Exhibits to Affidavit of Bernard Persky of September 14, 1998, Exhibit V.

¹ These rates are average blended rates. That is, they include work done by attorneys at any level of experience, law clerks, and paralegals. The top hourly rates for class counsel attorneys were as follows: Goodkind, \$ 490; Miller, \$ 455; Zwerling, \$ 445; Elwood, \$ 415; Bainbridge, \$ 395. The top hourly rate for class counsel paralegals was: Goodkind, \$ 145.

Whitfield	North Carolina	60	10,292	0.2	171.53
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OTHER LOCAL COUNSEL

Bader	Colorado ²	55.65	10,445.75	0.2	187.7
Bonnett	Arizona	245.7	55,523	0.8	225.98
La Cava	Wisconsin	148.48	41,587.75	0.6	280.09
Shockman	Arizona	204.3	34,325	0.5	168.01
Sando	Wash. D.C.	87.5	22,750	0.3	260
Niewald	Kansas	227.7	44,526	0.7	195.55
Berman	Maine	169.5	31,521.25	0.5	185.97
Hoffman	Maine	88.4	17,680	0.3	200
Hyman	Michigan	101.5	15,228.75	0.2	150.04
Sinsheimer	Washington	(51.49)	7,723	0.1	(150)
GRAND TOTAL		20,956.22	6,532,537.7	99.9	\$
			5		311.72

[53] APPENDIX D****Comparative Rates for North Carolina Lawyers¹**

(Typical rates for lawyer during 1997 at highest rate for any size city or firm in North Carolina.)

Category	Hourly Rate
Lawyers admitted 1991-92	\$ 148
Lawyers admitted 1987-88	\$ 176
Lawyers admitted 1983-84	\$ 201
Lawyers admitted 1977-78	\$ 250*
Antitrust Lawyers	\$ 190
Litigation	\$ 192
Personal Injury - Plaintiff	\$ 244
Securities	\$ 250*
Highest hourly rate for law clerks	\$ 72
Highest rate for paralegals	\$ 61

End of Document

² While Lodestar figures for Washington and Colorado were included in class counsel's fee application, neither state was part of the settlement before this Court.

¹ Figures based on the 1998 North Carolina Bar Association Economic Survey.

* Highest rate on entire survey.

The Court notes that in *Smith v. State of N.C.*, No. 95 CVS 6715 (Wake Co. Sup. Ct. (November 20, 1997)), Judge Manning awarded fees at the rate of \$ 265 an hour for senior attorneys at Womble Carlyle Sandridge and Rice, a large N.C. law firm.

The Court also notes that in *In Re Food Lion Effective Scheduling Litigation*, No. 92-198-MISC-5-F (E.D.N.C.) (April 13, 1995), Judge Fox applied the rate for similar services in the specific locale of *Eastern District* of North Carolina attorneys in determining the proper fee award for class counsel, awarding \$ 160 an hour for attorneys and \$ 35 an hour for paralegals in an employment litigation case.



Subsolutions, Inc. v. Doctor's Assocs.

United States District Court for the District of Connecticut

July 30, 1999, Decided ; August 2, 1999, Filed

CASE NO. 3:98CV470(AHN)

Reporter

62 F. Supp. 2d 616 *; 1999 U.S. Dist. LEXIS 12304 **; 1999-2 Trade Cas. (CCH) P72,677

SUBSOLUTIONS, INC., et al. v. DOCTOR'S ASSOCIATES, INC., et al.

Subsequent History: Magistrate's recommendation at [*Subsolutions, Inc. v. Doctor's Assocs., 2001 U.S. Dist. LEXIS 24393 \(D. Conn., Apr. 6, 2001\)*](#)

Disposition: [**1] Defendants' Motion to Dismiss [doc. # 74] GRANTED IN PART and DENIED IN PART.

Core Terms

franchise, franchisees, vendor, allegations, plaintiffs', amended complaint, antitrust, motion to dismiss, products, Sherman Act, antitrust claim, defendants', tying product, tied product, anticompetitive, competitors, conspiracy, sandwich, tying arrangement, anesthesiology, unfair, marks, relevant market, interchangeability, cross-elasticity, consumers, quotation, trademark, markets, buyer

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

HN1[] Defenses, Demurrsers & Objections, Motions to Dismiss

In deciding a motion to dismiss under [*Fed. R. Civ. P. 12\(b\)\(6\)*](#), the court is required to accept as true all factual allegations in the complaint and must construe any well-pleaded factual allegations in the plaintiff's favor. A court may dismiss a complaint 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. A court must not consider whether the claim will ultimately be successful, but should merely assess the legal feasibility of the complaint. In fact, in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. In deciding such a motion, consideration is limited to the facts stated in the complaint or in documents attached thereto as exhibits or incorporated therein by reference.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

62 F. Supp. 2d 616, *616LÁ999 U.S. Dist. LEXIS 12304, **1

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

HN2 [down] Standing, Requirements

In order to have standing to bring a private antitrust claim, a plaintiff must allege more than a personal injury. An 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. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. In examining this requirement, a court must keep in mind the fundamental tenet that the antitrust laws were enacted for the protection of competition, not competitors.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN3 [down] Defenses, Demurrsers & Objections, Motions to Dismiss

While statements from the original complaint may be used as impeachment evidence at trial, the court should not consider such statements on a motion to dismiss.

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

HN4 [down] Tying Arrangements, Clayton Act

Generally, a tying arrangement occurs where a party will sell one product (the "tying product") only if the buyer also purchases another product (the "tied product") or at least agrees that he will not purchase the tied product from any other entity.

Antitrust & Trade Law > Sherman Act > General Overview

HN5 [down] Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. §1](#).

Antitrust & Trade Law > Clayton Act > General Overview

HN6 [down] Antitrust & Trade Law, Clayton Act

See [15 U.S.C.S. § 14](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN7 [down] Price Fixing & Restraints of Trade, Tying Arrangements

A plaintiff must allege five essential elements in order to demonstrate an illegal tying arrangement. These elements include: first, a tying and a tied product; second, evidence of actual coercion by the seller that forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; and fifth, the involvement of a "not insubstantial" amount of interstate commerce in the "tied" market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

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

Trademark Law > ... > Licenses > Licensable Subject Matter > Tying Arrangements

Trademark Law > Conveyances > General Overview

HN8 Price Fixing & Restraints of Trade, Tying Arrangements

A franchiser's trademark may constitute a separate product for purposes of a tying arrangement.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN9 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 > General Overview

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

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

HN10 Price Fixing & Restraints of Trade, Tying Arrangements

In order to make out an antitrust claim, plaintiffs must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed. The relevant product market includes all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand. 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 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.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN11 Price Fixing & Restraints of Trade, Tying Arrangements

Products in a relevant market are characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN12 [] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

To successfully bring a claim under [§1](#) of the Sherman Act, [15 U.S.C.S. §1](#), a plaintiff must demonstrate a combination or some form of concerted action between at least two legally distinct economic entities which constitutes an unreasonable restraint on interstate trade or commerce. Thus, as long as a manufacturer acts independently, it may generally deal, or refuse to deal, with whomever it chooses.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN13 [] Pleadings, Heightened Pleading Requirements

An antitrust claim is not subject to any heightened pleading requirement and must simply be plead in conformity with [Fed. R. Civ. P. 8\(a\)](#). However, a [§1](#) of the Sherman Act, [15 U.S.C.S. §1](#), conspiracy claim supported by vague and conclusory allegations of concerted activity cannot withstand a motion to dismiss. A mere allegation that the defendants violated the antitrust laws as to a particular plaintiff and commodity is insufficient to survive a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN14 [] Antitrust & Trade Law, Sherman Act

To state a claim under [§1](#) of the Sherman Act, [15 U.S.C.S. §1](#), a plaintiff must assert facts demonstrating that the alleged competitors entered into an agreement which was designed to further their own economic interests while at the same time excluding other threatening competitors.

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

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN15 [] Commercial Interference, Prospective Advantage

The fundamental elements of a state law claim for tortious interference with a business expectancy are: the existence of a business relationship; the alleged tortfeasor's knowledge of that relationship; intentional interference with the relationship; and consequential loss. Given the nature of competition, not all conduct that interferes with a

business relationship is actionable. Rather, the plaintiff must establish that the defendant's behavior was tortious. The plaintiff may make such a showing by alleging that the defendant engaged in fraud, misrepresentation, intimidation, obstruction or molestation, or acted maliciously.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN16 [blue icon] State Regulation, Claims

The Connecticut Unfair Trade Practices Act, [Conn. Gen. Stat. §§ 42-110b\(a\)](#) (1999) (CUTPA), provides that no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Initially, a plaintiff must satisfy two factors in order to bring a CUTPA claim. First, the plaintiff must demonstrate that the defendant's conduct constitutes an unfair or deceptive practice. Second, the plaintiff must establish a basis for a reasonable estimate of damages.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Governments > Courts > Common Law

HN17 [blue icon] Regulated Practices, Trade Practices & Unfair Competition

In applying the "cigarette rule" to determine whether a trade practice is unfair or deceptive, a court must consider: (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, competitors, or other businessmen. A plaintiff does not have to satisfy all three of these factors.

Counsel: For SUBSOLUTIONS INC, DECO SOLUTIONS GROUP INC, plaintiffs: Raul Davila-Carlos, E. Glastonbury, CT.

For DOCTOR'S ASSOCIATES, INC., COMPUTER REGISTER ASSOCIATES, INC, defendants: Edward Wood Dunham, Wiggin & Dana, New Haven, CT.

For DOCTOR'S ASSOCIATES, INC., defendant: Sharyn B. Zuch, Wiggin & Dana, Hartford, CT.

For DOCTOR'S ASSOCIATES, INC., COMPUTER REGISTER ASSOCIATES, INC, defendants: Suzanne Ellen Wachsstock, Wiggin & Dana, Stamford, CT.

Judges: Alan H. Nevas, United States District Judge.

Opinion by: Alan H. Nevas

Opinion

[*618] RULING ON DEFENDANTS' MOTION TO DISMISS

The plaintiffs, Subsolutions, Inc. ("SSI") and Deco Solutions Group, Inc. ("DSG"), bring this action against the defendants, Doctor's Associates, Inc. ("DAI") and Computer Register Associates, Inc. ("CRA"), alleging violations of section 1 of the Sherman Act, 15 U.S.C. § 1, and section 14 of the Clayton Act, 15 U.S.C. § 14. The plaintiffs also bring a state law claim for tortious interference with a business expectancy and allege violations of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a to -110q ("CUTPA").¹

[**2] [*619] Now pending is DAI and CRA's Motion to Dismiss. For the reasons set forth below, the motion [doc. # 74] is GRANTED IN PART and DENIED IN PART.

STANDARD OF REVIEW

HN1 In deciding a motion to dismiss under Rule 12(b)(6), the court is required to accept as true all factual allegations in the complaint and must construe any well-pleaded factual allegations in the plaintiff's favor. See *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998); *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991). A court may dismiss a complaint 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); see also *Still v. DeBuono*, 101 F.3d 888 (2d Cir. 1996). A court must not consider whether the claim will ultimately be successful, but should merely "assess the legal feasibility of the complaint." See *Cooper*, 140 F.3d at 440 (citation omitted). In fact, "in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity [**3] for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976) (internal citations and quotation marks omitted); accord *George Haug Co. v. Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 139 (2d Cir. 1998); *Strobl v. New York Mercantile Exch.*, 561 F. Supp. 379, 383 (S.D.N.Y. 1983); *CBS, Inc. v. Ahern*, 108 F.R.D. 14, 28 (S.D.N.Y. 1985); *Eye Encounter, Inc. v. Contour Art., Ltd.*, 81 F.R.D. 683, 686 (E.D.N.Y. 1979). In deciding such a motion, consideration is limited to the facts stated in the complaint or in documents attached thereto as exhibits or incorporated therein by reference. See *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

FACTS

DAI, one of the defendants, is a Florida corporation with its principal place of business in Milford, Connecticut, that sells and services "Subway" sandwich shop franchises. (See Am. Compl. P 4.) DSG, one of the plaintiffs, is a Florida corporation which develops and services point of sales systems ("POS systems"), a computerized alternative to conventional cash registers. [**4] (See *id.* P 2.) SSI, the other plaintiff and another Florida corporation, markets and sells DSG's POS systems to Subway franchisees.² (See *id.* P 3.) SSI also provides extended service agreements to Subway franchisees who purchase DSG's POS system. (See *id.*) CRA, the other defendant, is a Florida corporation and DAI affiliate, that is in the process of developing POS system software for use in Subway sandwich shops. (See *id.* PP 5, 21.)

¹ The plaintiffs originally named Retail Business Systems, Inc. ("RBS") as an additional defendant in this action. On April 1, 1998, RBS filed a motion to dismiss. Because the plaintiffs failed to file a memorandum in opposition within twenty-one days of the date RBS filed its motion, the court granted the motion to dismiss absent objection on May 11, 1998. See D. Conn. L. Civ. R. 9(a) (recognizing that the "failure to submit a memorandum in opposition to a motion may be deemed sufficient cause to grant the motion"). The plaintiffs failed to seek timely reconsideration of this ruling. See D. Conn. L. Civ. R. 9(e) (requiring that motions for reconsideration be filed "within ten (10) days of the filing of the decision or order from which such relief is sought").

² According to the plaintiffs, "POS systems allow Subway franchisees to transmit certain sales figures and other financial data to DAI's home office electronically, and/or to reproduce the sales figures and other financial data in the format required by DAI." (Am. Compl. P 7.) The POS systems developed by DSG "are designed and programmed pursuant to operational specifications issued by DAI." (*Id.* P 8.)

Under the Subway franchise agreement, franchisees are only permitted to use Subway approved products and equipment.³ (See *id.* P 18.) A Subway franchisee **[**5]** who uses unauthorized goods or equipment is subject to termination by DAI. (See *id.*) Since 1992, SSI has been an approved Subway POS system vendor. (See *id.* P 14.) In this capacity, SSI has sold approximately 1,565 POS systems to Subway franchisees. (See *id.*)

For the past fifteen years, RBS, a New York corporation, has exclusively supplied cash registers to Subway restaurants. (See *id.* P 6.) RBS also provides POS hardware **[*620]** and software systems to Subway franchisees. (See *id.*)

On February 24, 1998, DAI implemented a policy which mandated that all Subway franchisees employ a POS system by January 1, 2001. (See *id.* P 9.) Franchisees who refuse to comply with this policy are subject to termination. (See *id.*) This policy evolved out of an agreement between DAI and RBS, in which they recognized that RBS would be the "sole **[**6]** DAI approved POS vendor in the Subway POS market."⁴ (*Id.* P 19.) Apparently, RBS's exclusive vendor status terminates once DAI's affiliate, CRA, develops its own POS system. (See *id.* P 22.) This agreement effectively forecloses SSI, as well as other POS vendors, from the Subway POS market.⁵ (See *id.* P 19) The plaintiffs allege that this agreement is part of a conspiracy between DAI, RBS and CRA to unreasonably restrain competition in the Subway POS market. (See *id.* P 20.)

On March 12, 1998, the plaintiffs commenced this action. An amended complaint was subsequently filed on October 27, 1998, raising various antitrust and state law claims against DAI and CRA.

DISCUSSION

[7] I. Allegations of an "Antitrust Injury"**

HN2 In order to have standing to bring a private antitrust claim, a plaintiff must allege more than a personal injury. See *Balaklaw v. Lovell*, 14 F.3d 793, 797 (2d Cir. 1994); *George Haug Co.*, 148 F.3d at 139. Such an action may be pursued only where an antitrust injury is present. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). An 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. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp.*, 429 U.S. at 489. In examining this requirement, a court must keep in mind "the fundamental tenet that the antitrust laws . . . were enacted for the protection of *competition*, not *competitors*." *Balaklaw*, 14 F.3d at 797 (citations and internal quotation marks omitted).

The defendants initially argue that the plaintiffs' antitrust claims must be dismissed because the plaintiffs have not alleged **[**8]** a cognizable antitrust injury, *i.e.*, an injury to competition as a whole. The defendants rely heavily on *Balaklaw* in support of their position. In *Balaklaw*, the plaintiff physician was the president of a private group of doctors who were solely responsible for meeting a hospital's anesthesiology requirements. See *Balaklaw*, 14 F.3d at 795-96. No written contract governed this relationship. See *id.* The hospital subsequently decided to solicit proposals from outside physicians in an effort to establish an exclusive contract for its anesthesiology needs. See *id.* at 796. Nine interested parties, including the plaintiff physician's group, submitted proposals to the hospital. See *id.* Although interviewed by the hospital, the plaintiff physician's group was ultimately not awarded the contract. See *id.* The plaintiff physician brought suit claiming that the selection process was anticompetitive and thus, a violation

³ SSI claims that prospective franchisees must agree to all of the terms of the Subway franchise agreement in order to operate a Subway franchise. (See *id.* P 37.)

⁴ The plaintiffs claim that traditionally the SSI POS system outsold the RBS POS system by a four to one margin. (See *id.* P 44.)

⁵ SSI alleges, however, that DAI will not terminate the franchisee agreement of any Subway franchisees who purchased the SSI POS system prior to February 24, 1998. (See *id.* P 25.)

of the Sherman Act. See *id.* In affirming the district court's grant of summary judgment, the Second Circuit held that there was no antitrust injury because the plaintiff's "claimed injury came as a result of his losing [**9] out in the competition for an exclusive anesthesiology contact at [the hospital], and nothing more." [*Id. at 798.*](#)

[*621] The defendants argue that the present case is similar to *Balaklaw* because: (1) DAI unilaterally selected RBS as the supplier of POS systems at the culmination of an open and vigorous competitive process, and (2) DAI chose RBS for pro-competitive reasons, including the fact that RBS's POS system offered the lowest price to the consumer. (See Mem. of Law of DAI and CRA in Supp. of Mot. to Dismiss at 6 [hereinafter "Defs.' Mem."].) Neither of these facts are contained in the plaintiffs' amended complaint. Rather, the defendants extract this information from the plaintiffs' original complaint. Because "it is well established that an amended complaint ordinarily supercedes the original, and renders it of no legal effect," *Dluhos v. Floating & Abandoned Vessel*, 162 F.3d 63, 68 (2d Cir. 1998) (citations and internal quotation marks omitted), the defendants' reliance on the plaintiffs' original complaint is misplaced. [HN3\[\]](#) While statements from the original complaint may be used as impeachment evidence at trial, see [*Andrews v. Metro North Commuter R.R. Co.*, 882 F.2d 705, 707 \(2d Cir. 1989\)](#); [***10] [*Decker v. Vermont Educ. Television, Inc.*.. 13 F. Supp. 2d 569, 572 \(D. Vt. 1998\)](#), the court should not consider such statements on a motion to dismiss.

Here, the plaintiffs' amended complaint contains numerous allegations that other competitors in the POS market have been injured as a result of the defendants' actions. (See Am. Compl. PP 19-20, 24.) Such allegations are sufficient to survive a motion to dismiss. See [*Delaware Health Care, Inc. v. MCD Holding Co.*, 893 F. Supp. 1279, 1291 \(D. Del. 1995\)](#) (finding that plaintiff had "satisfied its minimal burden of pleading harm not only to itself, but also to others in the competitive landscape and thus to competition"); [*Capital Imaging Assoc., P.C. v. Mohawk Valley Med. Assoc.*, 725 F. Supp. 669, 677-78 \(N.D.N.Y. 1989\)](#) (same); cf. [*Falstaff Brewing Co. v. Stroh Brewery Co.*, 628 F. Supp. 822, 827 \(N.D. Cal. 1986\)](#) (holding that an antitrust complaint was defective where it failed to allege an injury to competition). When the facts of *Balaklaw* are compared to those alleged in the plaintiffs' amended complaint, it is evident that *Balaklaw* is distinguishable. First, [***11] the physician plaintiff in that case alleged nothing more than a personal injury. See [*Balaklaw*, 14 F.3d at 796](#). Second, the *Balaklaw* court found that the exclusive anesthesiology contract entered into by the hospital actually enhanced competition because it expired after three years. See [*id. at 799*](#). Here, there are no allegations that the agreement entered into between DAI and RBS is of a limited duration. Both of these factors limit the applicability of *Balaklaw* to the present case.

Accordingly, the court holds that the plaintiffs have sufficiently alleged an antitrust injury in their amended complaint.

II. The Tying Claim

[HN4\[\]](#) Generally, a tying arrangement occurs where a party will sell one product (the "tying product") only if the buyer also purchases another product (the "tied product") or at least agrees that he will not purchase the tied product from any other entity. See [*Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 461, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#). The plaintiffs' tying claim is apparently predicated on both [Section 1](#) of the Sherman Act ⁶ and [Section 14](#) of the Clayton Act.⁷ See [*De Jesus v. Sears Roebuck & Co.*, \[*622\] Inc., 87 F.3d](#)

⁶ [HN5\[\]](#) This statute 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.A. § 1 \(West 1997\)*](#).

⁷ [HN6\[\]](#) [Section 14](#) provides that:

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, wares, merchandise, machinery, supplies, or other commodities . . . or 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, wares, merchandise, machinery, supplies, or other commodities 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.

[65, 70 \(2d Cir. 1996\)](#) [**12] (recognizing that a tying claim under either the Sherman Act or Clayton Act involves identical elements).

[**13] [HN7](#) [↑]

A plaintiff must allege five essential elements in order to demonstrate an illegal tying arrangement. See *id.* These elements include:

first, a tying and a tied product; second, evidence of actual coercion by the seller that forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; and fifth, the involvement of a "not insubstantial" amount of interstate commerce in the "tied" market.

Id. at 70 (citation omitted). Here, the defendants argue that the plaintiffs' claim must be dismissed because the plaintiffs cannot satisfy the first, third, and fourth elements of an illegal tying arrangement. The court disagrees.

A. Existence of Separate Products

The plaintiffs allege that the Subway trademark is the tying product and the POS system is the tied product. (See Am. Compl. PP 29-30.) The Second Circuit has specifically recognized that [HN8](#) [↑] a franchisor's trademark may constitute a separate product for purposes of a tying arrangement. See [Susser v. Carvel Corp., 332 F.2d 505, 519 \(2d Cir. 1964\)](#) [**14] (recognizing that "the true tying item was rather the Carvel trademark, whose growing repute was intended to help the little band of Carvel dealers swim a bit faster than their numerous rivals up the highly competitive stream"); see also [Power Test Petroleum Distrib., Inc. v. Calcu Gas, Inc., 754 F.2d 91, 96 \(2d Cir. 1985\)](#) (stating that "a trademark could in proper circumstances constitute a separate tying product") (citation omitted); [Esposito v. Mister Softee, Inc., 1979 U.S. Dist. LEXIS 7978](#), No. 75 C 555, 1979 WL 1733, at *8 (E.D.N.Y. 1979) (finding a tying arrangement where the defendants conditioned the plaintiffs' "right to the use of the trademark of Mister Softee upon their purchasing of all their supplies from a designated supplier"), modified on other grounds by, [1983 U.S. Dist. LEXIS 17849](#), No. 75 CV 555, 1983 WL 1806 (E.D.N.Y. Apr. 11, 1983); accord [Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 722 \(7th Cir. 1979\)](#); [Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47 \(9th Cir. 1971\)](#); [Little Caesar Enter. v. Smith, 34 F. Supp. 2d 459, 467 \(E.D. Mich. 1998\)](#); [Wilson v. Mobil Oil Corp., 940 F. Supp. 944 \(E.D. La. 1996\)](#). [**15] In light of this authority, the plaintiffs could make out a tying claim by alleging that the Subway trademark constitutes the tying product.

i. Are there Separate Markets for the Subway Franchise and the POS System?

The defendants argue that the plaintiffs cannot establish the first element of a tying claim because there is "no market for the Subway POS system distinct from the Subway franchise market." (Defs.' Mem. at 9.) Two Supreme Court cases control the court's consideration of this issue.

In *Jefferson Parish Hosp. v. Hyde*, the Supreme Court stressed "that [HN9](#) [↑] 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." [466 U.S. 2, 19, 104 S. Ct. 1551, 80 L. Ed. 2d 2 \(1984\)](#) (emphasis added). In *Jefferson Parish*, the Court recognized that anesthesiology services constituted a separate product from hospital services and rejected the defendant's argument [*623] that by linking the two the hospital was "merely providing a functionally integrated package of services." *Id. at 19*. Because "there [was] a sufficient demand for the purchase of anesthesiological [**16] services separate from hospital services to identify a distinct product market in which it [was] efficient to offer anesthesiological services separately from hospital services," *id. at 21-22*, the Court concluded that the first element of a tying claim was satisfied.

In *Eastman Kodak*, the Supreme Court confronted Kodak's "policy of selling replacement parts for micrographic and copying machines only to buyers of Kodak equipment who use Kodak service." [504 U.S. at 458](#). The Court applied the criteria of *Jefferson Parish* in an effort to ascertain whether service and parts constituted separate products for

purposes of a tying claim. See *Eastman Kodak, 504 U.S. at 462-63*. Kodak argued that parts and service were functionally linked and specifically "insisted that because there is no demand for parts separate from service, there cannot be separate markets for service and parts." *Id. at 463*. The Court disagreed and found that a factual question existed on this issue because service and parts had been "sold separately in the past and still are sold separately to self-service equipment owners." *Id. at 462*. **[**17]** The Court commented that "the development of the entire high-technology service industry is evidence of the efficiency of a separate market for service." *Id.*

Recently, a district court has applied the reasoning of both *Jefferson Parish* and *Eastman Kodak* to the franchise context. See *Little Caesar Enter., 34 F. Supp. 2d at 459*. There, the plaintiffs, a class of "Little Caesar's" franchisees, accused the defendant of unlawfully tying the sale of certain items from a wholly-owned subsidiary of Little Caesar to "the sale and continued operation of the Little Caesar franchises." *Id. at 464*. These items included, in pertinent part, "condiments with [Little Caesar's] proprietary symbols and marks." *Id. at 463*. Little Caesar argued that there were not two separate markets for its logoed products and its franchise because the logoed items "could not be sold anywhere or used anywhere separate from a [Little Caesar's franchise]." *Id. at 468*. The court rejected this reasoning. Instead, the court found that the proper test was whether it would be "efficient for a firm to provide [these items] separate from the **[**18]** [Little Caesar's] franchise." *Id. at 469* (citation and internal quotation marks omitted). The court found that two distinct markets existed because, in the past, "other private distributors, unrelated to Little Caesar, sold all the goods and services necessary to run Little Caesar franchises, including logoed paper goods." *Id. at 469*. These products were sold separately from the franchise itself. See *id.* The court also noted that Little Caesar had recently approved several new distributors to provide these items to its franchisees. See *id.* Because these items had been sold separately in the past, the court concluded that the market for Little Caesar's franchises was separate from the market for logoed goods. See *id. at 470*.

The court finds the reasoning of *Little Caesar Enter.* persuasive and hereby adopts it. Applying the consumer demand test to the present case, the court finds that the plaintiffs have alleged the existence of two distinct product markets. First, the amended complaint asserts that Subway franchisees "must purchase the POS system(s) for use in their Subway submarine sandwich franchise(s) from other firms, **[**19]** not DAI." (Am. Compl. P 31.) The plaintiffs further assert that prior to February 24, 1998, there were eight POS system vendors who competed for sales in the Subway POS system market. (See *id. P 16*.) Apparently, none of these vendors were related to DAI. The fact that a separate market for these POS system vendors evolved evidences that the Subway franchise market is distinct from the POS system **[*624]** market. See *Little Caesar Enter., 34 F. Supp. 2d at 470*.⁸

[20]** Accordingly, the court finds that the plaintiffs have properly alleged the first element of their tying claim.

B. Does DAI Possess Sufficient Market Power in the Tying Product Market?

i. Relevant Product Market

The defendants next argue that the plaintiffs' amended complaint does not define a valid market for the tying product. The court agrees.

HN10  In order to make out their antitrust claim, the plaintiffs "must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed." *Re-Alco Indus., Inc. v. Nat'l Ctr. for Health Educ., Inc., 812 F. Supp. 387, 391 (S.D.N.Y. 1993)* (citation omitted); see also *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)* (recognizing that the plaintiff bears "the burden of defining the relevant market") (citation omitted); *Hack v. President & Fellows of Yale College, 16 F. Supp. 2d 183, 196 (D. Conn. 1998)*

⁸ It is the defendants' position that *Casey v. Diet Ctr., Inc., 590 F. Supp. 1561 (N.D. Cal. 1984)*, provides the better reasoned approach to this issue. In *Casey*, the plaintiffs complained that the defendant tied the sale of its franchise, Diet Center, with the sale of certain nutritional products, including "Diet Supp." See *Casey, 590 F. Supp. at 1563*. The plaintiffs argued that equivalent nutritional products were available from various other sources for less money. See *id.* The court found no tying arrangement because "the demand for the Diet Supp is not separate from that for the franchise: it is generated wholly by the franchisee's operation of the franchise." *Id. at 1564*. Because *Casey* employs essentially a functional approach to this issue, the court finds it unpersuasive.

(same). "The relevant product market includes all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand." ⁹ [Re-Alco, 812 F. Supp. at 391](#) [**21] (citation omitted); see also [Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#) (stating that "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").

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 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.

[Queen City Pizza, 124 F.3d at 436](#); see also [Hack, 16 F. Supp. 2d at 196](#) (stating that a complaint may be dismissed where it does not define the relevant market by reference to the rule of reasonable interchangeability and cross-elasticity); [Re-Alco, 812 F. Supp. at 391](#) (same); [E. & G. Gabriel v. Gabriel Bros., Inc., 1994 U.S. Dist. LEXIS 9455](#), No. 93 CIV. 0894(PKL), 1994 WL 369147, at *3 (S.D.N.Y. July 13, 1994) (same). [**22]

In their amended complaint, the plaintiffs define the relevant market as follows:

The Subway sandwich franchise sold by DAI is interchangeable only with sandwich franchises that are similar in price and that have similar qualities to the Subway sandwich franchise sold by DAI (the 'Sandwich Franchise Market'). Alternatively, the Sandwich Franchise Market is a sub-market within the market for fast food franchises.¹⁰

[*625] (Am. Compl. P 28.) The defendants maintain that these allegations are "so vague and so narrowly circumscribed as to be meaningless under basic principles of **antitrust law**." (Reply Mem. of Law of DAI and CRA in Further Supp. of their Mot. [**23] to Dismiss at 6 [hereinafter "Defs.' Reply"].) The court agrees.

The plaintiffs' amended complaint contains no allegations regarding substitute products, does not differentiate the Subway franchise from comparable franchise opportunities, and does not include any facts regarding cross-elasticity of demand.¹¹ These deficiencies require that the defendants' motion to dismiss be granted with respect to this issue. See [Re-Alco, 812 F. Supp. at 391](#) (stating that "if a complaint fails to allege facts regarding [**24] substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of demand . . . a court may grant a [Rule 12\(b\)\(6\)](#) motion").¹² However, this determination does not end the inquiry.

⁹ [HN11](#) [↑] Products in a relevant market [are] characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market." [Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 \(3d Cir. 1991\)](#) (citation omitted).

¹⁰ "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.'" [Pepsico, Inc. v. Coca-Cola Co., 1998 U.S. Dist. LEXIS 13440](#), No. 98 CIV. 3282(LAP), 1998 WL 547088, at *5 (S.D.N.Y. Aug. 27, 1998) (citation omitted). Thus, the same pleading requirements which govern the relevant market also apply to the relevant sub-market. See *id.*

¹¹ As the defendants persuasively point out, consumers considering franchise opportunities would certainly look to other fast food franchise alternatives if Subway was to suddenly raise its franchise fees. Moreover, consumers would also eat at other fast food restaurants if Subway's menu prices dramatically increased.

¹² The plaintiffs maintain that the Second Circuit has found that "the proper tying product market in franchise tying cases, as a matter of law, is the market for franchising opportunities similar to that offered by the defendant." (Mem. in Supp. of Pls.' Objection to Defs.' Mot. to Dismiss at 19 [hereinafter "Pls.' Opp'n"].) The plaintiffs rely on both [Susser](#) and [Capital Temp., Inc. v. Olsten Corp., 506 F.2d 658 \(2d Cir. 1974\)](#). Neither of these cases supports this proposition. In fact, in [Susser](#) the court recognized that Carvel dealers "competed not only with similar chains - - Dairy Queen, Tastee Freez, Dari-Delite, King Kone, Dari-Isle, and others, but also with chains and independents utilizing mobile units, with chain stores and operations such [as] Howard Johnson, and with the ubiquitous corner drug-store." [Susser, 332 F.2d at 518-19](#) (emphasis added).

[25] ii. Is the Market Power Element Satisfied by the Plaintiffs' "Lock-In" Theory?**

Relying on *Eastman Kodak*, the plaintiffs alternatively argue that the market power element may still be satisfied despite the fact that the defendants lacked appreciable economic power in the tying product market of fast-food restaurants. Specifically, the plaintiffs argue that the franchisees have become "locked in" a relationship with DAI after substantially investing in the development of the franchise. The plaintiffs maintain that such a situation can satisfy the market power element. The court agrees.

As recognized previously, *Eastman Kodak* involved Kodak's "policy of selling replacement parts for micrographic and copying machines only to buyers of Kodak equipment who use Kodak service." [504 U.S. at 458](#). Kodak argued that because it lacked market power in the overall photocopier and micrographic equipment market, the fact that it possessed economic power in the aftermarket of parts and services was not sufficient to make out an antitrust claim. See [Eastman Kodak, 504 U.S. at 465-66](#). The Court rejected this claim on two grounds. First, the Court noted that [**26] because of the expense and difficulty of obtaining "lifecycle pricing" data when purchasing a copying machine, less sophisticated consumers may not consider such factors as the future price of parts and services for Kodak equipment at the time of their purchase. See [id. at 473-74](#). Second, and primarily relevant here, the Court stated that existing Kodak copier owners could face higher prices [**26] switching to an alternative copier than by paying the supracompetitive parts and service prices charged by Kodak. See [id. at 476](#). Thus, these consumers were "locked in" to accepting Kodak's parts and services arrangement because Kodak imposed the tie-in only after the consumers had expended significant capital purchasing the copier. See *id.*

Few courts have faced the difficult task of applying the Supreme Court analysis in *Eastman Kodak* to the franchise context. However, a well-reasoned approach to this issue was developed in *Little Caesar Enter.*, 34 F. Supp. 2d at 470-513. There, the court recognized that

[a] buyer knowing an announced or generally understood restrictive policy, or even a buyer who could reasonably anticipate [**27] the risk of such a 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.

Id. at 490. Thus, the court found that a plaintiff may pursue a "lock-in" theory in the franchise context only if he demonstrates that a reasonable person could not "reasonably anticipate later 'exploitation' when they bought the . . . franchise and that they could not reasonably protect themselves in the marketplace by obtaining . . . contract guarantees or warranties from the defendant or his rivals." *Id.* (citation omitted). This examination requires a court to determine what a reasonable franchisee knew at the time he entered into the franchise agreement. See *id.*

Applying the approach taken by the court in *Little Caesar Enter.* to this case, the court finds that the plaintiffs have alleged sufficient facts to make out a "lock-in" claim. First, at the time many of the franchisees entered into their franchise agreement with DAI the POS system was merely optional.¹³ (See Am. Compl. P 10.) Moreover, those franchisees who desired to purchase [**28] a POS system were not limited to a single POS vendor. (See [id. P 10](#).) On February 24, 1998, however, DAI implemented a policy requiring that Subway franchisees employ a POS system on or before January 1, 2001. (See [id. P 9](#).) DAI further designated RBS as the sole approved POS system vendor. (See [id. P 19](#).) Because this policy was not in place at the time many franchisees entered into their agreements with DAI, it is arguable that the franchisees could not reasonably foresee that DAI would implement such a restriction. A determination regarding this issue can only be made at a later point in this litigation. For purposes of deciding a motion to dismiss, these allegations satisfy the second element of the plaintiffs' tying claim.

C. Anticompetitive Effects in the Tied Product Market

The defendants next argue that because the selection of RBS as the exclusive vendor of POS systems "produced a sharp [**29] cut in the price that Subway franchisees must pay for POS systems," the plaintiffs cannot establish anticompetitive effects in the POS system market. (See Defs.' Mem. at 14.) There are no facts in the amended

¹³ The plaintiffs allege that a franchisee's initial investment can range from \$ 60,000 to \$ 149,800.

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complaint that indicate that DAI's selection of RBS as the exclusive POS vendor resulted in a price decrease to Subway franchisees. The defendants' attempt to raise this fact on a motion to dismiss is puzzling and will not be considered by the court at this stage of the litigation.

In order to make out their tying claim, all the plaintiffs have to allege is "that the tying arrangement has or is substantially likely to have an anticompetitive effect in the market for the tied product." [Helen Brett Enter. v. New Orleans Metro. Convention & Visitors Bureau, 1996 U.S. Dist. LEXIS 9137](#), Civ. A. No. 95-2888, 1996 WL 346314, at *7 n.5 (E.D. La. June 25, 1996) (citations omitted). Here, the plaintiffs allege that the defendants' tying arrangement has forced franchisees to purchase RBS's POS system despite the fact that numerous franchisees prefer SSI's POS system. (See Am. Compl. P 44.) The plaintiffs further allege that the defendants actions foreclosed competition in the POS system market [**30] as a whole. (See [id. P 45](#).) Such allegations satisfy the liberal pleading requirements of the Federal Rules of Civil Procedure.

Accordingly, the plaintiffs have satisfied the fourth element of their tying claim and the defendants' motion to dismiss this cause of action is DENIED.

III. Antitrust Conspiracy

[HN12](#) To successfully bring a claim under [Section 1](#) of the Sherman Act, a plaintiff must demonstrate "a combination or some form of concerted action between at least two legally distinct economic entities which constitutes an unreasonable restraint on interstate trade or commerce." *Daniel, M.D. v. American Bd. of Emergency Med.*, 988 F. Supp. 112, 123 (W.D.N.Y. 1997) (citations omitted). "Independent action is not proscribed." [Monsanto Co. v. Spray-Rite Serv. Corp.](#), 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); see also [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984) (recognizing that [Section 1](#) of the Sherman Act does not reach actions which are "wholly unilateral") (citation omitted). Thus, as long as a manufacturer acts independently, it may generally deal, or refuse to deal, with whomever it chooses. See [Monsanto](#), 465 U.S. at 761. [**31]

[HN13](#) An antitrust claim is not subject to any heightened pleading requirement and must simply be plead in conformity with [Fed. R. Civ. P. 8\(a\)](#). See [George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.](#), 554 F.2d 551, 554 (2d Cir. 1977). However, a [Section 1](#) conspiracy claim supported by vague and conclusory allegations of concerted activity cannot withstand a motion to dismiss. See [Estate Constr. Co. v. Miller & Smith Holding Co.](#), 14 F.3d 213, 220-21 (4th Cir. 1994). "A mere allegation that the defendants violated the antitrust laws as to a particular plaintiff and commodity is insufficient to survive a [Rule 12\(b\)\(6\)](#) motion." [Id. at 221](#) (citation and internal quotation marks omitted).

The defendants maintain that the plaintiffs' [Section 1](#) conspiracy claim must be dismissed because the plaintiffs have alleged nothing more than unilateral action on the part of DAI. While the court agrees that this claim must be dismissed against CRA, the plaintiffs may maintain this claim against DAI.

The plaintiffs' allegations that CRA participated in an antitrust conspiracy are both vague and conclusory. The amended complaint provides, [**32] in relevant part:

The DAI/RBS Contract is part of a conspiracy between DAI, CRA and RBS . . . to unreasonably restrain and/or eliminate competition in the Subway POS Market by forcing Subway franchisees within the Subway POS Market to purchase the RBS POS System and/or CRA POS system once developed, depriving Subway franchisees from access to competitive POS vendors other than RBS and excluding SSI and other competitive POS system vendors from the Subway POS market.

(Am. Compl. P 20.) The plaintiffs further allege that CRA is currently in the process of developing its own POS system and that DAI intends to designate CRA as the sole approved supplier in the near future. (See [id. PP 21-22](#).) The plaintiffs' amended complaint contains no allegations that CRA entered into an agreement with either DAI or RBS. There are also no allegations that CRA participated in any meetings with either DAI or RBS. Moreover, the plaintiffs have failed to assert [*628] that these three entities even communicated with each other. Given that the

amended complaint contains no allegations from which it can be inferred that CRA participated in a conspiracy in violation of Section 1 of the Sherman [**33] Act, this claim is dismissed with respect to CRA.

While not detailed, the allegations against DAI are sufficient to survive a motion to dismiss. The complaint alleges that DAI and RBS entered into an agreement on February 24, 1998, pursuant to which RBS was designated DAI's sole approved POS system vendor. (See Am. Compl. P 19.) The plaintiffs allege that the purpose of this agreement was to deprive Subway franchisees "from access to competitive POS vendors" and to exclude other POS system vendors from the POS market. (See *id. PP 19-20*.) The plaintiffs further allege that DAI ultimately seeks to designate its own affiliate, CRA, as the sole approved POS system vendor. (See *id. P 20*.) Such an action would obviously further DAI's economic interests to the detriment of other competitors. These allegations are sufficient to state a Section 1 conspiracy claim against DAI. See *Daniel*, 988 F. Supp. at 123-24 (recognizing that HN14[ to state a claim under Section 1 of the Sherman Act "a plaintiff must assert facts demonstrating that the alleged competitors entered into an agreement which was designed to further their own economic interests while at the same time excluding [**34] other threatening competitors").

IV. Tortious Interference with a Business Expectancy

In the third count of their complaint, the plaintiffs bring a state law claim for tortious interference with a business expectancy against DAI. HN15[ The fundamental elements of this claim are: "the existence of a business relationship; the alleged tortfeasor's knowledge of that relationship; intentional interference with the relationship; and consequential loss." *Chem-Tek, Inc. v. General Motors Corp.*, 816 F. Supp. 123, 130 (D. Conn. 1993) (citing *Solomon v. Aberman*, 196 Conn. 359, 383, 493 A.2d 193 (1985); *Harry A. Finman & Son, Inc. v. Connecticut Truck & Trailer Serv. Co.*, 169 Conn. 407, 415, 363 A.2d 86 (1975)).

Given the nature of competition, not all conduct that interferes with a business relationship is actionable. See *ChemTek*, 816 F. Supp. at 130; see also *Harry A. Finman & Son*, 169 Conn. at 415 (recognizing that "fair and free competition is necessary to the economic life of a community, and one may, by legitimate means, interfere with a competitor's mere expectancy that his business relations will continue"). Rather, the plaintiff [**35] must establish that the defendant's behavior was tortious. See *McKeown Distrib., Inc. v. Gyp-Crete Corp.*, 618 F. Supp. 632, 644 (D. Conn. 1985). The plaintiff may make such a showing by alleging that the defendant "engaged in fraud, misrepresentation, intimidation, obstruction or molestation, or . . . acted maliciously." *Id.* (internal citations and quotation marks omitted).

Here, the plaintiffs have sufficiently plead each element of this claim. The amended complaint alleges that the plaintiffs were involved in a business relationship with Subway franchisees. (See Am. Compl. P 49.) The plaintiffs assert that despite the fact that DAI was aware of these relationships, it still intentionally interfered with them. (See *id. PP 49, 51-53*.) The plaintiffs contend that DAI's actions damaged their contractual relationships and caused them to suffer financial losses. (See *id. PP 53-55*.) Finally, the plaintiffs maintain that DAI acted intentionally and maliciously. (See *id. PP 50-53*.)

Because these allegations are sufficient to state a claim for tortious interference with a business expectancy, DAI's motion to dismiss this count is DENIED.

[*629] V. CUTPA [**36] Claims

The plaintiffs also bring claims pursuant to CUTPA against both DAI and CRA. HN16[ CUTPA provides that "no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Conn. Gen. Stat. Ann. § 42-110b(a)* (West Supp. 1999). Initially, a plaintiff must satisfy two factors in order to bring a CUTPA claim. See *Chem-Tek*, 816 F. Supp. at 130. First, the plaintiff must demonstrate that the defendant's conduct constitutes an unfair or deceptive practice. See *id.* "Second, the plaintiff must establish a basis for a reasonable estimate of damages." *Id.* (citation omitted).

In order to determine whether a trade practice is unfair or deceptive, the Connecticut Supreme Court "has adopted the so-called 'cigarette rule' developed by the Federal Trade Commission in the context of section 5(a)(1) of the

Federal Trade Commission Act." [*Boulevard Assoc. v. Sovereign Hotels, Inc., 72 F.3d 1029, 1038 \(2d Cir. 1995\).*](#) [**HN17**](#) [Footnote] In applying the "cigarette rule," a court must consider:

(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy [**37] as it has been established by statutes, the common law, or otherwise - whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers [(competitors or other businessmen)].

[*Atlantic Richfield Co. v. Canaan Oil Co., 202 Conn. 234, 239, 520 A.2d 1008 \(1987\)*](#) (citations omitted). A plaintiff does not have to satisfy all three of these factors. See [*Chem-Tek, 816 F. Supp. at 130.*](#)

Here, the defendants concede that violations of either the Sherman Act or the Clayton Act can support a claim of unfair competition under CUTPA. See [*Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 609, 97 L. Ed. 1277, 73 S. Ct. 872 \(1953\)*](#) (recognizing that violations of the Sherman and Clayton Acts also transgress the Federal Trade Commission Act); [*Raybestos Prods. Co. v. Coni-Seal, Inc., 989 F. Supp. 166, 169 \(D. Conn. 1997\)*](#) (finding that establishment of a claim under Section 2 of the Sherman Act also establishes a claim under CUTPA). The defendants argue, however, that because the [**38] plaintiffs have not established an antitrust claim, their CUTPA claims must also be dismissed. In opposition, the plaintiffs simply assert that they have adequately plead antitrust claims against both DAI and CRA and thus, have alleged CUTPA violations.

Because the court finds that the plaintiffs have stated an antitrust claim with respect to DAI, it likewise finds that the plaintiffs may maintain a CUTPA claim against this defendant. See [*Raybestos Prods., 989 F. Supp. at 169.*](#) The fact that the plaintiffs have failed to state an antitrust claim against CRA, however, requires that the CUTPA claim be dismissed with respect to this defendant.

CONCLUSION

Based on the foregoing analysis, the defendants' Motion to Dismiss [doc. # 74] is GRANTED IN PART and DENIED IN PART. The motion is granted with respect to CRA. The motion is denied, however, as to DAI.

SO ORDERED this 30 day of July, 1999, at Bridgeport, Connecticut.

Alan H. Nevas

United States District Judge



Bizzle v. N. Mont. Healthcare

Twelfth Judicial District Court of Montana, Hill County

August 4, 1999, Decided

Cause No. DV-95-149

Reporter

1999 Mont. Dist. LEXIS 1136 *

DR. PAUL G. BIZZLE, Plaintiff, vs. NORTHERN MONTANA HEALTHCARE, INC., NORTHERN MONTANA HOSPITAL, and DR. JOEL E. CLEARY; Defendants.

Core Terms

geographic, relevant market, defendants', antitrust, patients, summary judgment, Practices, anti trust law, Unfair, orthopedic surgeon, monopoly power, market area, documents, planning, destroy

Judges: [*1] John Warner, District Judge.

Opinion by: John Warner

Opinion

ON MOTION FOR SUMMARY JUDGMENT NORTHERN MONTANA HEALTHCARE

Plaintiff Dr. Paul G. Bizzle brought this action against Defendants Northern Montana Healthcare, Inc., Northern Montana Hospital and Dr. Joel L. Cleary (hereinafter defendants) under the Montana Unfair Trade Practices Act. Specifically, plaintiff claims defendants violated 30-14-205, MCA, and requests treble damages as a result of that violation.

Defendants move the court for summary judgment under Rule 56(c), M.R.Civ.P. Defendants assert plaintiff has, as a matter of law, failed to 1) show an anti-trust injury, 2) identify the relevant geographic market, 3) show defendants possessed monopoly power within the geographic market, and 4) show harm to market-wide competition. Defendants further assert that plaintiff does not have standing to bring this action.

Plaintiff filed a memorandum in opposition stating that defendants erroneously apply federal law to this case when there are several distinctions between the federal law and Montana law. Plaintiff argues that the determinative issue is not so much the legal principles which apply, but rather the varied facts and factual inferences which [*2] are present in the case.

A hearing on defendants' motion for summary judgment was held July 27, 1999. Plaintiff was not present, but was represented by Lee C. Henning and D. James McCubbin. Defendants were not present, but were represented by Neil Ugrin, Kathleen M. Chancler and Jonathan B. Sprague.

Background

Northern Montana Hospital is located in Havre, Montana, and houses a variety of medical departments to serve the community's medical needs. Northern Montana Health Care, Inc. is the parent corporation which was created to

oversee the various medical programs and services. Those programs and services include Northern Montana Hospital, Northern Montana Health Care Foundation, Inc., Northern Montana Chemical Dependency, Inc., North Care, and Northern Montana Care Center.

In 1990, Plaintiff Dr. Paul G. Bizzle, a board-certified orthopedic surgeon, moved to Havre, Montana. Plaintiff established his practice and had staff privileges at Northern Montana Hospital. When plaintiff moved to Havre another orthopedic surgeon, Dr. Luettjohann, was practicing at the hospital. By 1992, Dr. Luettjohann had retired. Dr. Luettjohann's retirement left plaintiff as the sole orthopedic surgeon [*3] practicing in Havre.

Shortly thereafter, plaintiff publicly announced his decision to no longer treat Medicare patients. Not only did plaintiff announce his decision to the medical staff, but he announced his decision in writing to the public at large in the Havre Daily News. In addition, plaintiff refused to sign the Medicare and Medicaid attestation documents which were required for the hospital's reimbursement for Medicare patients.

The hospital subsequently recruited an orthopedic surgeon, Dr. Joel E. Cleary, to provide orthopedic services to all members of the community, and he began practicing under contract with the hospital in 1993. Thereafter, the hospital and Dr. Cleary introduced a sports medicine outreach program, and the program is still in existence.

Dr. Cleary and plaintiff were competing orthopedic surgeons in Havre until 1995 when plaintiff relocated to Oklahoma.

Standard of Law

For a grant of summary judgment, the moving party must show that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment [*4] as a matter of law. Rule 56(c), M.R.Civ.P. Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles. [Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 \(1962\)](#).

The Ninth Circuit has held that Poller merely teaches caution and does not preclude summary judgment in antitrust actions where appropriate. [Taggart v. Rutledge, 657 F.Supp. 1420, 1432 \(D.Mont.1987\)](#) citing [Barry v. Blue Cross of California, 805 F.2d 866, 871 \(9th Cir.1986\)](#) (citations omitted). Summary judgment is appropriate in antitrust cases when there is no "significant probative evidence tending to support the complaint." [Taggart, 657 F.Supp. at 1432](#) quoting [Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 732 F.2d 1403, 1406 \(9th Cir.1984\).](#)

There is minimal Montana law interpreting the Unfair Trade Practices Act. The Supreme Court of Montana has held that the antimonopoly provisions of the Unfair Trade Practices Act and the antimonopoly section of the Sherman Act are very similar and due weight will be given by Montana courts in interpreting [*5] the state statute to federal courts' interpretation of the [Sherman Act. Smith v. Video Lottery Consultants \(1993\), 260 Mont. 54, 58, 858 P.2d 11, 13.](#)

A party bringing a claim under 1 of the Sherman Act must prove three elements: 1) an agreement or conspiracy among two or more persons or distinct business entities; 2) by which the persons or entities intend to harm or restrain competition; and 3) which actually injures competition. [Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1445 \(9th Cir. 1988\)](#). Although 30-14-205(2), MCA, is modeled after 1 of the Sherman Act, it differs in one critical respect. Unlike the Sherman Act, which requires two or more persons to be involved in unlawful trade restraint, one person acting alone may violate the restraint of trade provision of the Unfair Trade Practices Act. Smith, 260 Mont. at 54. Pursuant to the remaining two elements set forth in Oltz, to prevail in his claim plaintiff must show defendants intended to harm competition and actually did injure competition.

Proving injury to competition almost uniformly requires the claimant to prove the relevant market and to show effects on competition within [*6] that market. [Oltz, 861 F.2d at 1446](#). The relevant market is defined in terms of both product and geographic market. [Morgenstern v. Wilson, 29 F.3d 1291, 1296 \(8th Cir.1994\)](#). The assessment of

the product market definition takes into account whether products excluded from the definition are interchangeable in use and whether there is cross-elasticity of demand between excluded and included products. *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 994 (9th Cir. 1986) citing *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 394-95, 76 S.Ct. 994, 1006-07, 100 L.Ed. 1264 (1956). The geographic market extends to the area of effective competition where buyers can turn for alternative sources of supply. *Oltz*, 861 F.2d at 1446, citing *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1218 (9th Cir. 1977). An actual monopolization claim often succeeds or fails strictly on the definition of the product or geographic market. *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994). (citations omitted).

Relevant Market

The geographic market encompasses the geographic area to which [*7] consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition. Id. citing *Baxley-DeLamar Monuments, Inc., v. American Cemetery Ass'n*, 938 F.2d 846, 850 (8th Cir. 1991). The plaintiff bears the burden of establishing that a specified area constitutes a relevant geographic market. *Morgenstern*, 29 F.3d at 1296. A close examination of the record indicates plaintiff has not met his burden in identifying a relevant geographic market.

A critical question in considering the relevant geographic market is the determination of where consumers of the product could practicably turn for alternate source of the product. Id. The focus is not on where patients actually went, but rather where the patients could practicably go. Id. In a recent decision, District Judge Jeffrey M. Sherlock granted summary judgment in favor of the defendants finding that, as a matter of law, heart surgeons in Great Falls compete with their counterparts in Spokane, Billings and Missoula for patients. *Berger v. Montana Deaconess Medical Center*, Cause No. ADV 95-609 (D.C. Cascade Co. 1998). Judge Sherlock aptly stated that "patient's vote [*8] with their feet", and the facts in that case showed that a number of people left the Golden Triangle market (the area identified by plaintiff as the relevant geographic market) every year for surgery in areas other than the Great Falls area.

In the case at hand, plaintiff defines the relevant market area as the Havre/Hi-Line area. In support of his position, plaintiff submitted various business plans prepared by defendants, the affidavit of economic analyst Dr. Paul E. Polzin, and the affidavit of a resident and nurse Mary Jane Hulett. Defendants urge the court to find that the market area is greater than the Havre/Hi- Line area and, at a minimum, includes Great Falls and Billings. Upon consideration of the record, the court agrees with defendants in that plaintiff's market definition is too narrow.

Defendants assert that plaintiff has confused the relevant market area with defendants' service area. The service area is described in several of defendants' business plan documents as the Havre/Hi-Line area. Plaintiff argues the defendants' business plans specifically utilize the words "market area" and, as such, that is the correct definition. Defendants aver that statements in planning [*9] documents which refer to "market area" do not define an antitrust relevant geographic market and cite *Home Health Specialists, Inc. v. Liberty Health System*, 1994 WL 463406, 3 (E.D.Pa. 1994) aff'd, 65 F.3d 162 (3d Cir. 1995), in support of their argument. The court finds Home Health to be well reasoned and credible. Defendants' business planning documents were not prepared for this litigation. The question of relevant market area revolves around what alternatives are available to defendants' customers. It is not determined by an area that was studied or considered for strategic business planning.

In *Miller v. Indiana Hospital*, 814 F.Supp. 1254 (W.D.Penn. 1992), the plaintiff physician attempted to identify the relevant geographic market by using language in a certificate of need and language in the hospital's program for development. The court held that by doing so, plaintiff ignored the fact that "what the Hospital itself perceives to be its competition is irrelevant to the question of whether in fact there existed competition." *Miller*, 814 F.Supp. at 1254. The Miller court found such statements in hospital documents to be insufficient [*10] to determine the relevant geographic market, and this court finds the same in the case at hand.

The court reviewed Dr. Polzin's affidavit and does not find such to be persuasive evidence. While Dr. Polzin provided a detailed explanation of the Central Place Theory, his affidavit indicates what people tend to do. It does not state what the record makes clear area patients actually do. Defendants provided 14 affidavits from area physicians which state what patients actually do and where patients actually go for medical care. "When an expert

opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. The expert opinion is useful as a guide to interpreting market facts, but it is not a substitution for them." [Morgenstern, 29 F.3d at 1297](#) quoting [Brooke Group v. Brown & Williamson Tobacco Co., 509 U.S. 209, 242, 113 S.Ct. 2578, 2598, 125 L.Ed.2d 168 \(1993\)](#).

Plaintiff also submitted the affidavit of Mary Jane Hulett in support of its conclusion that the relevant market area is the Havre/Hi-Line area. Ms. Hulett [*11] is a resident and former nurse. She states that travel to Great Falls is very difficult for older persons, and that these problems are compounded by the road conditions and weather. This court is not able to base its decision as to relevant market area on one resident's opinion regarding what the local elderly population prefers. It is defined as what alternate sources of medical services the community as a whole could utilize.

In [Bhan v. NME Hospitals, Inc., 929 F.2d 1404 \(9th Cir.1991\)](#), the court found that the relevant market area exceeded the geographic area as defined by the plaintiff. In making such determination, the court considered evidence that doctors at the defendant hospital used doctors based in other towns to cover for them. [Bhan, 929 F.2d at 1413, fn 12](#). In the case at hand, the record contains eighteen memorandums written by plaintiff himself in which he directed physicians and nursing personnel in Havre to refer orthopedic patients to Great Falls physicians in his absence.

It is readily apparent that the relevant geographic market area included Great Falls at all relevant times, and still does. Many area physicians as well as plaintiff [*12] refer patients to Great Falls. The record leaves virtually no doubt whatever that plaintiff and the defendants were at all relevant times in direct competition with the facilities located in Great Falls, as well as with each other. In consideration of modern transportation, for the court to say that people who reside in the Havre/Hi-Line area would be practically unable to travel to Great Falls, Glasgow, Shelby, Chester or Conrad for their general or orthopedic medical needs is completely inane and downright farcical. No reasonable finder of fact could find that Great Falls is not included in the relevant geographic market.

Effects On Competition Within The Relevant Market

Defining the market is not the aim of anti-trust law; it merely aids the search for competitive injury. Once defined, the relevant market demarcates "objective benchmarks" for separating reasonable and unreasonable restraints. It requires the claimant to demonstrate harm to the economy beyond the claimants' own injury. [Oltz, 861 F.2d at 1448](#). (citations omitted).

To prevail in his claim, plaintiff "must establish a violation of antitrust laws and actual injury attributable to something the antitrust [*13] laws were designed to prevent." [Taggart, 657 F.Supp. at 1433](#) quoting [Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1104 \(9th Cir.1986\)](#). Plaintiff cannot convert the losses he may have sustained as a result of alleged breaches of contract, or in this case potential tortious conduct, into an antitrust claim without demonstrating the type of injury against which the antitrust laws were intended to protect. [Sadler v. Rexair, Inc., 612 F.Supp. 491, 494-95 \(D.Mont. 1985\)](#) citing [Gianna Enterprises v. Miss World LTD, 551 F.Supp. 1348, 1355 \(S.D.N.Y.1982\)](#). Therefore, even if plaintiff would have identified the relevant market area he must still show an actual injury to something the laws were designed to prevent.

In Sadler, the court reiterated that the Montana legislature's purpose of 30-14-201 through 30-14-224, MCA, is to safeguard the public against the creation or perpetuation of monopolies and foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. [Sadler, 612 F.Supp. at 495](#). The Sherman Act was designed to prohibit [*14] significant restraint of trade rather than to proscribe all unseemly business practices. [Miller, 814 F.Supp. at 1265](#). (citations omitted). With similar purposes behind the federal and Montana statutes and with the absence of Montana case law interpreting the Montana statutes, the court is constrained to follow the federal precedent. [Sadler, 612 F.Supp. at 495](#).

In [Bathke v. Casey's General Stores, 64 F.3d 340 \(8th Cir.1995\)](#), the court stated that the problem with the plaintiff's evidence was that it looked at the issue only from the perspective of the defendants' rivals, not from the perspective

of the consumer. The court held it was not the correct approach in antitrust cases. [Bathke, 64 F.3d at 347](#). The focus of **antitrust law** is on promoting competition, not on protecting competitors. [Miller v. Indiana Hospital, 814 F.Supp. 1254, 1264 \(W.D.Penn.1992\)](#) citing [Brunswick Corp. v. Pueblo-Bowl-O-Mat, Inc.](#) 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); [National Collegiate Athletic Association v. Board of Regents](#), 468 U.S. 85, 103, 104 S.Ct. 2948, 2961, 82 L.Ed.2d 70 (1984).

In [Oksanen v. Page Memorial Hospital, 945 F.2d 696, 708 \(4th Cir.1991\)](#) [*15] the court held:

"a plaintiff cannot demonstrate the unreasonableness of a restraint merely by showing that it caused him an economic injury. For example, the fact that a hospital's decision caused a disappointed physician to practice medicine elsewhere does not of itself constitute an antitrust injury. . . If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market." (citations omitted).

Plaintiff must show harm to the economy rather than economic injury to himself. To do so, plaintiff must submit evidence of a restraint on competition in the relevant market, and further must show evidence that the restraint is substantially adverse. [Miller, 814 F.Supp. at 1265](#). (citations omitted). To show a substantial effect on competition, plaintiff must show that there was either 1) a rise in the price of medical services above a competitive level, 2) a decrease in the quantity of doctors in the market, or 3) a decrease [*16] in the quality of medical service provided. [Tunis Bros. Co. Inc. v. Ford Motor Co., 952 F.2d 715, 728 \(3d Cir.1991\)](#).

Of the three factors that show a substantial effect on competition, plaintiff focuses on the first and claims there was a rise in the price of medical services. However, he has failed to produce any evidence showing that such was above the competitive level. Plaintiff asserts that "any increase" in prices will do. His assertion is not consistent with the prevailing law. The increase must be a rise above the competitive level. Plaintiff failed to submit any evidence regarding the competitive pricing levels. Even accepting the plaintiff's argument that the Havre/Hi-Line area is the relevant market area (which the court has clearly found it is not as stated above), plaintiff failed to offer any comparative evidence regarding the competitive pricing levels within that market area. Instead, plaintiff simply makes the assertion that defendants' have increased their prices. This assertion is far from sufficient to meet the standard necessary to establish a restraint on trade.

Market power is defined as the ability to raise prices significantly above competitive [*17] levels without losing all of one's business. [K.M.B. Warehouse v. Walker Mfg Co., 61 F.3d 123, 129 \(2d Cir.1995\)](#). (citations omitted). Monopoly power requires something greater than market power. [Levine v. Central Florida Medical Affiliates, Inc.](#) 72 F.3d 1538, 1555 (11th Cir.1996), cert. denied, 519 U.S. 820 (1996). (citations omitted). A defendant possesses monopoly power if it has the ability to change the competitive variables of a product to the disadvantage of consumers without causing effective competitors to enter the relevant market. [Miller, 814 F.Supp. at 1266](#). Plaintiff has not introduced evidence of market power or monopoly power.

In the absence of evidence demonstrating the relevant geographic market or facts demonstrating defendants' ability to exert market dominance in that market, it would be impossible for plaintiff to establish that defendants formed a monopoly to prevent him from operating his trade. Id. citing [Brown v. Our Lady of Lourdes Medical Center, 767 F.Supp. 618, 631-32](#), (D.N.J.1991).

State Law Extends Federal Law

The court finds it unnecessary to discuss defendants' assertion that plaintiff [*18] lacks standing to bring this action as plaintiff has failed to 1) identify the relevant geographic market, 2) show defendants possessed monopoly power, and 3) show an anti-trust injury and harm to market-wide competition.. However, the court does find it necessary to speak to one final issue raised by plaintiff.

At the hearing, plaintiff argued that defendants' actions in establishing the sports medical program were a per se violation of 30-14-209, MCA. He asserts that the statute prohibits sales at less than cost, and because defendants provided sports medicine for free, obviously for less than cost, and he lost business because of this, he has a claim

for relief. Plaintiff asserts that this statute is a direct prohibition of such practice, without consideration of federal **antitrust law**, and he may therefore recover damages. There are significant flaws in plaintiff's argument.

First, plaintiff's second amended complaint does not mention a violation of 30-14-209, MCA, nor can any of the language used therein be interpreted to allege a violation of the statute. 30-14-209, MCA, says:

"it is unlawful for a vendor to sell, offer for sale, or advertise for sale any article of [*19] commerce at less than the costs thereof to the vendor or to give, offer to give, or advertise the intent to give away any article of commerce for the purpose of injuring competitors and destroying competition."

At the time of the hearing on defendants' motion for summary judgment, discovery had closed and the trial was approximately one month away. Plaintiff filed his claim against defendants in 1995, and amended his complaint on June 22, 1999. It would be unfair and could substantially prejudice the defense to require defendants to defend against a claim which was never formally noticed.

Second, even if plaintiff had properly pled a claim under 30-14-209, MCA, to succeed with such a claim, plaintiff must show defendants intended to give away services in the sports medicine program for the purpose of injuring plaintiff and destroying competition. As set forth above, defendants did not destroy competition, and there was no showing by plaintiff that such was their purpose. The record makes it clear that plaintiff himself at one time engaged in the same general activity for no cost, that it was a good business tool as well as a community service, and he was free to again offer [*20] such a service and considered doing so.

Further, the requirement in 30-14-209, MCA, that the purpose of the sale at less than cost be to destroy competition, not merely compete effectively, is a clear indication that **antitrust law** should apply and there is no legislative intent to create a new tort unique to [Montana. Smith v. Video Lottery Consultants, supra.](#), certainly suggests that 30-14-209, MCA, is not to be broadly interpreted outside of established antitrust theories.

Considering the record before the court, plaintiff simply cannot establish his claim.

NOW, THEREFORE, IT IS ORDERED that Defendants' Northern Montana Hospital, Northern Montana Health Care, Inc., and Dr. Joe E. Cleary motion for summary judgment must be, and is hereby GRANTED.

JUDGMENT is hereby entered in favor of the said defendants and against Plaintiff Dr. Paul G. Bizzle, dismissing his complaint, and he shall take nothing thereby.

Defendants shall have their costs.

DATED this 4th day of August

John Warner

District Judge



Century 21 Region V, Inc. v. Prudential Real Estate Affiliates, Inc.

United States District Court for the Central District of California

August 4, 1999, Decided ; August 4, 1999, Filed

SACV97-203 DOC (EEx)

Reporter

1999 U.S. Dist. LEXIS 21092 *; 1999-2 Trade Cas. (CCH) P72,665

CENTURY 21 REGION V, INC. a California corporation, Plaintiff, v. THE PRUDENTIAL REAL ESTATE AFFILIATES, INC., a Delaware corporation; JTE REAL ESTATE GROUP, INC., a California corporation; RML REALTY, INC., a California corporation; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a New Jersey corporation; and DOES 1 through 100, inclusive, Defendants.

Disposition: [*1] Instant Motion by the defendants for summary adjudication of count V, the California unfair trade practice claims, partially denied, with respect to the [Section 17043](#) claim, and partially granted, with respect to the other claims in the 2AC.

Core Terms

declaration, franchise, competitors, franchisees, prices, market share, percent, summary judgment, Unfair, injurious effect, defendants', Practices, destroy the competition, real estate, below-cost, deposition, roughly, royalty payment, genuine issue, moving party, antitrust, broker, costs, summary adjudication, injure a competitor, conversion, brokerage, annually, targeted

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > 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](#) [down arrow] Discovery, Methods of Discovery

Summary judgment upon all or any part of a claim is appropriate 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 a judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#).

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

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

HN2 **Summary Judgment, Opposing Materials**

The moving party has the burden of demonstrating the absence of such a genuine issue, and for this purpose the material it lodges, and inferences therefrom, must be viewed in the light most favorable to the opposing party. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. Indeed, the moving party need not produce any evidence at all on those matters.

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

HN3 **Summary Judgment, Burdens of Proof**

Where the moving party has no burden of proof at trial, the moving party's burden is met by showing, that is, pointing out to the that there is an absence of evidence to support the nonmoving party's case. If the movant satisfies its initial burden, it then rests with the opponent to set forth specific facts showing that there remains a genuine issue for trial. No defense to an insufficient showing, however, is required.

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

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

HN4 **Summary Judgment, Opposing Materials**

In determining any motion for summary judgment, the court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the statement of genuine issues and (b) controverted by declaration or other written evidence filed in opposition to the motion.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN5 **Regulated Practices, Trade Practices & Unfair Competition**

To violate Cal. Bus. & Prof. Code § 17043, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition. Purpose requires a culpability beyond the knowledge of a result's near certainty.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN6 **Price Discrimination, Competitive Injuries**

See Cal. Bus. & Prof. Code § 17071.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7 Regulated Practices, Trade Practices & Unfair Competition

[Cal. Bus. & Prof. Code § 17043](#) makes it unlawful to sell any product or article below the vendor's cost for the purpose of injuring a competitor or destroying competition.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN8 Regulated Practices, Trade Practices & Unfair Competition

See [Cal. Bus. & Prof. Code § 17071](#).

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9 Regulated Practices, Trade Practices & Unfair Competition

The ultimate element of the offense is whether the defendants acted with the purpose, i.e., the desire, of injuring competitors or destroying competition. The intent element is indeed crucial here, and summary judgment is inappropriate in antitrust cases where motivation, intent, and purpose are in issue.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN10 Regulated Practices, Trade Practices & Unfair Competition

Where there are only two competitors in the industry, and a building of defendant's customer base necessarily includes a reduction in the base of the dominant party.

Counsel: For CENTURY 21 REGION V INC, plaintiff: John A Belcher, Hanna & Morton, Los Angeles, CA.

For PRUDENTIAL REAL ESTATE AFFILIATES INC, PRUDENTIAL INSURANCE COMPANY OF NORTH AMERICA, defendants: Neal R Marder, Susan M Walker, Matthew I Kaplan, Sonnenschein Nath & Rosenthal, Los Angeles, CA.

For PRUDENTIAL REAL ESTATE AFFILIATES INC, PRUDENTIAL INSURANCE COMPANY OF NORTH AMERICA, defendants: Alan H Silberman, Sanford M Pastroff, Sonnenchein Nath & Rosenthal, Chicago, IL.

Judges: DAVID O. CARTER, United States District Judge.

Opinion by: DAVID O. CARTER

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION OF PLAINTIFF'S COUNT V (CALIFORNIA UNFAIR TRADE PRACTICES)

I. INTRODUCTION

Plaintiff Century 21 ("C-21") Region V, Inc., a California corporation ("Region V"), alleges that the remaining defendants -- the Prudential Real Estate Affiliates, Inc., a Delaware Corporation ("PREA"), JTE Real Estate Group, [*2] Inc., a California corporation, and the Prudential Insurance Company of America, a New Jersey corporation

("PICA") -- committed a single violation of [Cal. Business and Professions Code section 17043](#).¹ Because genuine issues of fact remain with respect to both the below-cost sale element of the claim and the intent element, the Court denies summary adjudication on this count, the [Section 17043](#) claim. All other pleadings of violations of other sections of the California Unfair Practices Act have been abandoned; as such, the Court grants summary adjudication in favor of PREA and PICA with respect to those other claims.

II. PROCEDURAL BACKGROUND

Region V filed its original complaint on January 14, 1994 in Orange County Superior Court, as case no. 723652. Region V twice amended the complaint at the state-court level; the operative pleading is the second amended complaint ("the 2AC"), filed March 12, 1997. Defendants PREA [*3] and PICA removed on March 17, 1997.

On September 28, 1998, PREA and PICA filed the instant motion, for summary adjudication of the California unfair trade practices claim ("the Instant Motion"). On November 9, 1998, Region V filed opposition papers ("the Opposition"). On November 16, 1998, PREA and PICA filed its reply. At the Court's request, on June 18, 1999, the parties concurrently filed supplemental briefs discussing the pertinence, if any, of [Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163 \[83 Cal. Rptr. 2d 548, 973 P.2d 527\]](#) (1999), which was issued by the California Supreme Court after the earlier briefing was filed. Also, on July 7, 1999, PREA and PICA filed an unsolicited supplemental brief ("the RSK Chart Brief") about the meaning of an exhibit cited by Region V in the opposition papers.

The instant matter came on for hearing before this Court on July 6 and 12, 1999. Appearing for plaintiff Region V was John Belcher, Esq. Appearing for the defendants, PREA and PICA, were Alan Silberman, Esq., and Susan Walker, Esq.

III. LEGAL STANDARDS

A. Legal Standard for Summary Judgment

[HN1](#) Summary judgment upon all or [*4] any part of a claim is appropriate 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 a judgment as a matter of law." [Fed.R.Civ.P. 56\(c\)](#).

[HN2](#) The moving party has the burden of demonstrating the absence of such a genuine issue, and for this purpose the material it lodges, and inferences therefrom, must be viewed in the light most favorable to the opposing party." [Neely v. St. Paul Fire & Marine Ins. Co., 584 F.2d 341, 343 \(9th Cir. 1978\)](#). "The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. Indeed, the moving party need not produce any evidence at all on those matters." William Schwarzer, et al., [Cal. Practice Guide: Fed. Civil Procedure Before Trial, Summary Judgments](#), § 14:129 at 14-30 (rev. ed. 1998), citing [Celotex Corp. v. Catrett, 477 U.S. 317, 325-26 \[106 S. Ct. 2548, 91 L. Ed. 2d 265\]](#) (1986) (emphasis omitted). [HN3](#)

Where the moving party has no burden of proof at trial, the moving party's burden is met by "showing" [*5] -- that is, pointing out to the District Court -- that there is an absence of evidence to support the nonmoving party's case."

[Celotex, 477 U.S. at 325](#). "If the movant satisfies [its] initial burden, it then rests with the opponent to set forth specific facts showing that there remains a genuine issue for trial." [Neely, 584 F.2d at 343-44](#). "No defense to an insufficient showing, however, is required." [Id. at 344](#).

[HN4](#) In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that

¹ All further statutory references are to the Cal. Business and Professions Code.

such material facts are (a) included in the 'Statement of Genuine Issues' and (b) controverted by declaration or other written evidence filed in opposition to the motion." C.D. Cal. Local Civ. Rule 7.14.3.

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 \[106 S. Ct. 2505, 91 L. Ed. 2d 202\]](#) (1986). "The mere existence of a scintilla of evidence [*6] in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for the plaintiff." [Id., at 252](#).

"Summary judgment is inappropriate in antitrust cases where motivation, intent, and purpose are in issue. See, e.g., [Poller v. Columbia Broadcasting Co., 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458](#). [1962.]" [Betaseed, Inc. v. U and I Inc., 681 F.2d 1203, 1229 \(9th Cir. 1982\)](#) (discussing federal **antitrust law**); accord [Corwin v. Los Angeles Newspaper Serv., 4 Cal. 3d 842, 852 \[94 Cal. Rptr. 785, 484 P.2d 953\]](#) (1971) (discussing state Cartwright Act).

B. California Unfair Practices Act Law

[Section 17043](#) states in full:

It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition.

"It appears the Unfair Practices Act employs a fully allocated cost or fully distributed cost standard to determine whether a sale has violated [section 17043](#)." [Turnbull & Turnbull v. ARA Transportation, Inc., 219 Cal. App. 3d 811, 819-20 \[268 Cal. Rptr. 856\]](#) [*7] (1990) (citations omitted). "The concept of fully allocated cost has been equated with average total costs, which reflects that portion of the firm's total costs -- both fixed and variable -- attributable on an average basis to each unit of output." [Id., at 820](#) (citations and internal punctuation omitted).

"[HN5](#) To violate [section 17043](#), a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." [Cel-Tech, 20 Cal. 4th at 174-175 \[83 Cal. Rptr. 2d at 557, 973 P.2d at 536\]](#). "Purpose requires a culpability beyond the knowledge of a result's near certainty." [Id., 20 Cal. 4th at 173 \[83 Cal. Rptr. 2d at 556, 973 P.2d at 535\]](#) (citation omitted).²

[HN6](#) [Section 17071](#) states in full:

In all actions brought under this chapter proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together [*8] with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition.

IV. EVIDENTIARY OBJECTIONS

PREA and PICA make many evidentiary objections; Region V makes no objections. The Court rules as follows on each PREA and PICA objection:

1. Exhibit 43 to the 11/9/98 Declaration of John Belcher: Overruled. See [Maljack Productions, Inc. v. Goodtimes Homevideo Corp., 81 F.3d 881, 889 n.12 \(9th Cir. 1996\)](#) (ruling admissible, in law-and-motion, documents offered under attorney's affidavit where documents produced by other side in discovery and authenticity not challenged).
2. Exhibit 53 to the Belcher declaration: Overruled (for the same reason).

² Regarding the other claims in the 2AC, see section 6(B), *infra*, titled "Other Claims."

3. Exhibit 116 to the Belcher declaration: Overruled (for the same reason).
4. Exhibit 46 to the Belcher declaration: Overruled (for the same reason).
5. All "unattributed quotations": Sustained, as Region V has not proffered evidence.
6. Exhibit 1 to the 9/28/98 Declaration of Susan Walker: Overruled (as deposition testimony is admissible under [Fed.R.Civ.P. 56\(e\)](#)).
7. Exhibit 47 to the Belcher declaration: Overruled [***9**] (for the same reason as no. 1, above).
8. Exhibit 48 to the Belcher declaration: Overruled (for the same reason as no. 6, above).
9. Exhibit 49 to the Belcher declaration: Overruled (for the same reason).
10. Exhibit 117 to the Belcher declaration: Overruled (for the same reason as no. 1, above).
11. Exhibit 52 to the Belcher declaration: Overruled (for the same reason).
12. Exhibit 45 to the Belcher declaration: Overruled (for the same reason as no. 6, above).
13. Exhibit 143 to the Belcher declaration: Overruled (for the same reason as no. 1, above).
14. Exhibit 57 to the Belcher declaration: Overruled (for the same reason).
15. Exhibit 118 to the Belcher declaration: Overruled (because even if declarant Jerry Cole is a lay witness, not an expert, the opinion testimony offered here is admissible under [Fed.R.Evid. 701](#)).
16. Exhibit 119 to the Belcher declaration: Overruled (for the same reason as no. 1, above).
17. Exhibit 21 to the 11/9/98 Declaration of David Laufer: Overruled (for the same reason).
18. Exhibit 22 to the Laufer declaration: Overruled (for the same reason).
19. Exhibit 23 to the Laufer declaration: Overruled [***10**] (for the same reason).
20. Exhibit 24 to the Laufer declaration: Overruled (for the same reason).
21. Exhibit 31 to the Laufer declaration: Overruled (for the same reason).
22. Exhibit 32 to the Laufer declaration: Overruled (for the same reason).
23. Exhibit 33 to the Laufer declaration: Overruled (for the same reason).
24. Exhibit 34 to the Laufer declaration: Overruled (for the same reason).
25. Exhibit 35 to the Laufer declaration: Overruled (for the same reason).
26. Exhibit 36 to the Laufer declaration: Overruled (for the same reason).
27. Exhibit 37 to the Laufer declaration: Overruled (for the same reason).
28. P78 of the Laufer declaration (discussing Exhibit 31 to the declaration): Sustained. Exhibit 40 is the "best evidence" of its own contents. See [Fed.R.Evid. 1002](#).
29. Exhibit 3 to the Laufer declaration: Overruled (for the same reason as no. 6, above).
30. Exhibit 120 to the Belcher declaration: Overruled (for the same reason as no. 1, above).

31. Exhibit 10 to the Laufer declaration: Overruled (for the same reason).
32. Exhibit 25 to the Laufer declaration: Overruled (for the same reason).
33. P16 [*11] of the Laufer declaration (discussing Exhibit 4 to the declaration): Sustained (for the same reason as no. 28, above).
34. P24 of the Laufer declaration (discussing Exhibit 10): Overruled (for the same reason as no. 1, above).
35. P66 of the Laufer declaration (discussing Exhibit 26): Overruled (for the same reason).
36. P80 of the Laufer declaration (discussing Exhibit 39): Overruled (for the same reason as no. 1, above).
37. P38 of the Laufer declaration (discussing Exhibit 12): Overruled (for the same reason).
38. Exhibit 3 to the Laufer declaration: Overruled (for the same reason as no. 6, above).
39. Exhibit 63 to the Belcher declaration: Overruled (for the same reason as no. 1, above).
40. Exhibit 121 to the Belcher declaration: Overruled (for the same reason).
41. Exhibit 13 to the Laufer declaration: Overruled (for the same reason).
42. Exhibit 122 to the Belcher declaration: Overruled (for the same reason).
43. Exhibit 123 to the Belcher declaration: Overruled (for the same reason as no. 6, above).
44. Exhibit 124 to the Belcher declaration: Overruled (for the same reason as no. 1, above).
45. Exhibit 125 to the Belcher [*12] declaration: Overruled (for the same reason).
46. Exhibit 126 to the Belcher declaration: Overruled (for the same reason).
47. Exhibit 127 to the Belcher declaration: Overruled (for the same reason).
48. Exhibit 128 to the Belcher declaration: Overruled (for the same reason).

V. FINDINGS OF UNDISPUTED (AND DISPUTED) FACTS

1. During the time period relevant to this litigation, Region V and PREA, along with several other companies, competed in the business of selling real estate brokerage franchises in Southern California. (See Consolidated Response of Plaintiff in Opposition to Defendants' Statements of Uncontroverted Facts at 161:2-13.)
2. Real estate brokerage franchise sellers earn revenues from periodic royalty payments and other fees coming from the franchisees. (See the Consolidated Response at 183:11-16.)
3. C-21 was the world's largest real estate brokerage franchise system. (See the Consolidated Response at 162:16-20.) PREA was no higher than no. 4 nationally. (See id. at 163:10-26.) Two of the other top four companies were ERA and Coldwell Banker. (See id. at 162:10-20.) There is no evidence of market share specific to the Southern [*13] California market; Region V provides zero evidence of PREA's share of this geographic market.
4. According to the defendants, PREA's expenses associated with the 1993 "conversion" and subsequent administration of the (James) Emery franchise were \$ 1.066 million. (See Exhibit A to Exhibit 120 to the Opposition at 1975:16-17.)

5. According to the defendants, PREA's anticipated revenues from the Emery franchise were \$ 1.350 million, based on a flat royalty rate over the seven-year (1993-to-1999) life of the franchise. (See Exhibit A to Exhibit 120 to the Opposition at 1975:16-17)

6. According to the plaintiff, PREA's anticipated revenues from the Emery franchise was \$ 1.003 million, based on a royalty rate declining by seven percent annually over the life of the franchise. (See Exhibit 128 to the Opposition at 2002 and the Consolidated Response at 194:2-6.)

7. From 1989 to 1992, the Emery franchise's "gross commission income" ("GCI"), from which the royalty payment to PREA is calculated, declined from \$ 12,112,195 (1989) to \$ 11,020,983 (1990) to \$ 11,308,362 (1991) and finally to either \$ 10,619,608 or \$ 9,538,391 (1992). (See Exhibits 124, 125 and 127 to the Opposition [*14] and contrast Exhibit 126 to the Opposition with Exhibit 2 to the June 22, 1998 Deposition of Robert S. Knudsen.) This decline averages as either roughly 3 percent (for the higher 1992 figure) or roughly 5 percent (for the lower 1992 figure) annually from 1989 to 1992. This decline averages as either 6 percent (for the higher 1992 figure) or roughly 15.5 percent (for the lower 1992 figure) from 1991 to 1992.

8. On January 26, 1993, Prudential executives Robert Bishop and Peter Stanford noted that the Emery franchise "has not been profitable and projections indicate cash flow losses (after debt service) will reach \$ 178K by April, 1993 and \$ 337K by March, 1994." (See Exhibit 31 to the Opposition.)

9. According to Region V, after PREA "converted" Emery, Region V lost approximately \$ 2,940,000 in royalty payments that would have come from Emery. (See Exhibit 42 to the Opposition at 511:12-17.)

10. At a June 20, 1992 Region V broker's meeting, Emery stated his thanks that Region V had agreed to implement a rebate program which the franchisees had requested. (See Exhibit 46.) However, "there had been some tough times and some ruffled feelings and counter attacks back and [*15] forth..." (See id.)

11. Months prior to this June 20, 1992 meeting, Emery and other C-21 franchisees had formed a group of "concerned brokers" who attempted "in effect [to] force the Region to make changes in policy..." (See Exhibit 1 to the Walker declaration at 104:13, 104:21-105:1.)

12. Prior to and during the PREA conversion of Emery, Region V and Emery were involved in litigation against each other, over several hundred thousand dollars in royalty payments that Emery was withholding from Region V. (See Exhibit A to Region V's 11/9/98 Request for Judicial Notice.)

13. In roughly mid 1992, PREA decided to: "concentrate on [its] profitability, market presence, and leadership in Southern California. ...The proposed opportunities [included] ...a number of discussions with the largest broker in the C-21 national network C-21 Emery, about affiliation and possible merger with PruCal's Orange County Offices." (See Exhibit 43 to the Opposition at 517.)

14. According to former PREA president Jerry Cole, PREA's pricing of "sales were 'predatory' in the sense that pricing was designed to slightly undercut competitors' prices..." (See Exhibit A to Exhibit 118 to the [*16] Opposition at P7.) A PREA consultant outlined a strategy of attracting new franchisees by pricing franchises low, i.e., by "focusing on a strategy which allows cost to follow and not precede revenues." (See Exhibit 119 to the Opposition at 1950.)

15. When PREA went looking for other companies' franchisees to recruit, PREA ultimately focused on disgruntled Century 21 franchisees. (See Exhibit 52 to the Opposition at 569-70.)

VI. LEGAL ANALYSIS

A. Section 17043 claim

"[HNT](#)[↑] [Section 17043](#) makes it unlawful to sell any product or article below the vendor's cost for the purpose of injuring a competitor or destroying competition." [Western Union Financial Services, Inc. v. First Data Corp., 20 Cal. App. 4th 1530, 1532 \[25 Cal. Rptr. 2d 341\]](#) (1993). The Court must decide whether PREA's "conversion" of the Emery franchise -- the only transaction at issue -- was a below-cost sale done with an unlawful purpose, and thus in violation of the statute.

1. Below-cost sale

The first element of the statutory violation concerns whether the Emery franchise sale was below cost. As noted above, "the Unfair Practices Act employs a fully allocated cost or fully distributed [*17] cost standard to determine whether a sale has violated [section 17043](#)." [Turnbull, 219 Cal. App. 3d at 819-20](#). Determining whether the instant sale was below cost presents a special challenge, because we are dealing with a franchise sale, with costs and royalty income accruing over seven years at rates that could not have been precisely known, just estimated, at the commencement of the arrangement. Whether the sale was below cost should be analyzed from the perspective of 1993, when the franchise agreement was made; the determination should be based on the probability then of a money-losing outcome at the end of the franchise agreement.³

[*18] In this context, Region V's argument centers on rebutting the deposition and declaration testimony of Knudsen, who tried to show that PREA, in 1993, thought the costs and income associated with the Emery franchise were ultimately going to be profitable. (See Exhibits 120, 123, 125, and 128 to the Opposition.) Knudsen's analysis had concluded that "total estimated...expenses to PREA as a result of the Emery franchise are...\$ 1.066 million." (See Exhibit A to Exhibit 120 to the Opposition at 1975:16-17.) In response, Region V directs the Court's attention to an exhibit from the deposition of Knudsen, which document (hereinafter, "the RSK Chart") is initialed at several places by "RSK." (See Exhibit 128 to the Opposition at 2002; and the Consolidated Response at 194:2-6.) The RSK Chart, Region V urges, appears to show that Knudsen calculated PREA's expected income from the transaction to be only "\$ 1,003,800." (See id.) Given that \$ 1.066 million in costs is higher than the \$ 1.0038 million revenue figure, a below-cost sale is plainly indicated here.

PREA and PICA's motion and reply papers were silent with regard to the RSK Chart (other than an evidence objection to the document, overruled [*19] above). In an unsolicited supplemental filing with the Court, PREA and PICA admit that they "overlooked" the RSK Chart. (See the RSK Chart Brief at 2 n.1.) In the new brief, PREA and PICA go on to show that the document was created by Region V's counsel, not by Knudsen, and does not reflect Knudsen's opinions about projected income from the Emery sale. (See id. at 2-3.) Knudsen initialed the RSK Chart at his deposition only to reflect that he had, as requested by Region V's counsel, checked the math in the calculations contained in Region V's document. (See id. at 4.)

The RSK Chart contains an assumption that Emery's GCI, and thus PREA's royalty income, would decline at a rate of 7 percent annually over the life of the Emery franchise agreement. Is this assumption realistic? Looking at historical figures for Emery for the four years just prior to the PREA-Emery contract, when Emery was part of Region V, one sees that Emery's GCI declined from \$ 12,112,195 (1989) to \$ 11,020,983 (1990) to \$ 11,308,362 (1991) and finally to either \$ 10,619,608 or \$ 9,538,391 (1992). (See Exhibits 124, 125 and 127 to the Opposition and contrast Exhibit 126 to the Opposition with Exhibit 2 to the June [*20] 22, Knudsen Deposition.) This decline averages as either roughly 3 percent (for the higher 1992 figure) or roughly 5 percent (for the lower 1992 figure) annually from the years 1989 to 1992. This decline averages as either 6 percent (for the higher 1992 figure) or

³The Court accepts as correct the methodology for determining a below-cost sale advanced by PREA and PICA witness Robert S. Knudsen, a certified public accountant, as he explained: "In order to assess the profitability to PREA of the Emery franchise, the franchise agreement was analyzed over its seven year term [footnote] using the fully allocated cost basis applicable under [California Business and Professions Code Section 17043](#). Determination of whether or not the franchise was sold above or below cost was made by offsetting the expected franchise revenue to PREA by the costs that PREA would incur directly as a result of the services provided to the franchise in addition to other costs that are deducted as a result of the full cost allocation." (See id. at 1970:17-25; emphasis added.)

roughly 15.5 percent (for the lower 1992 figure) from the years 1991 to 1992. Furthermore, on January 26, 1993, Prudential executives Bishop and Stanford noted that the Emery franchise "has not been profitable and projections indicate cash flow losses (after debt service) will reach \$ 178K by April, 1993 and \$ 337K by March, 1994." (See Exhibit 31 to the Opposition.) Based on these historical figures and the actual 1993 predictions, the Court concludes that, as of 1993, it was certainly reasonable, and also probable, to expect an annual 7 percent decline in the revenues from the Emery franchise. It follows that the sellers of the Emery franchise, in 1993, well could have, and probably, realized that they ultimately would lose money on the seven-year sale.

Therefore, Region V has demonstrated that there is a genuine issue of fact with respect to whether a below-cost sale occurred here.⁴

[*21] 2. Presumption of purpose

HN8 Once a below cost sale is shown, in order for there to be a presumption of the defendants' "purpose or intent to injure competitors or destroy competition" ([§ 17071](#)), the plaintiff must also prove "the injurious effect of such acts." Id.

Region V proffers evidence showing that, after PREA converted Emery, Region V lost approximately \$ 2,940,000 in royalty payments that would have come from Emery. (See Exhibit 42 to the Opposition at 511:12-17.) This is the alleged injurious effect.

PREA and PICA do not offer any rebutting evidence on this point. Instead, PREA and PICA cite [Co-Opportunities, Inc. v. NBC, 510 F. Supp. 43, 50 \(N.D. Cal. 1981\)](#), for the proposition that "the mere fact that the plaintiff claims to have lost business is not sufficient evidence of injurious effect to trigger the presumption of [§ 17071](#)." (See the S.J. Motion at 16:14-17.)

PREA and PICA's interpretation of [Co-Opportunities](#) is correct in that the "injurious effect" element of [Section 17071](#) requires the plaintiff to show more than lost business. The plaintiff must show that the loss of business was the result of the below-cost sale and not some other [*22] factor. See [E & H Wholesale, Inc. v. Glaser Bros., 158 Cal. App. 3d 728, 735 \[204 Cal. Rptr. 838\]](#) (1984) (finding evidence of injurious effect sufficient upon showing that diverted customers had been "previously satisfied with plaintiff's services"); accord, [Co-Opportunities, 510 F. Supp. at 50 n.9](#) (finding evidence of injurious effect insufficient where "there is no indication of the reason for the cancellation" of dealing with plaintiff).

The record with respect to why Emery left Region V and whether Emery previously was satisfied with Region V's services is at best mixed. Region V repeatedly cites the notes of a June 20, 1992 Region V broker's meeting at which Emery stated his thanks that Region V had agreed to implement a rebate program which the franchisees had requested. (See Exhibit 46.) However, this same document reflects that "there had been some tough times and some ruffled feelings and counter attacks back and forth..." (See id.) Additionally, Phil Yeager, Region V's chief executive officer and chairman of the board, testified that Emery and other C-21 franchisees months before had formed a group of "concerned brokers" who attempted [*23] "in effect [to] force the Region to make changes in policy..." (See Exhibit 1 to the Walker declaration at 104:13, 104:21-105:1.) Finally, prior to and during the PREA conversion of Emery, Region V and Emery were involved in litigation against each other, over royalty payments that Emery was withholding from Region V. (See Exhibit A to Region V's 11/9/98 Request for Judicial Notice.)

Based on this ambiguous record, the Court cannot conclude that, under [Section 17071](#), it was necessarily the below-cost sale, rather than Emery's unhappiness with Region V, that caused the injurious effect. Therefore, the

⁴The Court need not consider other evidence from Region V's Opposition's Exhibit 118, the Declaration of former PREA President Jerry Cole, that Knudsen underestimated the cost of the Emery deal to PREA by failing to account for certain fixed costs. Even assuming Knudsen's cost figures are correct, Region V has demonstrated a genuine issue of fact regarding whether the revenue could cover those costs.

Court does not find "presumptive evidence of the purpose or intent to injure competitors or destroy competition." § 17071.⁵ In other words, rather than the burden shifting to PREA to disprove the purpose element, the burden remains with Region V to prove this element. See [Western Union, 20 Cal. App. 4th at 1540](#) (citation omitted). The analysis proceeds without a shift in the burden of proof.

[*24] 3. Actual purpose

HN9[[↑]] The ultimate element of the offense is whether the defendants acted "with the purpose, i.e., the desire, of injuring competitors or destroying competition." [Cel-Tech, 20 Cal. 4th at 174 \[83 Cal. Rptr. 2d at 557, 973 P.2d at 536\]](#). The intent element is indeed crucial here, as the Court notes that "summary judgment is inappropriate in antitrust cases where motivation, intent, and purpose are in issue. See, e.g., [Poller v. Columbia Broadcasting Co., 368 U.S. at 473, 82 S. Ct. at 491](#). [1962.]" [Betaseed, 681 F.2d at 1229](#) (discussing federal **antitrust law**); accord [Corwin, 4 Cal. 3d at 852](#) (discussing the Cartwright Act). "The Unfair Practices Act has as one of its purposes an **antitrust law** objective." [Uneedus v. Cal. Shoppers, Inc., 86 Cal. App. 3d 932, 941 \[150 Cal. Rptr. 596\]](#) (1978). This Court understands that it should be reluctant to grant summary judgment here, on the [Section 17043](#) antitrust claim, if the defendants' intent is reasonably at issue.

Region V's evidence of the defendants' intent breaks into two categories: (1) that PREA picked prices just below its competitors [*25] in order to take away market share; and (2) that PREA specifically targeted for conversion Century 21 franchisees, rather than those of other companies like Coldwell Banker. Regarding (1) "just-below pricing," Region V cites the statement of Jerry Cole, the former PREA president, that PREA's "sales were 'predatory' in the sense that pricing was designed to slightly undercut competitors' prices..." (See Exhibit A to Exhibit 118 to the Opposition at P7.) Also, a PREA consultant outlined a strategy of attracting new franchisees by pricing franchises low, i.e., by "focusing on a strategy which allows cost to follow and not precede revenues." (See Exhibit 119 to the Opposition at 1950.) Regarding (2) "targeting" Century 21 franchisees, Region V cites an internal PREA document in which PREA and the Prudential Residential Services Corp. state that:

Because of its strategic importance to both PREA and PRSC, we will continue our most immediate focus on PruCal, concentrating on their profitability, market presence and leadership in Southern California. The proposed opportunities [include] ...a number of discussions with the largest broker in the C-21 national network C-21 Emery, about [*26] affiliation and possible merger with PruCal's Orange County Offices.

(See Exhibit 43 to the Opposition at 517.) And in the Opposition papers, Region V provides other general references to the defendants' plan to convert dissatisfied C-21 franchisees. See *id.* at 14:9-16:8 (and cited exhibits).

6

A relevant recent precedent on the intent question is [Western Union](#). Reviewing a denial of a preliminary injunction on a [Section 17043](#) claim, the [Western Union](#) Court considered a fact pattern in which a smaller money-transfer company admitted its promotional sales campaign was designed to capture market share from the dominant -- and only other -- company in the same industry. See [20 Cal. App. 4th at 1531-35](#). **HN10[[↑]]** Where, as here, there are only two competitors in the industry, and a building of [the defendant's] customer base necessarily [*27] includes a

⁵ This mixed evidence of Emery's motive in leaving Region V was sufficient for Region V to withstand the defendants' summary judgment motion on count 1, inducement of breach of the Emery contract. There, the Court found that a reasonable jury could (but might not) reasonably find that the monetary inducements were the legal cause of Emery's departure from Region V. Here, in contrast, the Court has considered something different: whether the evidence affirmatively establishes a legal presumption of injurious effect on Region V. The Court should not make this determination merely because a reasonable fact-finder might do so. It is the determination of actual purpose of injurious intent which is a mixed question of fact and law, and which would be given to the trier of fact if a fact issue existed. Cf. [Mering v. Yolo County Grocery & Meat Market, 127 P.2d 985, 992 \(1942\)](#) (noting different legal standard for presumption of purpose and actual purpose in Unfair Practices Act).

⁶ The Court need not (but does) consider this other material, which does not appear in the Consolidated Response. See C.D. Cal. Local Civ. Rule 7.14.3.

reduction in the base of the dominant party..." (*id., at 1541* (internal punctuation omitted; emphasis added)) -- there is no unlawful purpose to injure competition, even where the defendant's "advertising [of the below-cost product] targeted [the plaintiff] by name." *Id., at 1540*. Additionally, the fact that the defendant's "internal documents show the promotion was intended to capture a customer base from [the plaintiff] is immaterial because that is something [the defendant] was entitled to do." *Id.*

The instant fact pattern is similar, but not identical, to Western Union with respect to the market dominance of the plaintiff in the relevant industry. The instant case does not involve a "two-competitor industry" (*id., 20 Cal. App. 4th at 1541*), although the instant case's industry has just several large competitors. Region V does not dispute that, during the relevant time period, C-21 was the world's largest real estate brokerage franchise system, and that PREA was no higher than no. 4 nationally. (See the Consolidated Response at 161:2-13, 162:16-20, 163:10-26.) There is zero evidence of market share [*28] particular to the Southern California market.

The comparison between Western Union and our case goes only so far. In Western Union, when the defendant sought to increase its market share, this increase, as noted above, "necessarily" had to come at the expense of the plaintiff, the only other company in the industry. *20 Cal. App. 4th at 1541*. In contrast, in the instant case, when PREA was looking to increase its market share, this likely increase had to come at the expense of one of the market leaders, but which one of these several companies would be targeted was not predetermined.

If Western Union applied here, then Region V's intent evidence would not be sufficient, because Western Union upheld the defendant's right to take actions similar to those of PREA and PICA, actions designed to enhance market share. As noted above, Western Union involved a unique fact pattern, a two-competitor industry. In such a situation, where any action taken by one competitor to gain market share necessarily comes at the expense of the other competitor, there is no way to distinguish acts designed simply to increase one's own market share, and thus having a lawful [*29] intent, from acts designed to injure a competitor, which is an improper purpose. But this principle does not apply to the case at bar, because one competitor's (namely, PREA's) acts in the multi-company real estate brokerage franchise industry do not inevitably and necessarily affect a particular other competitor (namely, Century 21). There is room here for a fact-finder to differentiate mere competitive purpose by PREA to gain market share from a deliberate, unlawful desire by PREA to target and injure Region V.

A more relevant precedent is E & H Wholesale. The procedural posture of E & H also was an appeal from a denial of a preliminary injunction. See *158 Cal. App. 3d at 730*. The E & H defendants, two cigarette distributors in a multi-competitor industry, were selling cigarettes just below their competitors' invoice cost in order to capture market share. See *id. at 731-38*. On the critical question of intent, the Court ruled that certain evidence from one of the defendants, that it selected prices "arbitrarily" in order to be a "very nominal amount" below the competitors' costs, corroborated "the presumption of intent to injure competition." [*30] *Id., at 738*.

E & H's fact pattern of a multi-competitor industry is similar to ours. Furthermore, our case's evidence of the defendants' deliberate undercutting of Century 21's franchise prices (see above) echoes the evidence in E & H. E & H suggests that Region V's evidence of the defendants' intent to undercut Region V's price on the Emery franchise is sufficient for a law-and-motion proceeding.

In conclusion, Region V demonstrates a genuine issue of material fact regarding whether the defendants acted with an unlawful purpose under Section 17043. Because of this finding of the Court, coupled with the finding that there is a genuine issue as to whether a below cost sale occurred, the Court denies summary judgment with respect to the Section 17043 claim.

B. Other Claims

In the 2AC, Region V also alleges that the defendants violated Sections 17044, 17045, and 17048 of the Unfair Practices Act. (See *id. at PP69, 70, 72*.) However, in the Opposition, Region V makes no reference to, and accordingly provides zero evidence of any violations of, these statutory sections. (In the June 18, 1999 supplemental briefing, requested by the Court, Region V makes its [*31] first mention of Section 17044, but still not

the other sections.) Because the Court finds that Region V has abandoned its claims under [Sections 17044, 17045](#), and [17048](#), the Court grants the Instant Motion in favor of PREA and PICA with respect to these statutory claims. See [Celotex, 477 U.S. at 325](#).

VII. CONCLUSION

For the foregoing reasons, the Instant Motion by the defendants for summary adjudication of count V, the California unfair trade practice claims, is partially denied, with respect to the [Section 17043](#) claim, and partially granted, with respect to the other claims in the 2AC.

IT IS SO ORDERED.

DATED: August 4, 1999

DAVID O. CARTER

United States District Judge

End of Document

J & S Oil, Inc. v. Irving Oil Corp.

United States District Court for the District of Maine

August 4, 1999, Decided ; August 4, 1999, Filed

Civil No. 98-60-B

Reporter

63 F. Supp. 2d 62 *; 1999 U.S. Dist. LEXIS 12192 **; 1999-2 Trade Cas. (CCH) P72,615

J & S OIL, INC., Plaintiff v. IRVING OIL CORP., Defendant

Disposition: [**1] Defendant's Motion for Summary Judgment as to Counts I and II of Plaintiff's Complaint GRANTED and Counts III, IV and V DISMISSED. Plaintiff's Motion for Further Discovery DENIED.

Core Terms

retail, gasoline, prices, summary judgment, discovery, stations, refined, petroleum, price discrimination, relevant market, below-cost, geographic, wholesale, refinery, selling, discriminating, competitors, genuine, Counts, seller, sales, Oil

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > 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[] Summary Judgment, Supporting Materials

Summary judgment is appropriate in the absence of a genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. An issue is genuine for these purposes if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A material fact is one that has the potential to affect the outcome of the suit under the applicable law. Facts may be drawn from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN2 [down arrow] Robinson-Patman Act, Coverage

See [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

HN3 [down arrow] Competitive Injuries, Primary Line Injuries

Two types of competitive injury are cognizable under the statute: primary-line injury and secondary-line injury. Primary-line injury refers to injury to competition among the direct competitors of the discriminating seller. Secondary-line injury occurs when a discriminating seller offers the same product to retailers (or wholesalers) at different prices, thereby injuring competition between them.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN4 [down arrow] Price Discrimination, Competitive Injuries

To establish an injury to competition under a primary-line theory, a plaintiff must demonstrate that (1) the prices complained of are below an appropriate measure of the discriminating seller's costs; and (2) the discriminating seller has a reasonable prospect of eventually recouping the investment it made in below-cost pricing.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN5 [down arrow] Price Discrimination, Competitive Injuries

Establishing that a defendant was reasonably likely to recoup its investment in below-cost pricing calls for proof that (1) its pricing practice is capable of producing the intended effect on its competitor, either driving the competitor out of business or disciplining it to raise its prices to a supracompetitive level within a disciplined oligopoly and that (2) it has sufficient market power to charge and maintain supracompetitive prices within the relevant market.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN6 [down arrow] Price Discrimination, Competitive Injuries

To demonstrate that a defendant has sufficient market power to maintain supracompetitive prices long enough to reap the benefit of its investment in below cost pricing, 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.

Counsel: FOR PLAINTIFF: Harold Friedman, Esq., Karen Wolf, Esq., FRIEDMAN, BABCOCK & GAYTHWAITE, Portland, ME.

FOR DEFENDANT: John Hubbard Rich III, Esq., David McConnell, Esq., PERKINS, THOMPSON, HINCKLEY & KEDDY, Portland, ME.

Judges: MORTON A. BRODY, United States District Judge.

Opinion by: MORTON A. BRODY

Opinion

[*63] ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Plaintiff J & S Oil, Inc. ("Plaintiff") brings this antitrust action against Defendant Irving Oil Corp. ("Defendant") alleging predatory price discrimination in violation of [15 U.S.C. § 13\(a\)](#) (Count I) and unfair trade practices in violation of [15 U.S.C. § 45](#) (Count II). To these counts, Plaintiff appends state law claims for interference with business relations (Count III), violation of the Unfair Sales Act, [Me. Rev. Stat. Ann. tit. 10, § 1201-1209](#) (Count IV), and breach of contract (Count V). Before the Court is Defendant's Motion for Summary Judgment on Counts I and II of Plaintiff's Complaint and Plaintiff's [*2] Motion for Further Discovery. For the reasons set forth below, the Court GRANTS Defendant's Motion for Summary Judgment on Counts I and II and DISMISSES the remaining state claims pursuant to [28 U.S.C. § 1367\(c\)](#). Plaintiff's Motion for Further Discovery is DENIED.

I. SUMMARY JUDGMENT

HN1 [↑] Summary judgment is appropriate in the absence of a genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). An issue is genuine for these purposes if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). A material fact is one that has "the potential to affect the outcome of the suit under the applicable law." [Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 \(1st Cir. 1993\)](#). Facts may be drawn from "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." [Fed. R. Civ. P. 56\(c\)](#).

II. BACKGROUND

The following are the relevant facts presented in a light most favorable to [*3] Plaintiff. See [McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 \(1st Cir. 1995\)](#).

Both Plaintiff and Defendant are Maine corporations. Plaintiff operates retail gasoline stations in Kennebec County, specifically in the towns of Winslow, Farmingdale, Manchester, and Augusta. In addition, Plaintiff sells refined petroleum products on a wholesale basis to independent gasoline stations and heating oil customers in central Maine.

Defendant operates retail gasoline stations throughout the state of Maine. Within Kennebec County, it has stations in Manchester, Gardiner, Waterville, and Augusta. In addition, Defendant is affiliated with Irving Oil Limited ("Irving Limited"), a refinery in the Canadian province of New Brunswick that converts crude oil into a number of refined petroleum products that it sells to Defendant and other carriers, including Plaintiff. While Defendant purchases refined petroleum from Irving Limited at an internal "accounting price," other carriers buy petroleum from Irving Limited at the "spot" price. The spot price is the price at which the product is available from other refineries selling in New York Harbor and elsewhere.

[*64] The predominant [*4] sources of the refined petroleum ultimately sold at retail gas stations in Maine are Irving Limited's refinery and refineries selling out of New York Harbor. Thus, no matter what brand name is displayed at retail stations in Maine, it is possible that the original source of the gas is Irving Limited. Between 1995

and 1997, Defendant imported an average of 30.58 percent of all motor gasoline refined by Irving Limited and imported into Maine.¹

Plaintiff claims, and for purposes of this Motion Defendant does not dispute, that the gas sold by Defendant at its retail stations in Kennebec County has been priced "below cost" on many occasions since August of 1995. In other words, Defendant [**5] sold gas to consumers at a price lower than the price paid by other carriers to purchase gas at wholesale. During this same period, Defendant sold gas at its retail stations outside Kennebec County for prices higher than the below-cost prices it was charging at its stations within Kennebec County.

The market for retail gasoline in Kennebec County has been characterized as moderately competitive since June of 1995 by the Maine Attorney General. In 1995-96, the level of market concentration in Kennebec County decreased by nineteen percent from the prior year and has continued to decrease since then. The volume of retail gasoline sold in Kennebec County by Defendant totaled 7,247,000 gallons in 1995, 7,660,600 gallons in 1996, and 8,316,000 gallons in 1997. In contrast, the volume of retail gasoline sold by Plaintiff in Kennebec County during the same three years totaled 11,178,804 gallons, 11,887,273 gallons, and 11,914,950 gallons respectively.² Plaintiff opened a new retail station in Augusta in July of 1997.

[**6] III. PROCEDURAL HISTORY

Plaintiff filed its Complaint in this Court on March 3, 1998. On March 27, 1998, Defendant filed an Answer and United States Magistrate Judge Beaulieu issued a scheduling order setting July 1, 1998 as the deadline for joinder of parties and amendment of the pleadings. The order also directed the parties to complete discovery by September 16, 1998. That deadline was subsequently amended to December 16, 1998.

The parties had a phone conference with the Magistrate Judge on October 22, 1998 to discuss whether Defendant was entitled to limit its response to Plaintiff's request for information on its sales, pricing, costs, and profits to its retail stations in Kennebec County. The Magistrate Judge ruled that Defendant could not limit its disclosure in this manner.

Two months later, on December 23, 1998, Defendant filed the Motion for Summary Judgment that is the subject of this order, as well as a Motion to Bifurcate Discovery in which it sought to limit discovery to the issues of market definition, market share, barriers to entry, and market capacity.

Following a phone conference on December 23, 1998, the Magistrate Judge stayed all discovery pending resolution [**7] by this Court of Defendant's Motion for Summary Judgment and Plaintiff's anticipated Motion for Further Discovery.

IV. DISCUSSION

Plaintiff claims that Defendant's practice of selling its retail gasoline at below-cost prices in Kennebec County constitutes a violation of [15 U.S.C. §§ 13\(a\)](#) and [45](#). In its Response to Defendant's Motion for Summary Judgment, Plaintiff concedes [<*65] that [15 U.S.C. § 45](#), barring unfair trade practices, provides no private right of action and withdraws that claim. The Court therefore will limit itself to an examination of Plaintiff's price discrimination and state law claims.

¹ In its Statement of Material Facts, Plaintiff asserts that "Irving's own sales to its Maine entity and direct imports to Maine exceed 50% during relevant times in this case." (Pl.'s Statement of Facts P 5.) The Court finds this statement not only undecipherable, but unsupported by the portion of the record to which Plaintiff cites.

² These totals reflect Plaintiff's fiscal year which runs from October 1 to September 31.

A. Price Discrimination

HN2 [↑] Section 2 of the Clayton Act, as amended by the Robinson-Patman Act and codified at [15 U.S.C. § 13\(a\)](#), prohibits a seller from charging different prices for the same product

where the effect . . . 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. § 13](#) [**8] [\(a\) \(1994\)](#). **HN3** [↑] Two types of competitive injury are cognizable under the statute: primary-line injury and secondary-line injury. Primary-line injury refers to injury to competition among the direct competitors of the discriminating seller. See [Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220, 125 L. Ed. 2d 168, 113 S. Ct. 2578 \(1993\)](#). Secondary-line injury occurs when a discriminating seller offers the same product to retailers (or wholesalers) at different prices, thereby injuring competition between them. See [Jefferson County Pharmaceutical Ass'n v. Abbott Labs, 460 U.S. 150, 178 n.6, 74 L. Ed. 2d 882, 103 S. Ct. 1011 \(1983\)](#) (O'Connor, J., dissenting).

HN4 [↑] To establish an injury to competition under a primary-line theory, a plaintiff must demonstrate that (1) the prices complained of are below an appropriate measure of the discriminating seller's costs; and (2) the discriminating seller has a reasonable prospect of eventually recouping the investment it made in below-cost pricing.³ See [Bridges v. MacLean-Stevens Studios, Inc., 35 F. Supp. 2d 20, 27 \(D. Me. 1998\)](#) (citing [Brooke Group Ltd., 509 U.S. at 223-24](#)). [**9]

As set forth in its Complaint, Plaintiff's theory of the case appears to be that Defendant intended to establish itself as the dominant retailer in [**10] Kennebec County by eliminating competition from Plaintiff. According to Plaintiff, Defendant's dominance of the retail market for gasoline in many parts of Maine enabled it to charge below-cost prices in Kennebec County. Plaintiff claims that this predatory pricing practice, begun in August of 1995, caused it to lose profits and presents a substantial risk of creating a more highly concentrated market for retail gasoline in Kennebec County and the state of Maine, thereby injuring competition. Though Plaintiff does not identify it as such, the facts alleged, if true, would constitute a primary-line injury.

While Defendant concedes for purposes of summary judgment that its price for retail gasoline in Kennebec Country was below-cost, it asserts that Plaintiff has not established a genuine issue of material fact as to whether Defendant had a reasonable prospect of recouping its investment.⁴ [*66] Plaintiff counters that any failure to establish a

³ In addition to these substantive requirements, section 2(a) of the Robinson-Patman Act contains a jurisdictional requirement: the statute applies only to those discriminatory sales that take place "in commerce." See [Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 189 \(1st Cir. 1996\)](#); see also 1A Phillip E. Areeda & Herbert Hovencamp, [Antitrust Law](#) P 267c (Aspen Law & Business 1997). In the context of a primary-line injury, the "in commerce" requirement has been interpreted to mean that the product exchanged in at least one of the sales, whether the below-cost sale or the sale to which the below-cost sale is being compared, must cross a state line. See [Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200-201, 42 L. Ed. 2d 378, 95 S. Ct. 392 \(1974\)](#); see also Areeda & Hovencamp, *supra*, P 267c.

⁴ Defendant also argues that Plaintiff's claim does not meet the statute's threshold "in commerce" requirement because neither the gasoline sold at Defendant's retail stations in Kennebec County at below-cost prices, nor the gasoline sold at its retail stations elsewhere in Maine at higher prices, crossed a state line in the course of the sales. Plaintiff responds that Defendant's sales of retail gas to its customers in Maine were "in commerce" because the gas originated at Irving Limited's refinery in Canada.

It appears that Plaintiff is relying on an exception, established by the Supreme Court in [Standard Oil Co. v. FTC, 340 U.S. 231, 237-38, 95 L. Ed. 239, 71 S. Ct. 240 \(1951\)](#), to the "in commerce" requirement for goods which are sold intrastate, but nevertheless remain in the "flow of commerce." Cases from other circuits interpreting [Standard Oil](#) have found the "flow of commerce" rationale applies

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genuine issue of material fact with respect to recoupment is due to Defendant's refusal to comply with discovery. Plaintiff argues that consideration of Defendant's Motion for Summary Judgment is consequently premature and moves that the Court allow [\[**11\]](#) discovery to continue pursuant to [Fed. R. Civ. P. 56\(f\)](#).

[\[**12\]](#) [HN5](#) 

Establishing that a defendant was reasonably likely to recoup its investment in below-cost pricing calls for proof that (1) its pricing practice is capable of producing the intended effect on its competitor, either driving the competitor out of business or disciplining it to raise its prices to a suprareactive level within a disciplined oligopoly ⁵ [\[**13\]](#) and that (2) it has sufficient market power to charge and maintain suprareactive prices within the relevant market. See [Brooke Group Ltd., 509 U.S. at 225](#); see also 3 Philip E. Areeda & Herbert Hovencamp, **Antitrust Law** PP 745d & e (1996). The parties focus on the second of these requirements in their briefs and so shall the Court.⁶

(1) Where [goods] are purchased by the retailer upon the order of a customer with the definite intention that the goods are to go at once to the customer; (2) where the goods are purchased by the retailer from the supplier to meet the needs of specified customers pursuant to some understanding with the customer, although not for immediate delivery; and (3) where the goods are purchased by the retailer based on the anticipated needs of specific customers.

[Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 210 \(5th Cir. 1969\)](#) (citing [Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588, 590 \(5th Cir. 1969\)](#)).

There is no clear First Circuit precedent on this issue. The case cited by Defendant, [Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 189-90 \(1st Cir. 1996\)](#), is distinguishable because the refined oil at issue in that case never crossed state lines: the oil was refined in Puerto Rico and the relevant sales were made by the refinery to wholesalers in Puerto Rico. On the other hand, the case relied upon by Plaintiff, [Rio Vista Oil, Ltd. v. Southland Corp., 667 F. Supp. 757 \(D. Utah 1987\)](#) has been criticized by a leading commentator in the field and flatly contradicted by the decisions of other courts. See Areeda & Hovencamp, *supra* note 3, P 267c; see also [Indiana Grocery Co. v. Super Valu Stores, Inc., 647 F. Supp. 254, 261 \(S.D. Ind. 1986\)](#) (holding retail sale of groceries not "in commerce"); [Cliff Food Stores, Inc., 417 F.2d at 210](#) (same).

Clearly, the case law regarding the "in commerce" requirement is unsettled. The Court declines to reach the issue here, however, in light of its finding that Plaintiff has failed to make out a genuine question of material fact as to the substantive elements of its price discrimination claim.

⁵ This latter effect, called "oligopolistic price coordination" or "conscious parallelism," occurs when firms that share monopoly power in a highly concentrated market "[set] their prices at a profit-maximizing, suprareactive level by recognizing their shared economic interest and their interdependence with respect to price and output decisions." [Brooke Group Ltd., 509 U.S. at 227](#).

⁶ With respect to the first requirement, Plaintiff's Complaint asserts that Defendant instituted its below-cost pricing strategy in August of 1995 with the credible intention of putting Plaintiff out of business in Kennebec County. Though Defendant does not press the point, the Court finds that Plaintiff has not created a genuine issue of fact as to whether it was adversely affected by the below-cost pricing, much less as to whether it was in danger of going out of business.

It undisputed that Plaintiff currently operates retail gasoline stations in Winslow, Farmingdale, and Manchester, just as it has since 1995, the beginning of the alleged predatory period. Moreover, Plaintiff acknowledges that it opened a new station in Augusta in July of 1997. Beyond a bare allegation in the Complaint, there is no indication that these stations have lost money. Indeed, the affidavit of William Norwood, Plaintiff's Chief Financial Officer, does nothing to substantiate Plaintiff's claim of lost profits, and there is evidence that the volume of retail gas sold in Kennebec County by Plaintiff exceeded that sold by Defendant each year from 1995 to 1997.

Plaintiff's claim that it requires additional discovery to establish the fact or probability of its own injury is unavailing. Proving such injury "requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will." [Brooke Group Ltd., 509 U.S. at 225](#). Information about Plaintiff's own financial strength, incentives and will, if not those of its competitor, are well within Plaintiff's control, yet it has produced no evidence of any ill-effect despite four years of alleged predation. The Court thus finds that Plaintiff has failed to meet its burden to show that Defendant's below-cost pricing could drive it from the retail gasoline market. Furthermore, the

[**14] [HN6](#)[↑]

[*67] To demonstrate that a defendant has sufficient market power to maintain supracompetitive prices long enough to reap the benefit of its investment in below cost pricing, 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." [Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 \(9th Cir. 1995\)](#); see also [Brooke Group Ltd., 509 U.S. at 226](#) (noting relevance of market concentration, barriers to entry, and capacity of defendant to absorb market shares of rivals to market power analysis). Defining the relevant market requires identification of both the product at issue and the geographic market for that product. See [Coastal Fuels of P.R., Inc., 79 F.3d at 196](#) (determining relevant market in context of monopoly claim).

Defendant posits that the relevant market in this case is the market for retail gasoline in Kennebec County and argues it is entitled to summary judgment because Plaintiff has not raised a genuine issue [**15] of fact as to Defendant's dominance in that market or the existence of structural conditions that would stifle competitors.

At the heart of Plaintiff's Response to Defendant's Motion for Summary Judgment is its contention that it has not received adequate discovery to allow it to perform an analysis of market power. Specifically, Plaintiff asserts that it needs "the volume of product sold by Irving at its refinery, the price at which it sold this product to others and to itself, who Irving's customers were and where the product ended up, and the corporate relationship between Irving's entities." (Ernest T. Kendall, Aff. P 13.) In support of this argument, Plaintiff resorts to a theory of liability different from the one presented in its Complaint: its Response appears to allege that Defendant is likely to gain control over the market for retail gasoline because Defendant, through Irving Limited, currently controls the supply of refined gasoline available to retail outlets in the state of Maine. Plaintiff also suggests for the first time that the relevant market should be defined with reference to wholesale, as well as retail, gasoline and that the geographic market is much larger [**16] than Kennebec County because "if Irving sells refined product to every retailer in Kennebec County, then consumers must leave Kennebec County to obtain alternative product." (Pl.'s Resp. Def.'s Mot. Summ. J. at 12.)

The Court finds that Plaintiff's allegations bear little, if any, connection to the required elements of a price discrimination claim. First, the Court observes that Plaintiff's definition of the relevant market reflects a flawed understanding of that concept. For one thing, Plaintiff's Complaint does not allege, nor does the record support, a claim that Defendant discriminated in its sales of wholesale gasoline. Thus, wholesale gasoline has no relevance to the definition of the market in this case. Plaintiff's assertion that the geographic market for retail gasoline is [*68] larger than Kennebec County also misses the mark. Simply put, the geographic market for retail gasoline depends on how far individuals are willing and able to travel to purchase the product. See [Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 346 \(8th Cir. 1995\)](#) ("the geographic market encompasses the geographic area to which consumers can practically turn for alternative sources of the [**17] product"). While the Court does not deny the possibility that people will travel beyond county lines to purchase gasoline, it finds that Plaintiff has failed to establish a factual issue as to this matter and that none of the discovery it requests is reasonably calculated to do so. See [id. at 346](#) (observing that information regarding practical alternative sources is rarely available from defendant) (citing H. Hovencamp, [Federal Antitrust Policy](#), § 3.6d at 113-14).

Second, Plaintiff's claim that additional discovery will reveal that Defendant, through Irving Limited, has the ability to control the price at which gasoline is available to retailers in Maine and thereby can limit the capacity of its rivals to increase their output in the short run is similarly unpersuasive. Not only does this argument raise a question about whether Plaintiff has brought suit against the appropriate party, it ignores the affidavit testimony of Plaintiff's own expert which indicates that Irving Limited is not the only source from which Maine retailers can obtain gasoline. Indeed, according to Plaintiff's expert, "the predominant sources of imported refined products in Maine are the [**18] Irving . . . refinery and New York Harbor." (Kendall Aff. P 8.) (emphasis added). If the price of Irving Limited's refined petroleum price plus transportation costs exceeded the spot price plus transportation costs of

suggestion in Plaintiff's brief that Defendant's pricing strategy was intended to discipline Plaintiff to raise its own prices to a supracompetitive level within an oligopolistic market also is completely without support.

petroleum available at New York Harbor, Maine retailers could purchase petroleum at New York Harbor. (Kendall Aff. P 8.) The existing evidence thus indicates that any attempt by Defendant to limit its rivals' output capacity would be unsuccessful. Moreover, much of the evidence necessary to demonstrate otherwise relates to alternate sources of refined petroleum and therefore is beyond the scope of Plaintiff's requested discovery.

Lastly, there is no evidence of significant barriers to entry in the retail gasoline market. In fact, Defendant has offered evidence that entry into the retail gasoline market can be accomplished with an initial capital outlay of approximately \$ 250,000.00 to \$ 280,000.00, some of which would be advanced by a gasoline supplier. Defendant further asserts that the cost of leasing a gasoline-only station in the Manchester/Augusta area is about \$ 1,200.00 per month, while the cost of leasing a station in that area that also offers in-store sales [**19] is about \$ 2,600.00 per month. The Court finds no reason why Plaintiff could not have presented contrary evidence on this point since such information is not in the exclusive control of Defendant. In the absence of such evidence, the Court can only conclude that Defendant would be unable to maintain supracompetitive retail prices because such prices would be undercut by new entrants to the market.

The Supreme Court recently has observed that "the prerequisites to recovery [in a price discrimination case] are not easy to establish" and that such claims are "rarely tried, and even more rarely successful." [Brook Group Ltd., 509 U.S. at 226](#) (internal quotations omitted). In the present case, Plaintiff has failed to put forth a coherent theory of liability or evidence that would satisfy the elements of price discrimination under any theory, nor has it shown how the discovery it requests from Defendant would remedy these deficiencies. Defendant's Motion for Summary Judgment on Plaintiff's price discrimination claim therefore is granted.

B. State Law Claims

Plaintiff has asserted claims under state law for interference with business relations and breach of contract, [**20] as well as a claim under the Unfair Sales Act, [Me. Rev. Stat. Ann. tit. 10, § 1201-1209.](#) [*69] In light of the fact that the Court has dismissed Plaintiff's federal antitrust claims by way of summary judgment, the Court declines to exercise its supplemental jurisdiction over these remaining claims. See [28 U.S.C. § 1337\(c\)\(3\); see Mercado-Garcia v. Ponce Federal Bank, 979 F.2d 890, 896 \(1st Cir. 1992\)](#) ("Once the court dismissed some of the federal claims and resolved the others before trial by summary judgment, it had the discretion also to dismiss the pendent state claims."); [Martinez v. Colon, 54 F.3d 980, 990 \(1st Cir. 1995\)](#) ("once the court determined so far in advance of trial that no legitimate federal question existed, the jurisdictional basis for plaintiff's pendent claims under Puerto Rico law evaporated"). Plaintiff, of course, is free to pursue these claims in state court.

IV. CONCLUSION

For the reasons discussed above, the Court GRANTS Defendant's Motion for Summary Judgment as to Counts I and II of Plaintiff's Complaint and DISMISSES Counts III, IV and V. Plaintiff's Motion for Further Discovery is DENIED.

[**21] SO ORDERED.

MORTON A. BRODY

United States District Judge

Dated this 4th day of August, 1999.



Red Lion Med. Safety, Inc. v. Ohmeda, Inc.

United States District Court for the Eastern District of California

August 4, 1999, Decided ; August 6, 1999, Filed

CIV-S-96-1919 DFL GGH

Reporter

63 F. Supp. 2d 1218 *; 1999 U.S. Dist. LEXIS 12985 **

RED LION MEDICAL SAFETY, INC., et al., Plaintiffs, v. OHMEDA, INC., Defendant.

Disposition: [**1] Motion for summary judgment GRANTED as to plaintiffs' claim of monopolization of service market for all anesthesia machines and as to per se and rule of reason group boycott claims. Motion DENIED as to all other claims.

Core Terms

machines, anesthesia, prices, customers, plaintiffs', manufacturer, market power, antitrust, consumers, monopoly power, market share, aftermarket, relevant market, monopolization, monitors, trained, buy, summary judgment, competitors, tooling, costs, share of the market, triable issue, permanently, platforms, policies, products, switch, brand, replacement part

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN1[] Antitrust & Trade Law, Clayton Act

Under the Clayton Act, [15 U.S.C.S. § 15b](#), private antitrust claims are subject to a four-year statute of limitations.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Extensions & Revivals

[HN2](#) Price Discrimination, Defenses

In **antitrust law**, a continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured. When a continuing violation exists, the limitations period runs from the "last overt act" by the defendant, which must be (1) a new and independent act that is not merely a reaffirmation of a previous decision that (2) inflicts "new and accumulating" injury on the plaintiff.

[Antitrust & Trade Law > Sherman Act > Claims](#)

[Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[HN3](#) Sherman Act, Claims

A monopoly 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.

[Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview](#)

[Evidence > Admissibility > Circumstantial & Direct Evidence](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market](#)

[HN4](#) Regulated Practices, Monopolies & Monopolization

Proof of monopoly power, which the Supreme Court has defined as the power to control prices or exclude competition, may be by direct or circumstantial evidence. Direct evidence of monopoly power is evidence of restricted output and supracompetitive prices. To demonstrate monopoly power by circumstantial evidence, 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.

[Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview](#)

[HN5](#) Regulated Practices, Monopolies & Monopolization

As an abstract matter of law and economics, a manufacturer can have monopoly power in the servicing of its own equipment even if it has no such power in the sale of that equipment, and further, that a manufacturer can achieve monopoly power in servicing by tying service to parts.

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[HN6](#) Regulated Practices, Market Definition

Parts and service can constitute separate markets, and a single brand, by itself, can constitute a separate market for parts or service.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN7**](#) [down] **Regulated Practices, Market Definition**

The proper market definition can be determined only after a factual inquiry into the "commercial realities" faced by consumers. The crucial inquiry in determining whether related products, such as equipment and service, constitute one or multiple markets is whether there is sufficient consumer demand so that it is efficient for a firm to provide one separately from the others.

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN8**](#) [down] **Antitrust & Trade Law, Sherman Act**

Although ultimately what constitutes a relevant market is a factual determination for the jury, a court may grant summary judgment on a Sherman Act [§ 2](#) claim where no reasonable jury could find in favor of the plaintiff on the relevant market issue.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN9**](#) [down] **Regulated Practices, Market Definition**

A dominant share often carries with it the power to control output across the market, and thereby control prices. Courts generally require a 65 percent market share to establish a *prima facie* case of market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

[**HN10**](#) [down] **Regulated Practices, Market Definition**

The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the "cross-elasticity of demand."

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > Sherman Act > General Overview

[**HN11**](#) [down] **Regulated Practices, Private Actions**

63 F. Supp. 2d 1218, *1218 (1999 U.S. Dist. LEXIS 12985, **1

Even if a Sherman Act § 2 plaintiff shows that the defendant has a 100 percent share of a given market, it cannot make out a valid § 2 claim without showing barriers to market entry and expansion.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN12**](#) [] **Regulated Practices, Private Actions**

A Sherman Act § 2 monopoly plaintiff must also show monopolistic conduct by the defendant, which is the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

[**HN13**](#) [] **Regulated Practices, Monopolies & Monopolization**

Where a plaintiff presents evidence of exclusionary action designed to maintain a parts monopoly and use of control over parts to strengthen a monopoly share of a service market, liability turns on whether legitimate business justifications can explain the defendant's actions.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

[**HN14**](#) [] **Price Discrimination, Defenses**

When the defendant offers a legitimate business justification, the plaintiff may rebut that justification by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual.

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN15**](#) [] **Private Actions, Remedies**

Finally, a Sherman Act § 2 plaintiff must establish antitrust injury by showing that its injury flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

63 F. Supp. 2d 1218, *1218 (1999 U.S. Dist. LEXIS 12985, **1

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN16 [blue icon] Attempts to Monopolize, Elements

To make out an attempted monopolization claim under [§ 2](#) of the Sherman Act, a plaintiff must show (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN17 [blue icon] Tying Arrangements, Sherman Act Violations

A tying arrangement is a device used by a competitor with market power in one market (for the "tying" product) to extend its market power into an entirely distinct market (for the "tied" product). To accomplish this, the competitor agrees to sell the tying product only on the condition that its customers also purchase the tied product.

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN18 [blue icon] Regulated Practices, Private Actions

To make out a tying claim, a plaintiff must establish that: (1) defendant has tied two products or services sold in different markets; (2) defendant has market power in the tying product, and (3) the tie affects a not insubstantial volume of commerce.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN19 [blue icon] Regulated Practices, Market Definition

The Supreme Court defines market power as the power to force a purchaser to do something that he would not do in a competitive market.

Counsel: For RED LION MEDICAL SAFETY, INCORPORATED, ANATECH, INC., ANESTHESIA PLUS, BELL MEDICAL, INC., BIO-MEDIC, BIOMEDICAL EQUIPMENT SPECIALISTS, INC., GARRETT MED-TECH, INC., SAFETY ANESTHESIA EQUIPMENT SERVICES, INC., plaintiffs: Andrea M Miller, Nageley and Meredith Inc., Sacramento, CA.

For RED LION MEDICAL SAFETY, INCORPORATED, ANATECH, INC., ANESTHESIA PLUS, Incorporated, BELL MEDICAL, INC., BIO-MEDIC, BIOMEDICAL CONCEPTS, INC., BIOMEDICAL EQUIPMENT SPECIALISTS, INC., GARRETT MED-TECH, INC., SAFETY ANESTHESIA EQUIPMENT SERVICES, INC., plaintiffs: Merrill G Davidoff, PRO HAC VICE, Edward W Millstein, PRO HAC VICE, Berger and Montague, Philadelphia, PA. David R. Scott, PRO HAC VICE, Scott & Scott, LLC, Colchester, CT.

For OHMEDA, INC., defendant: Scott E Mortman, PRO HAC VICE, Thomas A McGrath, PRO HAC VICE, Shearman and Sterling, New York, NY.

63 F. Supp. 2d 1218, *1218A 1999 U.S. Dist. LEXIS 12985, **1

For OHMEDA, INC., defendant: James T Halverson, PRO HAC VICE, Richard H Porter, PRO HAC VICE, John L Jacobus, PRO HAC VICE, Kenneth P Ewing, PRO HAC VICE, Steptoe and Johnson [**2] LLP, Washington, DC.

For OHMEDA, INC., defendant: Bradley Nelson Webb, Law Offices of Bradley N Webb, Sacramento, CA.

For OHMEDA, INC., defendant: Geoffrey Alan Goodman, Murphy Austin Adams Schoenfeld LLP, Sacramento, CA.

Judges: DAVID F. LEVI, United States District Judge.

Opinion by: DAVID F. LEVI

Opinion

[*1221] MEMORANDUM OF OPINION AND ORDER

Plaintiffs Red Lion Medical Safety, Inc. et al. bring this antitrust action against defendant Ohmeda, Inc. Ohmeda moves for summary judgment.

I.

Ohmeda, Inc. is one of the nation's leading manufacturers of medical anesthesia equipment. Plaintiffs are independent service organizations ("ISOs") who service anesthesia equipment, including Ohmeda machines. Plaintiffs accuse Ohmeda of trying to exclude them from the servicing market for Ohmeda equipment.

Until recently, when it was partitioned and sold, Ohmeda was the health care division of The BOC Group, a British conglomerate. (See Willig Decl. at 7.) Ohmeda manufactures and sells anesthesia systems. (See Brandmeier Decl., P 8.) An anesthesia system consists of (1) a gas delivery platform, including vaporizers and ventilators, that mixes gases with anesthetic agent and induces the mixture [**3] into the patient; (2) respiratory gas monitors that track the presence of gases in the patient; and (3) physiological monitors that track the patient's vital signs, such as heart rate. (See id., P 9.) Ohmeda provides service for its anesthesia systems and also manufactures and sells replacement parts for its machines.

Ohmeda classifies the parts it manufactures for its hardware into three categories. (See Grosse Decl., PP 19-21.) Some parts are "restricted" and are not for sale by themselves; instead, these parts are incorporated into larger "subassemblies" and sold in that form. (See id., P 19.) Other parts are "unrestricted" and may be sold to anyone. Ohmeda asserts that "the vast majority of [its] repair and maintenance parts and subassemblies" fall within the unrestricted category. (See id., P 20.) Finally, about 12% of Ohmeda parts are [*1222] "service restricted." (See id., P 24.) This category includes parts "which require installation, replacement or adjustment by trained personnel using specialized procedures to help maintain patient safety and proper operation of the equipment." (Id., Exh. A.)

From at least 1984 to mid-1997, Ohmeda refused to sell service [**4] restricted parts or provide any training or manuals to ISOs. (See Lewitzke Decl., P 9.) If a hospital did not use Ohmeda for service, Ohmeda would only sell the hospital service restricted parts in two situations: first, if the hospital had its own in-house, Ohmeda-trained biomedical technicians to do the servicing, or second, if the hospital signed a waiver letter absolving Ohmeda of liability arising out of the use of the machine, including liability unrelated to service by the ISO. (See id.; Burke Decl., P 22.) Plaintiffs allege that Ohmeda maintained these restrictions on the sales of replacement parts in order to coerce buyers of its equipment into using Ohmeda service rather than ISO service.

Ohmeda's restrictive parts policy is the heart of plaintiffs' claim that Ohmeda has sought to dominate the servicing market in violation of the antitrust laws. In addition to their attack on the availability of Ohmeda parts, plaintiffs make a number of other related factual allegations: they assert that Ohmeda engaged in price discrimination by selling identical parts at different prices under separate part numbers, (see Ardrey Decl., P 12); levied hidden price increases on [**5] its customers by decreasing the amount of service provided while keeping prices constant, (see Lemanek Decl., P 9; Lewis Decl., P 14); struck back at customers who used ISOs by making unnecessary repairs,

(see Lesko Decl., PP 24-25), and even sabotaging its own machines, (see Burke Decl., P 31; Garrett Decl., P 21); and generally disparaged the quality of ISO service, (see Lemanek Decl., P 6; Lesko Decl., P 9; Lewis Decl., P 28). Plaintiffs also assert that Ohmeda forbade independent original equipment manufacturers ("OEMs") of Ohmeda parts from selling service restricted parts to ISOs. (See Foster Decl., P 16; Garrett Decl., P 18.)

Plaintiffs filed this lawsuit on November 1, 1996. In June 1997, Ohmeda changed its parts and servicing policy and established the Qualified Independent Service Organization ("QISO") program. Under this program, Ohmeda offers the same service training to ISOs that it requires of its own service technicians and hospital biomedical technicians. (See Willig Decl. at 60; Yeager Decl., PP 3-4.) Any ISO with a technician who has passed the Ohmeda training course becomes eligible to order manuals and parts -- even service restricted parts **[**6]** -- directly from Ohmeda for any equipment on which the technician has been trained. (See Willig Decl. at 60-61.)

According to plaintiffs, however, Ohmeda's QISO training is infrequently given, prohibitively expensive, and unhelpful to most experienced technicians. Plaintiffs assert that it costs approximately \$ 40,000 to train a single technician on the full line of Ohmeda equipment, (see Ardrey Decl., P 24; Coholan Decl., P 23; L. McBride Decl., P 24), not including lost income and travel expenses. Plaintiffs allege that the classes are given only a few times a year and are often full. (See Coholan Decl., P 25; Foster Decl., P 23). As a result, it may take "up to three years" to fully train a single technician. (Id.) Even after an ISO technician completes QISO training, the technician is required to take periodic refresher courses, a requirement Ohmeda does not impose on its service employees. (See id.) Moreover, plaintiffs contend that if a trained technician leaves one ISO for another, Ohmeda requires that the technician be retrained. (See Coholan Decl., P 23; L. McBride Decl., P 24.) Finally, plaintiffs allege that Ohmeda is free to cancel an ISO's QISO **[**7]** status at any time without justification or penalty. (See Coholan Decl., P 26; Foster Decl., P 24.)

Based on the above policies and practices, plaintiffs make eight antitrust claims **[*1223]** against Ohmeda: (1) monopolization of the market for service on all anesthesia equipment in violation of § 2 of the Sherman Antitrust Act; (2) monopolization of the market for service on Ohmeda equipment in violation of § 2; (3) attempted monopolization of the market for service on all anesthesia equipment under § 2; (4) attempted monopolization of the market for service on Ohmeda equipment under § 2; (5) per se illegal tying of service to parts under § 1 of the Sherman Act; (6) illegal tying of service to parts under the rule of reason in violation of § 1; (7) a per se illegal group boycott under § 1; and (8) an illegal group boycott under the rule of reason in violation of § 1. Ohmeda now moves for summary judgment on all claims.

II.

Ohmeda first argues that plaintiffs' claims are time-barred. [HN1](#) Under the Clayton Act, 15 U.S.C. § 15b, private antitrust claims are subject to a four-year statute of limitations. See Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1300 (9th Cir. 1986). **[**8]** "A civil cause of action under the [antitrust laws] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time." Id. (quoting AMF, Inc. v. General Motors Corp., 591 F.2d 68, 70 (9th Cir. 1979)). Plaintiffs filed this suit on November 1, 1996, so any antitrust claim that accrued before November 1, 1992 is untimely. It is undisputed that Ohmeda's restrictive parts policy was put into effect no later than 1984, eight years before the start of the limitations period. (See Lewitzke Decl., PP 8-9.) Plaintiffs' industry expert, Michael Brinkman, conjectures that the Ohmeda policy dates from the late 1970s. (See Brinkman Depo. at 28.) All but one of the plaintiffs had been in business for more than four years at the time the suit was filed.¹

[9]** In response, plaintiffs argue that the continuing violations doctrine saves their claims. [HN2](#) In antitrust law, "[a] continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action

¹ Fred Nichols of Anatech, Inc. did not enter the industry until January 1996. (See Nichols Decl., P 6.) Although Nichols was an Ohmeda employee prior to and during the limitations period and was aware of Ohmeda's parts policy when he formed Anatech, (see id., PP 5-6, 16-17), his late entry into the market means Anatech did not suffer antitrust injury until some point within the limitations period. Thus, even if the other plaintiffs' claims were time-barred, Anatech's claims would go forward.

arises each time the plaintiff is injured." *Pace Industries, Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987) (citing *Hennegan*, 787 F.2d at 1300-01). When a continuing violation exists, the limitations period runs from the "last overt act" by the defendant, which must be (1) a new and independent act that is not merely a reaffirmation of a previous decision that (2) inflicts "new and accumulating" injury on the plaintiff. *Id. at 238*.

"New and independent acts" may include active enforcement of policies first put into place outside the limitations period. In *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 111 F.3d 1427 (9th Cir. 1996), a power company refused to sell power to the plaintiff under an 18-year-old horizontal market share division agreement. The Ninth Circuit held that the refusal was a new and independent act because the original agreement "was not a permanent and final decision [**10] that controlled the later act." *111 F.3d at 1444*. Similarly, in *Hennegan*, tour operators diverted customers from plaintiffs' souvenir shop. Although the tour operators had originally agreed to do so more than four years before plaintiffs filed suit, the Ninth Circuit held that the original agreement "did not immediately and permanently destroy the Hennegans' business, nor [was it] 'irrevocable, immutable, permanent and final.'" *787 F.2d at 1301*. New and accumulating injury was inflicted upon the plaintiffs each time a defendant diverted [*1224] customers from plaintiffs' business. *See also Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1190 (9th Cir. 1984) (holding that active enforcement of an illegal tie is an independent act); *Aurora Enterprises, Inc. v. National Broadcasting Co., Inc.*, 688 F.2d 689, 694 (9th Cir. 1982) (holding that active enforcement of the terms of an illegal contract is a new and independent act).

In contrast to *Columbia Steel* and *Hennegan*, the Ninth Circuit has found no continuing violation only in situations in which the act outside the limitations period "completely and permanently excluded [**11] [the plaintiff] from the market." *Hennegan*, 787 F.2d at 1301. In *AMF*, 591 F.2d 68, four automobile manufacturers collectively refused to buy afterburners from the plaintiff outside the limitations period, deciding instead to manufacture their own afterburners. The AMF court reasoned that because the defendants required considerable lead time to integrate afterburners into new cars, the market for plaintiff's new car afterburners "effectively disappeared" then and for the foreseeable future at the point defendants decided to develop their own afterburners. In practice, the decision not to buy from plaintiff was "irrevocable, immutable, permanent, and final." *591 F.2d at 72*. Because defendants' decision had the effect of permanently excluding plaintiff from the afterburner market, plaintiff's injury was complete at that time, and it suffered no additional harm within the limitations period.² *See id.*

[**12] This case is more like *Columbia Steel* and *Hennegan* than *AMF*. Although Ohmeda's parts policy has been in place for at least 15 years, the policy is not a "permanent and final" decision that forever more compels Ohmeda to refuse to sell service restricted parts to ISOs. Ohmeda could always change its policy, as indeed it did in 1997 by establishing the QISO program, or make an exception for a particular ISO or a particular part. Unlike *AMF*, there is no technological impediment or necessary lead time associated with an amendment to the service restricted parts policy. Moreover, unlike the auto manufacturers' decision in *AMF*, the mere adoption of the parts policy did not "immediately and permanently destroy" plaintiffs' businesses or "completely and permanently exclude" plaintiffs from the relevant market. *Hennegan*, 787 F.2d at 1301. Instead, Ohmeda's policy incrementally limits plaintiffs' ability to expand their businesses. Thus, the effects of the policy are felt not all at once and for the foreseeable future, as was the case in *AMF*, but each time an ISO is unable to sign a hospital customer to a service contract because it cannot readily obtain [*13] Ohmeda parts.

Because Ohmeda's enforcement of its parts policy allegedly has caused new injury to plaintiffs within the four-year limitations period, plaintiffs' claims are not time-barred.³

² Defendant also relies on *Pace Industries*, 813 F.2d 234, but that case is limited to a particular kind of allegation. In *Pace Industries*, the only alleged antitrust violation was the defendants' prosecution of a lawsuit seeking to enforce an assertedly illegal contract. The plaintiff argued that "each phase" of the lawsuit "from the filing of [the] complaint through resolution of the final appeal constituted discrete overt acts which restarted the statute of limitations." *Id. at 237*. The Ninth Circuit rejected this argument, holding that the filing of the suit was the last overt act for statute of limitations purposes "where the alleged antitrust violation is the attempted enforcement of an illegal contract through the judicial process." *Id.*

III.

Plaintiffs claim that Ohmeda has monopolized the market for service on all anesthesia equipment, or, alternatively, on [*1225] Ohmeda anesthesia equipment in violation of § 2 of the Sherman Act. [HN3](#) A monopoly claim under § 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, [**14] business acumen, or historic accident." [Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 2089, 119 L. Ed. 2d 265 \(1992\)](#) (hereinafter Kodak I) (quoting [United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 \(1966\)](#)).

A. Monopoly Power in the Relevant Market.

[HN4](#) Proof of monopoly power, which the Supreme Court has defined as "the power to control prices or exclude competition," see [Grinnell, 384 U.S. at 571, 86 S. Ct. at 1704](#) (quoting [United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 1005, 100 L. Ed. 1264 \(1956\)](#)), may be by direct or circumstantial evidence. See [Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 \(9th Cir. 1997\)](#) (hereinafter Kodak II). Direct evidence of monopoly power is "evidence of restricted output and supracompetitive prices." [Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 \(9th Cir. 1995\)](#) (citing [Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 2018-19, 90 L. Ed. 2d 445 \(1986\)](#)). [**15] To demonstrate monopoly power by circumstantial evidence, "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." [Kodak II, 125 F.3d at 1202](#) (quoting [Rebel Oil, 51 F.3d 1421 at 1434](#)). Plaintiffs rely on circumstantial evidence to establish their monopoly power claim.

In Kodak I, the Supreme Court addressed the antitrust implications of "aftermarkets," derivative markets for replacement parts and servicing. The Kodak plaintiffs were ISOs who serviced Kodak photocopiers and micrographics equipment. They sued Kodak for monopolizing the market for service on Kodak equipment by restricting access to replacement parts. See [Kodak I, 504 U.S. at 456, 112 S. Ct. at 2076](#). The Court held that [HN5](#) as an abstract matter of law and economics, a manufacturer could have monopoly power in the servicing of its own equipment even if it had no such power in the sale of that equipment, and further, that a manufacturer could achieve monopoly [**16] power in servicing by tying service to parts. See [id. at 481-82, 112 S. Ct. at 2089-90](#); see also [Shapiro, "Aftermarkets and Consumer Welfare: Making Sense of Kodak," 63 Antitrust L.J. 483, 483-84 \(1995\)](#). Two related principles follow from the Kodak analysis: [HN6](#) first, parts and service can constitute separate markets, see [Kodak I, 504 U.S. at 462-63, 481-82, 112 S. Ct. at 2079-80, 2090](#), and second, a single brand, by itself, can constitute a separate market for parts or service, see [id. at 482, 112 S. Ct. at 2090](#).

In making its ruling, the Court reaffirmed that [HN7](#) "the proper market definition . . . can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." [Kodak I, 504 U.S. at 482, 112 S. Ct. at 2090](#). The crucial inquiry in determining whether related products -- such as equipment and service -- constitute one or multiple markets is whether there is "sufficient consumer demand so that it is efficient for a firm to provide" one separately from the others. [Id. at 462, 112 S. Ct. at 2080](#) (citing [Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22, 104 S. Ct. 1551, 1563, 80 L. Ed. 2d 2 \(1984\)](#)). [**17]

[*1226] 1. The Relevant Market⁴

³ However, as counsel for plaintiffs acknowledged at oral argument, plaintiffs' recovery is limited to damages suffered within the four-year limitations period. See [Hanover Shoe Co. v. United Shoe Mach. Corp., 392 U.S. 481, 502, 88 S. Ct. 2224, 2236, 20 L. Ed. 2d 1231 \(1968\)](#); [LaSalvia v. United Dairymen of Ariz., 804 F.2d 1113, 1119 \(9th Cir. 1986\)](#).

⁴ [HN8](#) -

Plaintiffs argue that the relevant market is for service of all anesthesia gas platforms, excluding monitors, or, alternatively, of Ohmeda gas platforms. Ohmeda contends that the relevant market is much broader, encompassing sales of gas systems, including monitors, as well as post-sale service. (See Willig Decl. at 11-12.) Ohmeda argues that there is no separate and distinct market for service of anesthesia gas systems, apart from sales, and thus that service cannot be a "relevant market" for antitrust purposes.⁵

[**18] The Ninth Circuit has defined the "relevant market" as the group of sellers or producers who have the "actual or potential ability to deprive each other of significant levels of business." [51 F.3d at 1434](#) (quoting Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., [875 F.2d 1369, 1374 \(9th Cir. 1989\)](#)). Market definition thus "focuse[s] on . . . whether consumers view the products as substitutes for each other." [51 F.3d at 1435](#) (citing Sullivan & Harrison, Understanding Antitrust and Its Economic Implications § 6.04[2] (1988)). "If consumers view the products as substitutes, the products are part of the same market." *Id.*

Plaintiffs have introduced sufficient evidence to create a triable issue as to whether service is a separate and distinct product from sales of anesthesia equipment and parts. Plaintiffs do not sell gas machines and monitors themselves, and have only recently begun to sell parts in conjunction with Ohmeda's QISO program. There is plainly enough consumer demand so that it is efficient for competitors such as the plaintiffs here to provide service without selling equipment or parts. See [Kodak I, 504 U.S. at 462, 112 S. Ct. at 2080](#) [**19] (noting that "service and parts have been sold separately in the past"). Ohmeda's claim that hospitals view the equipment and service markets as one because hospitals engage in life cycle pricing is placed in dispute by plaintiffs' evidence to the contrary.⁶

[**20] Moreover, contrary to Ohmeda's assertion, that consumers may often buy equipment and service as a package does not necessarily combine those products into a single market. The Supreme Court held in Kodak I that parts and service could constitute separate markets even though "there is no demand for parts separate from service." [Kodak I, 504 U.S. at 463, 112 S. Ct. at 2080](#). Otherwise, "we would be forced to conclude that there could never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires." *Id.* And in tying cases under [§ 1](#) of the Sherman Act, the Court has "often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." [Jefferson Parish, 466 U.S. at 19 n.30, 104 S. Ct. at 1562 n.30](#).

[*1227] Plaintiffs have also created a triable issue as to whether the relevant market is service of Ohmeda machines rather than anesthesia systems in general, including those manufactured by other companies. In Kodak I, the Court held that the relevant market was service of Kodak copiers and not all copiers:

The relevant [**21] market for antitrust purposes is determined by the choices available to Kodak equipment owners. Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines.

Although "ultimately what constitutes a relevant market is a factual determination for the jury," [Kodak II, 125 F.3d at 1203](#), a court may grant summary judgment on a [§ 2](#) claim where no reasonable jury could find in favor of the plaintiff on the relevant market issue, see [Rebel Oil, 51 F.3d at 1435](#).

⁵ Both parties assume for this motion that the relevant geographic market is the United States. (See Mot. at 33 n.100.)

⁶ Life cycle pricing is discussed later in greater detail as part of Ohmeda's attempt to distinguish Kodak I on the basis that its customers (1) were not surprised by any sudden changes to Ohmeda's parts sales policy, (2) make purchasing decisions in the equipment market based on costs throughout the life cycle of the equipment, and (3) were not locked in to continued use of Ohmeda machines by high switching costs. These factors are considered infra in Part III.A.3 as part of the evaluation of Ohmeda's market power, although they also relate to market definition. See [Kodak I, 504 U.S. at 469 n.15, 112 S. Ct. at 2083 n.15](#) ("Whether considered in the conceptual category of 'market definition' or 'market power,' the ultimate inquiry is the same -- whether competition in the equipment market will significantly restrain competition in the service and parts markets.").

504 U.S. at 481-82, 112 S. Ct. at 2090. As was the case in Kodak I, service and parts for Ohmeda equipment are not interchangeable with other manufacturers' service and parts; presumably this is the reason Ohmeda insists on specialized training through the QISO program. In sum, the jury may find that from the perspective of an owner of Ohmeda equipment the relevant market for service consists only of organizations that service Ohmeda machines. If so, service of Ohmeda machines could constitute a relevant market for antitrust analysis.

Finally, the parties dispute whether service on the monitors attached to the gas delivery platform should be included as part of the relevant service market. There seems to be evidence pointing either way on this issue. On the one hand, all ISOs who service Ohmeda platforms also service the [**22] monitors attached to the platforms. Ohmeda also services both its gas platforms and its monitors. On the other hand, monitors are often sold separately from gas machines, (see Leath Decl., P 8; Bernick Decl., P 5; Boldan Decl., P 5), and are normally upgraded more frequently than machines, (see Leath Decl., P 8). Most Ohmeda gas machines are designed specifically to function with any monitor, not just monitors manufactured by Ohmeda. (See id.) Ohmeda gas machine owners do not always purchase Ohmeda monitors. (See id.). Finally, many monitor manufacturers, such as Hewlett Packard and SpaceLabs, do not make gas machines. It is a reasonable inference that there are companies who service monitors but not gas platforms.

For these reasons, plaintiffs have created a triable issue as to whether the relevant antitrust market here is the market for service on Ohmeda anesthesia gas machines whether with or without monitors.

2. Market Power: Dominant Share of the Market

Next, plaintiffs must show that a jury could find that Ohmeda owns a dominant share of the relevant market for service on Ohmeda gas platforms. See Kodak II, 125 F.3d at 1206 (citing Rebel Oil, 51 F.3d at 1434). [**23] HN9 [↑] "A dominant share often carries with it the power to control output across the market, and thereby control prices. Courts generally require a 65% market share to establish a prima facie case of market power." Id. (citing American Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 1133, 90 L. Ed. 1575 (1946) (internal citation omitted)).

Plaintiffs rely on three kinds of evidence to establish Ohmeda's share of the market for service of Ohmeda machines.⁷ First, they cite a 1994 survey which reported that 69% of hospitals that own Ohmeda machines contracted with Ohmeda for service. (See Pls' Exh. 469.) As plaintiffs concede, (see Opp'n at 45 n.220), this figure is not as impressive as it appears because some customers used more than one service provider. Ohmeda's actual market share for all available accounts according to this document is 58.06%. (See id.) Second, plaintiffs cite to internal Ohmeda reports which state that "of the [**1228] 24,000 Ohmeda machines in use, 17,000 are on Ohmeda maintenance contracts," (Opp'n at 45 (citing Pls' Exh. 141)), which works out to a market share of 70.83%. Third, they offer the testimony of various former [**24] Ohmeda employees as to Ohmeda's market share in regional service markets. (See, e.g., Lewis Decl., P 22 ("Our service market share on Ohmeda machines was nearly 100%").)⁸

Ohmeda disputes the accuracy of its internal market [**25] share data, stating that the figures were casually compiled through broad estimates. (See Spence Depo. at 394, 405-06; see also Brandmeier Depo. at 104-05, 174-75; Brandmeier Decl., P 27-30.) Instead, Ohmeda offers three reports -- one compiled by an outside source -- showing that Ohmeda has achieved only between 40% and 48% of the market for service on all anesthesia equipment. (See Stoll Decl., P 32 & Exh. 8 (presentation by president of Ohmeda to potential purchasers describing

⁷ These statistics include monitor service as part of the relevant market; excluding monitors would likely increase Ohmeda's market share.

⁸ Plaintiffs argue that Ohmeda's share of the service market on its machines is actually higher than the data suggest because the data include customers who service their machines in-house and thus, according to plaintiffs, do not participate in the service market at all. (See Opp'n at 44-46.) But because the proper definition of an antitrust market turns on "whether consumers view the products as substitutes for each other," Rebel Oil, 51 F.3d at 1435, in-house technicians may be viewed as part of the overall service market. In-house technicians are a substitute for outside service contracts, whether with Ohmeda or an ISO.

40% market share); Stoll Decl., P 26 & Exh. 3 (Bain & Company report commissioned by Ohmeda showing 48% market share); Willig Decl. at 78 & Exh. 13 (hospital survey prepared for Dr. Willig showing 47% share).) Ohmeda has not offered any evidence on its share of the market for service on Ohmeda machines alone.

Ohmeda's market share figures for servicing on all machines are actually consistent with plaintiffs' data concerning servicing on Ohmeda systems. Because Ohmeda only performs service on Ohmeda machines, its share of the market for service on those machines will equal its share of the total service market divided by its share of the equipment market.⁹ Ohmeda's share of the equipment sales [**26] market is in dispute, but plaintiffs offer evidence that Ohmeda controls between 61%, (see Pls' Exh. 424 (1996 Booz-Allen and Hamilton study)), and 65%, (see Millstein Decl., Exh. A (1993 Frost & Sullivan report)), of the market. Ohmeda's own evidence, gathered in more informal surveys, shows a market share somewhere between 46%, (see Pls' Exh. 210 (blind survey conducted at 1992 American Society for Anesthesiology convention)), and "about" 50%, (Willig Decl. at 84 & Exh. 11 (1997 Willig telephone survey)).

Adopting a provisional figure of 55% for Ohmeda's share of the equipment market -- roughly halfway between plaintiffs' top figure of 65% and Ohmeda's bottom figure of 46% -- plaintiffs' claim that Ohmeda possesses 71% of the service market for Ohmeda machines [**27] is consistent with Ohmeda's assertion that it controls 40% of the service market for all anesthesia machines.¹⁰ In light of this evidence, plaintiffs' claim that Ohmeda possesses a 71% share of the service market on its own machines, and thus controls a "dominant share of the market" under Kodak II, is triable.

Despite this market share evidence, Ohmeda insists that an examination of market realities reveals that it has no market [*1229] power. First, it asserts that it is losing money on its service business. (See Bourgart Decl., P 37 (showing 6.1% loss for fiscal 1997).) By itself, the fact that an accused monopolist is operating at a loss is not dispositive; an [**28] aspiring monopolist might accept short-run losses as the price of eliminating competition in a given market. Ohmeda also claims that it has not raised its prices appreciably in recent years, (see Shrago Decl., P 30), behavior it asserts is inconsistent with monopoly power. Plaintiffs, however, may prove market power through circumstantial evidence and need not submit direct evidence of suprareactive prices. See Kodak II, 125 F.3d at 1202. Moreover, plaintiffs have introduced evidence suggesting that Ohmeda has levied hidden price increases on its customers by keeping its prices constant while reducing the amount of service its technicians actually provide. (See Lemanek Decl., P 9; Lewis Decl., P 14.) A triable issue thus exists as to whether and to what extent Ohmeda has increased its prices.

Although plaintiffs have come forward with sufficient evidence as to whether Ohmeda possesses a monopoly share of the service market for its own machines, they have not shown that Ohmeda possesses a dominant share of the market for service of anesthesia machines in general. Even if plaintiffs' most favorable market share data is accurate, Ohmeda possesses only 71% [**29] of the market for service on its own machines, and only 65% of the equipment sales market. When the service-market percentage is multiplied by the overall equipment percentage, Ohmeda's share of the overall service market is only 46.15%, well short of the 65% threshold announced in Kodak II. Plaintiffs' monopolization claim can thus succeed only if the trier of fact accepts plaintiffs' position that the relevant market is the market for service on Ohmeda machines.

3. Market Power: the Kodak Aftermarket Issues

Ohmeda asserts the same defenses to the allegation of market power offered by Kodak in Kodak I: Ohmeda argues that even if it has monopoly power in the service market, it cannot exercise that power because of competition in the equipment market. Ohmeda contends that if it were to flex its muscles in the service market by raising its

⁹ In other words, A (Ohmeda's share of the Ohmeda service market) will equal B (Ohmeda's share of the total service market) divided by C (Ohmeda's share of the equipment market, or the percentage of all machines that were made by Ohmeda).

¹⁰ Forty percent (Ohmeda's share of the service market on all machines, according to Ohmeda) divided by .55 (Ohmeda's share of the market for sales of anesthesia equipment) equals 72.73% (.40 / .55 = .7273). This figure is very close to the 71% share of the market for service on Ohmeda anesthesia machines that plaintiffs contend Ohmeda controls.

service prices above a competitive level, any resulting increase in profits would be more than offset by losses in the equipment market as customers switched to equipment with lower service costs. In Kodak I, the Supreme Court accepted the plausibility of this general principle, noting that HN10¹¹ the "extent to which one market prevents [**30] exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the 'cross-elasticity of demand.'"Kodak I, 504 U.S. at 469, 112 S. Ct. at 2083 (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. at 400, 76 S. Ct. at 1010, and 2 Areeda & Kaplow, Antitrust Analysis P 342(c) (1988)).

The Kodak I ISOs offered two possible and related reasons why equipment sales and service prices might not be "cross-elastic," and thus why equipment sales might not respond to an increase in service prices, as apparently they had not. First, consumers looking to purchase equipment might not have enough information or sophistication to engage in "life cycle pricing," the estimation of the total cost of a piece of equipment over the life of the machine, including parts and service. See id. at 473, 112 S. Ct. at 2085. Second, once the consumer has purchased the equipment, the cost of switching to another brand of equipment in response to high servicing charges might be prohibitive. See id. at 476, 112 S. Ct. at 2087. Consumers [**31] who cannot readily switch to another brand -- whether because of the high capital outlay or for other reasons -- are "locked in" and "will tolerate some level of service-price increases." Id. "Under this [**1230] scenario, a seller profitably 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 were high relative to the number of new purchasers." Id.

Several circuit courts have found in Kodak I an implicit limitation on aftermarket antitrust claims to situations involving a change of policy or pricing as to after market parts and services. In PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811 (6th Cir. 1997), the Sixth Circuit held that "an antitrust plaintiff cannot succeed on [an aftermarket] 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." 104 F.3d at 820; see also Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756, 762-63 (7th Cir. 1996); Lee v. Life Ins. Co. of N. Am., 23 F.3d 14, 20 (1st Cir. 1994). [**32] Ohmeda asserts that, unlike Kodak, it did not surprise its equipment customers by changing its parts policy or raising its servicing prices. It contends that it has not raised its prices appreciably in recent years, (see Shrago Decl., P 30), its parts policy remained constant between 1984 and 1997, (see Lewitzke Decl., PP 8-9), and the policy was public and widely-known by hospital customers, (see Taylor Decl., P 12).

The Honeywell court's interpretation of Kodak I, however, is not supported by the text or reasoning of that opinion. Kodak I does not hold that an aftermarket claim is contingent on a change in a manufacturer's parts or service policy; it simply acknowledges that Kodak's ability to make a policy change without suffering losses in the equipment market was evidence that the service market was not disciplined by competition in the equipment market. See Kodak I, 504 U.S. at 477, 112 S. Ct. at 2087-88 ("It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarket, since respondents offer direct evidence that Kodak did so.").¹¹

The Honeywell opinion assumes that information [**33] 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." Honeywell, 104 F.3d at 818. But this has it backwards. The policy change did not create lock-in; instead, the existence of lock-in -- high switching costs -- made it both possible and economically desirable for Kodak to change its policy and exploit aftermarket consumers. See Kodak I, 504 U.S. at 476-77, 112 S. Ct. at 2087. Thus, the policy change did not create monopoly power; it was merely persuasive evidence that Kodak had market power in parts and engaged in monopolistic conduct in the aftermarket despite competition in the equipment market. To insist on a showing of a policy change confuses a symptom of market power and a lack of cross elasticity with the underlying condition itself.¹¹

¹¹ Acknowledging that the Kodak I Court "did not explicitly state the extent to which Kodak's change in policy affected the Court's analysis," the Sixth Circuit in Honeywell bases its interpretation of Kodak I on the following cryptic statement in a footnote:

[**34] [*1231] It is noteworthy that in the Kodak I Court's lengthy discussion of information costs it never once makes reference to Kodak's change in policy. Information costs may be high, and a manufacturer may thus have considerable market power in the aftermarket, even in the absence of a change in policy. As the Kodak I Court pointed out,

even if consumers were capable of acquiring the complex body of [life cycle pricing] information, they may choose not to do so. Acquiring the information is expensive. If the costs of service are small relative to the equipment price, or if consumers are more concerned about equipment capabilities than service costs, they may not find it cost efficient to compile the information.

[Kodak I, 504 U.S. at 474-75, 112 S. Ct. at 2086.](#)

Moreover, to the extent that the Ninth Circuit has considered the Honeywell aftermarket theory, it appears to have rejected it. In [Datagate, Inc. v. Hewlett Packard Co., 60 F.3d 1421 \(9th Cir. 1995\)](#), Hewlett Packard allegedly refused to provide software support to its customers unless they agreed also to buy hardware service. Various ISOs sued, alleging an illegal tie. [**35] The Ninth Circuit never examined whether competition in the equipment market might discipline the service aftermarkets. Neither party offered evidence that Hewlett Packard had recently changed its software service policy, and the court never indicated that a policy change was the crucial element of an aftermarket claim. Instead, in the marked absence of such evidence, the court held that Hewlett Packard's conduct could amount to an illegal tie. See [id. at 1426](#). And when Kodak returned to the Ninth Circuit on remand, the Ninth Circuit did not identify Kodak's policy change as an essential element of the plaintiffs' aftermarket claim.¹²

the dissent disagrees [with our conclusion in this case] based on its hypothetical case of a tie between equipment and service. "The only thing lacking" to bring this case within the hypothetical case, states the dissent, "is concrete evidence that the restrictive parts policy was generally known." But the dissent's "only thing lacking" is the crucial thing lacking -- evidence.

[504 U.S. at 477 n.24, 112 S. Ct. at 2087 n.24](#). This enigmatic comment, designed as a brisk rejoinder, is too slender a reed on which to base a significant restriction on the Court's holding particularly when in its very next sentence, the Kodak I majority emphasizes that liability "depends on whether the equipment market prevents the exertion of market power in the [aftermarket]." The Sixth Circuit also attempts to limit Kodak I in light of Jefferson Parish, on the theory that unless a change of policy is understood as a critical component of the Kodak I decision, then Kodak I would implicitly overrule Jefferson Parish. But the two cases are so factually distinct that there is little or no tension between them. In the factual setting of Jefferson Parish, where there was no evidence of an increase in price or decrease in quality of the tied product -- anesthesiology services -- and no evidence that any consumer was forced to accept unwanted anesthesiology services, the Court was unwilling to base a finding of an illegal tying arrangement solely on alleged market imperfections, including information costs. Jefferson Parish is not addressed to the question of information costs in the context of after market services and the effect of competition in the equipment market.

Nor is much of the discussion in the Seventh Circuit's opinion in Digital consistent with Kodak I. The Digital court noted that Kodak I could not stand for the proposition that "there is a market in a firm's own products, even if it sells in vigorous competition," [73 F.3d at 762](#), because then Kodak I would have effectively overruled the Supreme Court's earlier decision in Jefferson Parish. In the first place, Kodak I does hold, and unambiguously, that a single brand can be a relevant antitrust market where "service and parts for [that brand] are not interchangeable with other manufacturers' service and parts." See [Kodak I, 504 U.S. at 482, 112 S. Ct. at 2090](#). It is doubtful that this holding is inconsistent with Jefferson Parish, in which the Court found that a hospital -- the "single brand" -- did not have market power because consumers could easily travel to other hospitals. In any event, Digital does not involve the specific question of aftermarket servicing that was the issue in Kodak I and is the issue here.

¹² Declining to reverse the jury's verdict for plaintiffs, the court stated that

the record reflects the following [evidence of monopoly power in the service market]: Kodak has a 95% share of the Kodak high volume photocopier service market and an 88% share of the Kodak micrographic service market. Several ISOs withdrew from the Kodak service market or substantially restricted their service due to the lack of available parts, although other ISOs made substantial profits and continued to grow steadily. Some ISOs could not obtain any parts for newer models, indicating that the current ISO service market may last only as long as the pre-1986 models survive. Kodak equipment customers experienced the "lock-in" and information imperfections as described in [Kodak I]. Kodak's market share in the equipment market further limits choices by consumers. Finally, although Kodak criticizes their methodology, the

[**36] [*1232] Thus, the mere fact that Ohmeda has not recently changed its parts policy does not entitle it to summary judgment.

Applying Kodak I to the facts here, plaintiffs have presented sufficient evidence of information costs and "lock-in" to defeat Ohmeda's contention that competition in the equipment market restrains any market power that it might have in the aftermarket. Plaintiffs offer evidence that consumers in the anesthesia equipment market do not engage in lifecycle pricing. (See Lemanek Decl., P 19; Naylor Decl., P 19; Perkins Decl., P 8.) There is no dispute that service costs are small compared to the cost of a new anesthesia machine, which reduces a purchaser's incentive to collect life cycle information. And plaintiffs offer an additional reason why hospitals might not collect life cycle information, or might even buy Ohmeda machines despite high service costs: most gas machine users are anesthesiologists, who generally prefer to use the same brand of equipment on which they were trained. (See Leath Decl., P 6; Lesko Decl., P 19; Perkins Decl., P 9.) A hospital whose purchasing anesthesiologist was trained on Ohmeda equipment might not gather life cycle price information [**37] because the convenience and comfort of the familiar Ohmeda machine is more important than some measure of service market savings. Finally, plaintiffs contend that Ohmeda did not inform its equipment customers of its restrictive parts policy prior to sales of equipment. (See Lesko Decl., P 16; Naylor Decl., P 21.)

The disparity in cost between anesthesia machines and service on those machines also increases the likelihood of lock-in. Anesthesia machines cost anywhere from \$ 35,000 to \$ 100,000, while a year's preventive maintenance contract costs approximately \$ 940. (See J. McBride Decl., P 15). A hospital is unlikely to switch brands and incur thousands of dollars in capital expenses in order to save \$ 20 to \$ 40 per hour, (see Burke Decl., P 13; Foster Decl., P 13; Garrett Decl., P 15; Lueders Decl., P 13), in service costs, (see Naylor Decl., P 22; Horner Decl., P 8; Lemanek Decl., P 20; Lowe Decl., P 9). This is particularly true given the important role physician preference plays in brand selection. And because anesthesiology machines are expensive, each purchase must be approved months ahead of time as part of a hospital's capital budget for a given year. ([**38] See Naylor Decl., P 19.) In his deposition, Mark Jones, an Ohmeda employee, conceded that it "can often take a number of years" for a hospital to switch all of its gas machines from one brand to another, (Jones Depo. at 519). Finally, plaintiffs assert that the lack of a market for used anesthesia equipment makes it harder for customers to switch brands. They aver that the trade-in value of a \$ 40,000 anesthesia system is just \$ 3,000.¹³ (See Horner Decl., P 6.)

Ohmeda offers evidence that points [**39] in the other direction regarding life cycle pricing by customers and the existence of lock-in, (see, e.g., Bernick Decl., P 8; Boldan Decl., P 9; DeMur Decl., P 9 (consumers regularly calculate life cycle cost); Bernick Decl., P 12; DeMur Decl., P 13; Rongey Decl., P 15 (consumers would consider switching to another brand in the event of a substantial price increase)), but these are disputed issues for trial. Kodak I does not entitle Ohmeda to summary judgment on this claim.

4. Barriers to Entry and Potential to Increase Output

HN11 [+] Even if a § 2 plaintiff shows that the defendant has a 100% share of a given [*1233] market, it cannot make out a valid § 2 claim without showing barriers to market entry and expansion. See Kodak II, 125 F.3d at 1208. "Barriers to entry 'must be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting.'" *Id.* (quoting Rebel Oil, 51 F.3d at 1439). Common entry barriers include patents

ISOs presented evidence that Kodak earns supracompetitive profits in service, and overall. Substantial evidence supports the jury's verdict on the issue of Kodak's service market monopoly.

Kodak II, 125 F.3d at 1212.

¹³ Ohmeda replies by noting that this figure applies only to machines traded in at the end of their useful lives. (See Horner Decl., P 6.) Ohmeda asserts that a newer used machine would command significantly more on the trade-in market, but they provide no testimony or evidence to support this specific assertion. Ohmeda does offer general testimony about the "lively" market for used anesthesia systems. (See Brandmeier Decl., P 16; Willig Decl. at 89.) This is an issue for the fact finder to resolve.

and other intellectual property licenses, control of essential or superior resources, entrenched buyer preferences, high capital entry costs and economies of scale. [**40] See id.

In their declarations, plaintiffs assert that hospitals will not buy service from ISOs who do not maintain a full inventory of Ohmeda parts. (See Burke Decl., PP 19-21 & Exh. B; Garrett Decl., P 20; Hoyt Decl., PP 16-17; Horner Decl., P 19; Wier Decl., P 7; Lueders Decl., P 14.) Robert Burke, the owner of plaintiff Safety Anesthesia Equipment Services ("SAES"), states that "as a result of Ohmeda's restrictive and anticompetitive policy, SAES has been prohibited from expanding its business beyond those customers with whom I have established a business relationship." (Burke Decl., P 20.) Burke names six specific hospitals that have refused to contract with SAES because it cannot guarantee a full inventory of Ohmeda parts, and estimates that Ohmeda's parts policy costs him at least \$ 130,000 per year. (See id., P 21.) Burke also submits a bid request from a hospital that requires ISO bidders to "show proof of parts stock relevant to each item listed on bid requisition" and "provide exact model loaners to the hospital if the hospital machine is down past one day of operation" in order to obtain the hospital's service contract. (Id., Exh. B at 2.)

Similarly, Daniel [**41] Coholan, president of plaintiff De-Tec, Inc., contends that De-Tec has been unable to expand its business into the Ohmeda service market because of Ohmeda's policy. (See Coholan Decl., P 17.) Coholan also names six hospitals that would have contracted with De-Tec for service on Ohmeda machines were it not for Ohmeda's restrictive parts policy. (See id., P 18.) Gerald Hoyt, president of plaintiff Bio-Medic, Inc., also alleges that Ohmeda's parts policy has prevented Bio-Medic from expanding its service business beyond its existing customer base, (see Hoyt Decl., P 21), and names five hospitals that would have contracted with Bio-Medic had Ohmeda been willing to sell parts directly to ISOs, (see id., P 22).

Plaintiffs concede they are generally able to obtain service restricted parts on the gray market, although they are required to pay up to 25% more than Ohmeda's list price. (See Garrett Decl., P 19; L. McBride Decl., P 19; see also Foster Decl., P 17; Keogh Decl., P 16.) Plaintiffs assert, however, that spending so much time, energy and money locating parts through alternative channels prevents them from increasing their output. (See Garrett Decl., P 19; [**42] Keogh Decl., P 16; Lueders Decl., P 18.) And although Ohmeda has recently begun to allow ISOs to purchase parts directly under the QISO program, plaintiffs assert that the program takes many years to complete, is prohibitively expensive, and can be canceled by Ohmeda at any time without notice. (See Ardrey Decl., P 24; Coholan Decl., PP 23, 25-26; Foster Decl., PP 23-24; L. McBride Decl., P 24.) This is enough evidence of barriers to expansion to avoid summary judgment.

B. Willful Acquisition or Maintenance of Monopoly Power

HN12[] A § 2 monopoly plaintiff must also show monopolistic conduct by the defendant, which is the use of monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." Kodak I, 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)). Plaintiffs assert that the following actions taken by Ohmeda have injured competition in the Ohmeda service market: (1) refusing to sell service restricted parts to hospitals without a signed [*1234] waiver letter; (2) refusing to sell parts or manuals to ISOs and insisting that [**43] OEMs who manufacture Ohmeda parts do the same; (3) disparaging ISOs to end users; and (4) establishing the allegedly unfair QISO program. As Ohmeda concedes, plaintiffs' evidence here is similar to the evidence of monopolistic acts introduced by the Kodak I plaintiffs.¹⁴ HN13[] Where a plaintiff presents evidence of exclusionary action designed "to maintain [a] parts monopoly and [use of] control over parts to strengthen [a] monopoly share of [a] service market," liability turns on whether legitimate business justifications can explain the defendant's actions. See id. at 483, 112 S. Ct. at 2091.

¹⁴ Kodak also refused to sell parts to ISOs, controlled sales of parts by OEMs, pressured its customers not to purchase service from ISOs, and restricted the availability of used Kodak machines. See Kodak I, 504 U.S. at 456-48, 112 S. Ct. at 2076-78.

C. Legitimate Business Justifications

Even where a plaintiff shows monopoly power and monopolistic conduct, the defendant may not be **[**44]** liable under § 2 if its conduct is excused by a legitimate business justification. See Kodak II, 125 F.3d 1195 at 1212 (citing Kodak I, 504 U.S. at 483, 112 S. Ct. at 2090-91). **HN14** When the defendant offers a legitimate business justification, the plaintiff may rebut that justification "by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual." Id. Here, Ohmeda offers four justifications for its restrictive parts policies: (1) promoting patient safety, (2) reducing potential liability, (3) preserving its reputation, and (4) protecting its investment in its equipment and parts business. (See Mot. at 62-68.)

All four of these justifications are essentially restatements of each other. By promoting patient safety, Ohmeda can avoid liability. By avoiding liability, it can avoid a bad reputation. By avoiding liability and maintaining its good reputation, Ohmeda can avoid commercial damage to its equipment and parts business. In Kodak I, Kodak offered a similar business justification -- maintaining high quality service and avoiding blame for equipment breakdowns. See Kodak I, 504 U.S. at 483, 112 S. Ct. at 2091. **[**45]** The Ninth Circuit has held that the quality-control justification "is suspect." High Technology Careers v. San Jose Mercury News, 996 F.2d 987, 991 (9th Cir. 1993); see also Mozart Co. v. Mercedes-Benz of North America, 833 F.2d 1342, 1349-52 (9th Cir. 1987) (describing "skepticism" with which courts have viewed the justification). In Kodak I, in rebuttal to Kodak's legitimate business justifications, the ISOs presented evidence that they provided quality service and that some Kodak equipment owners preferred ISO service to Kodak service. The Court found that this evidence was "sufficient to raise a genuine issue of fact" as to the legitimacy of the justification. 504 U.S. at 483-84, 112 S. Ct. at 2091. In this case, plaintiffs have offered similar evidence that some Ohmeda hardware owners consider ISO service to be both safe and superior to Ohmeda service. (See Leath Decl., P 11; Lowe Decl., PP 9-10; Naylor Decl., PP 15-16; Perkins Decl., PP 9-12; Wier Decl., P 7.)

The respondents in Kodak I also argued that Kodak's quality-control justification was pretextual. Specifically, they pointed out that the quality justification

appears **[**46]** inconsistent with its thesis that consumers are knowledgeable enough to lifecycle price Kodak claims the exclusive-service contract is warranted because customers would otherwise blame Kodak equipment for breakdowns resulting from ISO service. Thus, Kodak simultaneously claims that its customers are sophisticated enough to make complex and subtle lifecycle-pricing decisions, and yet too obtuse to distinguish which breakdowns are due to bad equipment and which are due to bad service.

Kodak I, 504 U.S. at 484, 112 S. Ct. at 2091.

Ohmeda echoes Kodak's argument in its discussion of the need to preserve its **[*1235]** reputation, stating that "in any given case, the cause of the problem may be inadequate service by a third party service provider, but to physicians and other clinicians whose work depends on the availability of the system, the problem may appear to be with the equipment or its design rather than with the service provider." (Mot. at 66-67.) In the anesthesia equipment market, however, it is these "physicians and clinicians" who are primarily responsible for making purchasing and service decisions regarding equipment. (See Bernick Decl., P 3; Boldan **[**47]** Decl., P 4; DeMur Decl., P 4; Rongey Decl., P 4.) Like Kodak, Ohmeda portrays its customers as sophisticated when making buying decisions but undiscerning when apportioning blame for breakdowns.

On this record, plaintiffs have established a triable issue as to the legitimacy of Ohmeda's business justifications.

D. Antitrust Injury

HN15 Finally, a § 2 plaintiff must establish antitrust injury by showing that its injury flows from that which makes defendants' acts unlawful." Lucas Automotive, 140 F.3d 1228 at 1233 (quoting Cargill, 479 U.S. 104 at 113, 107 S. Ct. at 491). Plaintiffs have done so. To begin with, the asserted antitrust violation in this case is Ohmeda's

restrictive parts policy, and plaintiffs have submitted adequate evidence that they have lost service business as the result of that policy. Plaintiffs have introduced testimony from Ohmeda equipment owners who, because of Ohmeda's parts policy, use Ohmeda service despite their preference for ISO service, (see Lowe Decl., P 6-9; Naylor Decl., PP 13, 16; Oltz Decl., PP 12-13; Wier Decl., P 7), and who believe that ISO service is of higher quality than Ohmeda service, (see Leath Decl., [**48] P 11; Naylor Decl., P 16; Wier Decl., P 7). Plaintiffs also offer testimony from ISOs who claim that they have lost substantial, specified business because of Ohmeda's parts policies. (See Coholan Decl., PP 18-19; Foster Decl., PP 18-19; Garrett Decl., PP 19-20; Migliaccio Decl., P 10; Nichols Decl., P 21.) This is a sufficient showing that plaintiffs' injuries are caused by Ohmeda's challenged parts policies.

In response, Ohmeda argues that, far from harming competition in the service market, its policies have actually had procompetitive effects. Because of these positive effects, Ohmeda contends that, even if its parts policy has harmed plaintiffs, it has not done the sort of harm that the antitrust laws were enacted to prevent. Specifically, Ohmeda argues that even if its policies have increased prices to supracompetitive levels and restricted competition in the service market, these alleged harms actually benefit plaintiffs: if Ohmeda charges artificially high prices, the argument goes, plaintiffs are able either to make more money by charging higher prices themselves or to boost their market share by undercutting Ohmeda, and if Ohmeda's policies weed competitors out of the [**49] market by decreasing competition, the remaining service firms, such as plaintiffs, will be able to increase their market share and raise their prices. (See Mot. at 86-87.)

If courts adopted such backwards economic logic, a plaintiff would never be able to establish antitrust injury. Plaintiffs allege that Ohmeda is only able to increase its own prices and restrict competition by excluding ISOs such as plaintiffs from large segments of the service market. This is precisely the sort of harm to consumer welfare and competition that the antitrust laws address. Plaintiffs have established a triable issue as to whether they suffered antitrust injury.

E. Summary

Ohmeda is entitled to summary judgment on plaintiffs' claim of monopolization with respect to the market for service on all anesthesia systems because plaintiffs have not established that Ohmeda has monopoly [*1236] power in that market. Ohmeda is not entitled to summary judgment on plaintiffs' monopolization claim regarding the market for service on Ohmeda machines.

IV.

Next, plaintiffs contend that Ohmeda attempted to monopolize the market for service on anesthesia equipment, or, alternatively, Ohmeda anesthesia equipment. HN16 [**50] To make out an attempted monopolization claim under § 2, plaintiffs must show "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power"; and (4) causal antitrust injury." Rebel Oil, 51 F.3d at 1433 (citing McGlinch v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)). As noted above, plaintiffs have established triable issues as to three of the four elements of the claim: anticompetitive conduct, monopoly power in the service market, and antitrust injury.

The remaining element, specific intent, can be inferred where the defendant's asserted anticompetitive conduct is "predatory or clearly in restraint of competition such as a per se violation under section 1." Thurman Indus., 875 F.2d at 1378 (citing Blanton v. Mobil Oil Corp., 721 F.2d 1207, 1214 (9th Cir. 1983)). Plaintiffs have come forward with evidence that Ohmeda refused to sell service restricted parts to ISOs, refused to sell such parts directly to end users without a signed waiver of liability, and disparaged [**51] the quality of ISO service. Faced with similar evidence, the Kodak I Court permitted an attempt claim to go forward at the summary judgment stage, see 504 U.S. at 485-86, 112 S. Ct. at 2092, and the Kodak II panel upheld the subsequent jury verdict on that claim, see 125 F.3d at 1212 (upholding both § 2 verdicts). Accordingly, plaintiffs have offered enough evidence to support an attempt claim, and Ohmeda is not entitled to summary judgment.

Moreover, the minimum required showing of market share on an attempt claim is "a lower quantum than the minimum showing required in an actual monopolization case." [Rebel Oil, 51 F.3d at 1438](#). Although most courts have held that a market share of 30% is too low to establish market share for purposes of an attempt claim, see id., the [Rebel Oil](#) court found a triable issue as to market share where the defendant had a 44% share of a market with high barriers to entry and expansion, see id. at 1438 & n.10.

As noted above, plaintiffs have introduced evidence showing that Ohmeda's share of the market for service on all anesthesia machines is about 46.15%. Plaintiffs [**52] have also offered evidence that Ohmeda's parts policy prevents them from expanding their output. (See Burke Decl., PP 19-21 & Exh. B; Garrett Decl., P 20; Hoyt Decl., PP 16-17; Horner Decl., P 19; Wier Decl., P 7.) This is sufficient under [Rebel Oil](#) to create a triable issue as to whether Ohmeda attempted to monopolize the market for service on anesthesia machines generally as well as the service market for Ohmeda machines.

Accordingly, Ohmeda is not entitled to summary judgment on either of plaintiffs' attempt claims.

V.

Plaintiffs allege that Ohmeda has illegally tied a customer's purchase of Ohmeda service to the sale of Ohmeda equipment and replacement parts in violation of [§ 1](#) of the Sherman Act. [HN17](#) [↑] "A tying arrangement is a device used by a competitor with market power in one market (for the "tying" product) to extend its market power into an entirely distinct market (for the "tied" product). To accomplish this, the competitor agrees to sell the tying product . . . only on the condition that its customers also purchase the tied product." [Datagate, \[*1237\] 60 F.3d at 1423](#).¹⁵

[**53] [HN18](#) [↑]

To make out a tying claim, plaintiffs must establish that: (1) Ohmeda has tied two products or services sold in different markets; (2) Ohmeda has market power in the tying product, and (3) the tie affects a "not insubstantial volume of commerce." [60 F.3d at 1423-24](#). Plaintiffs argue that Ohmeda has illegally tied the purchase of Ohmeda service to the sale of Ohmeda parts. Ohmeda concedes that the alleged tie affects a not insubstantial volume of commerce, but contends that plaintiffs have not established the other two elements of their tying claim.

A. Tie-In Between Two Products

To defeat Ohmeda's motion for summary judgment on the tying claims, plaintiffs must come forward with evidence that (1) service is a product distinct from equipment and parts, and (2) Ohmeda has tied the sale of those products. See Kodak I, 504 U.S. at 462, 112 S. Ct. at 2079-80. Plaintiffs have presented enough evidence to establish a material issue as to whether the market for service is distinct from the market for parts.¹⁶

¹⁵ In their complaint, plaintiffs assert both a per se tying claim and a tying claim under the rule of reason. (See Compl., PP 100-111.) As the Sixth Circuit noted in [Honeywell](#), however, these theories have merged in recent years. See Honeywell, 104 F.3d at 815 n.2. As applied by the Supreme Court in [Kodak I](#), per se tying analysis involves detailed factual inquiries into the defendant's market power and whether the defendant's challenged conduct has procompetitive effects, see Kodak I, 504 U.S. at 478-79, 112 S. Ct. at 2088-89, which looks more like traditional rule of reason methodology than a per se rule. The Supreme Court never mentions the terms "per se" or "rule of reason" in its [Kodak I](#) opinion. Professors Areeda, Elhauge and Hovenkamp explain the apparent merger of the two tying theories by stating that "the per se rule against tying is 'per se' in only one respect -- namely, dispensing with proof of anticompetitive effects... ." 10 Areeda, Elhauge & Hovenkamp, [Antitrust Law](#) P 1760e, at 372 (1996). The two theories may be analyzed together on this motion.

¹⁶ As was the case with the distinction between the equipment sales market and the service market, there is sufficient customer demand for market participants to provide service but not parts and vice versa. Like [Kodak I](#), there is evidence in the record in this case "that service and parts have been sold separately in the past and still are sold separately to self-service equipment owners." [Kodak I, 504 U.S. at 462, 112 S. Ct. at 2080](#). Many, if not most, ISOs do not sell parts and would presumably not need to if Ohmeda would make service restricted parts readily available to equipment owners.

[**54] Ohmeda argues, however, that plaintiffs have not established that it tied the purchase of Ohmeda service to the sale of Ohmeda parts. Ohmeda contends that it has only provided incentives for customers to buy Ohmeda service by refusing to sell parts directly to ISOs or to hospitals without trained in-house biomeds or a signed waiver letter. It asserts that these incentives, although potentially powerful, do not amount to a tie because it has not explicitly limited the sale of parts to purchasers of Ohmeda service.

But as Datagate makes clear, the "essential characteristic' of a per se illegal tying arrangement is that the seller makes use of its market power in the tying product to coerce the buyer to purchase the tied product." [60 F.3d 1421 at 1426](#) (citing [Jefferson Parish, 466 U.S. at 12-13, 104 S. Ct. at 1558](#)). And in an earlier opinion during the Datagate litigation, the Ninth Circuit described a tie as a relationship in which the seller "coerced to some extent the purchaser into buying the tied product." [Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864, 870 \(9th Cir. 1991\)](#) (emphasis added). In Datagate, summary judgment [**55] was inappropriate because the plaintiff had shown that the defendant's restrictive policies "precluded [customers] from considering other providers of hardware service." [Datagate, 60 F.3d at 1426](#). Here, plaintiffs have offered testimony from customers who would prefer to use ISOs to service their Ohmeda machines but do not because of defendant's restrictive parts policy. (See Leath Decl., P 11; [*1238] Lowe Decl., PP 9-10; Naylor Decl., PP 15-16; Perkins Decl., PP 9-12; Wier Decl., P 7.) This is a sufficient showing to establish that Ohmeda "coerced to some extent" hospitals into buying Ohmeda service instead of ISO service, and is thus sufficient evidence of a tying relationship under Datagate. See also [Kodak I, 504 U.S. at 462-63, 112 S. Ct. at 2079-80](#).

B. Market Power in the Tying Product

Plaintiffs contend that the tying product in this case is replacement parts for Ohmeda machines and that Ohmeda has market power in this market. (See Compl., PP 101-02.) Market power under [§ 1](#) is a more lenient standard than monopoly power under [§ 2](#). See [Kodak I, 504 U.S. at 481, 112 S. Ct. at 2089-90. HN19](#) ↑ The Supreme Court defines [**56] market power as "the power 'to force a purchaser to do something that he would not do in a competitive market.'" [Id. at 464, 112 S. Ct. at 2080](#) (quoting [Jefferson Parish, 466 U.S. at 14, 104 S. Ct. at 1559](#)). Generally, market power is inferred from a seller's possession of a dominant share of the market. [Id. at 464, 112 S. Ct. at 2081](#).

Both parties have assumed throughout the litigation, and the court sees no reason to doubt, that Ohmeda has a dominant share of the market for its own parts. Although plaintiffs are able to buy service restricted parts from sources other than Ohmeda on a secondary gray market, (see Shrago Decl., P 12; Pepper Decl., P 8; Lewitzke Decl., P 9), there is no indication that the gray market occupies anything more than a small fraction of the overall parts market. It is undisputed that Ohmeda has a monopoly over service restricted parts and that it restricts its OEMs from selling parts directly to customers. (See Coholan Decl., P 16; Hoyt Decl., P 18; Lueders Decl., P 16.) This is sufficient evidence to establish market power for purposes of [§ 1](#). Cf. [Kodak II, 125 F.3d at 1207](#) (holding that defendant [**57] had power in market for its own parts where it manufactured 30% of parts itself, controlled an additional 20-25% through tooling clauses and discouraged self-servicing and resale of parts by end users, even though replacement parts were not "absolutely unavailable" from other sources). Summary judgment is inappropriate as to plaintiffs' tying claims.

VI.

Finally, plaintiffs contend that Ohmeda and its OEMs engaged in a group boycott in violation of [§ 1](#) by conspiring to refuse to sell parts to ISOs. Plaintiffs base this claim on the tooling clause provision in the contracts between Ohmeda and its OEMs that bars the OEMs from manufacturing service restricted parts for anyone other than Ohmeda.

Plaintiffs advance both a per se boycott claim and a boycott claim under the rule of reason. Under the Supreme Court's recent decision in [Nynex Corp. v. Discon, Inc., 525 U.S. 128, 142 L. Ed. 2d 510, 119 S. Ct. 493 \(1998\)](#), however, the per se rule is limited "in the boycott context to cases involving horizontal agreements among direct competitors." [119 S. Ct. at 498](#). The asserted boycott in this case does not involve a horizontal agreement among

competitors; instead, the allegation [**58] involves a purely vertical agreement between Ohmeda and each of its various OEMs. Ohmeda is not a competitor of its OEMs. And the OEMs who may be competitors have not come to an agreement with one another but individually with Ohmeda. In this circumstance, plaintiffs' per se boycott claim must be dismissed.

Plaintiffs may still assert a boycott claim under the rule of reason. Ohmeda argues, however, that plaintiffs have not offered sufficient evidence that Ohmeda conspired with OEMs to deny ISOs access to replacement parts. Instead, Ohmeda contends, it unilaterally imposed the tooling clause on its OEMs. A plaintiff asserting a § 1 claim must offer evidence "that reasonably tends to prove that the manufacturer and others 'had a conscious commitment [*1239] to a common scheme designed to achieve an unlawful objective,'" [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 1471, 79 L. Ed. 2d 775 \(1984\)](#), including evidence that "tends to exclude the possibility that the manufacturer and [alleged co-conspirators] were acting independently." *Id.* at 766, 104 S. Ct. 1471.

Plaintiffs do not submit any direct evidence that Ohmeda and the [**59] OEMs jointly agreed to adopt the tooling clause and boycott parts sales to ISOs, such as declarations from the OEMs.¹⁷ [**60] Plaintiffs' only evidence of a group boycott is the tooling clause itself. While this may be circumstantial evidence of an agreement to a common scheme, where a § 1 plaintiff presents only circumstantial evidence of a conspiracy, "defendant may discharge its initial summary judgment burden by proffering a plausible and justifiable alternative interpretation of its conduct that rebuts the plaintiff's allegation of conspiracy." [American Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 788-89 \(9th Cir. 1996\)](#) (quoting [T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 632 \(9th Cir. 1987\)](#)) (internal quotation marks omitted).¹⁸

¹⁷ In fact, the inadmissible hearsay evidence plaintiffs have offered supports the opposite conclusion. Several plaintiffs testify that various OEMs have told them that although they would like to sell service restricted parts directly to ISOs, Ohmeda will not let them. (See Foster Decl., P 16; Garrett Decl., P 18; J. McBride Decl., P 5.) The alleged statements by OEMs are out-of-court statements offered for their truth -- i.e., to prove that Ohmeda coerced OEMs into a group boycott - and as such are hearsay, see Fed. R. Evid. 801(c), and are inadmissible to defeat a motion for summary judgment, see Anheuser-Busch v. Natural Beverage Distributors, 69 F.3d 337, 345 n.4 (9th Cir. 1995), unless they fall within an exception to the hearsay rule, see, e.g., Fed. R. Evid. 801(d), 803, 804. Plaintiffs do not suggest any potentially applicable hearsay exceptions and none is readily apparent.

In any event, although plaintiffs offer the statements to prove the existence of a common scheme, they actually point to the opposite conclusion. The fact that OEMs would sell service restricted parts directly to ISOs but for Ohmeda's insistence on the tooling clause tends to prove that the tooling clause was Ohmeda's unilateral creation rather than the result of concerted action between Ohmeda and its OEMs. As noted below, it would make no economic sense for OEMs to agree to the tooling clause if they had any choice in the matter, because the tooling clause restricts their ability to sell their products and earn revenue.

¹⁸ In one case, the Ninth Circuit appeared to create another requirement for a defendant seeking summary judgment in a § 1 case: proof that "permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." [In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 906 F.2d 432, 440 \(9th Cir. 1990\)](#). The Ninth Circuit has not always imposed the requirement in subsequent cases. See American Ad Management, 92 F.3d at 788-89.

The significant deterrent requirement has its origins in the Supreme Court's opinion in [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#). In Matsushita, the Court "emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." [475 U.S. at 593, 106 S. Ct. at 1360](#). "Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id. at 594, 106 S. Ct. at 1360*. Here, the inference plaintiffs ask the court to draw -- that OEMs agreed with Ohmeda to adopt a tooling clause that substantially limited the OEMs' sales opportunities -- is implausible on its face, and plaintiffs have offered no evidence to suggest otherwise.

Moreover, plaintiffs do not dispute that tooling clauses are standard throughout the medical anesthesia equipment industry and have the effect of protecting Ohmeda's proprietary service restricted parts from counterfeiting. There is no question that Ohmeda's ability to protect its proprietary parts enhances its ability to compete in the equipment sales market. Inferring a conspiracy from the tooling clause would restrict Ohmeda's ability to protect its proprietary parts and thus hamper this beneficial

[**61] [*1240] Ohmeda's assertion that the tooling clause was the result of its independent action and not a conspiracy is a "plausible and justifiable alternative interpretation" of the facts of this case. Ohmeda has every incentive to protect its proprietary parts by requiring its OEMs to agree not to sell those parts to ISOs. The OEMs, on the other hand, would gain nothing by agreeing to boycott ISOs and forego thousands of dollars in potential sales every year. Commercial common sense supports an inference that Ohmeda presented its OEMs with a form contract, including a tooling clause, that they were free either to sign or to reject but not to modify. Simple acquiescence to a form contract is normally not the sort of concerted action that constitutes an "agreement" under § 1. See *Matrix Essentials v. Emporium Drug Mart, Inc.*, 988 F.2d 587, 594 (5th Cir. 1993); *American Airlines v. Christensen*, 967 F.2d 410, 412-15 (10th Cir. 1992). Plaintiffs offer no evidence to support the contrary -- and counterintuitive -- conclusion that the OEMs bargained for or participated in the drafting or adoption of a tooling clause that has the direct effect of limiting their potential [**62] profits.

Plaintiffs are free to offer evidence of the tooling clause and its effect on competition in the service market in support of their monopolization, attempted monopolization and tying claims. But because they have not established that the tooling clause was the product of concerted action between Ohmeda and its OEMs, plaintiffs may not bring an independent group boycott claim based on the clause.

VII.

In *Kodak I*, the Supreme Court acknowledged that, in the end, Kodak's aftermarket arguments might prove to be correct. "It may be that [Kodak] parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anti-competitive effects of Kodak's behavior are outweighed by its competitive effects." *Kodak I*, 504 U.S. at 486, 112 S. Ct. at 2092. The same may be true here, but the court cannot conclude that Ohmeda is entitled to summary judgment as a matter of law on all of plaintiffs' claims.

The motion for summary judgment is GRANTED as to plaintiffs' claim of monopolization of the service market for all anesthesia machines and [**63] as to the per se and rule of reason group boycott claims. The motion is DENIED as to all other claims.

IT IS SO ORDERED.

Dated: 4 August 1999.

DAVID F. LEVI

United States District Judge

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Rhode Island Laborers' Health & Welfare Fund v. Philip Morris, Inc.

United States District Court for the District of Rhode Island

August 11, 1999, Decided ; August 11, 1999, Filed

C.A. No. 97-500L

Reporter

99 F. Supp. 2d 174 *; 1999 U.S. Dist. LEXIS 12400 **; 2000-1 Trade Cas. (CCH) P72,936

RHODE ISLAND LABORERS' HEALTH & WELFARE FUND, by and through its Trustees, on behalf of all other similarly situated Health & Welfare Funds in the state of Rhode Island, Plaintiffs v. PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. RILLARD TOBACCO COMPANY; LIGGETT GROUP, INC; THE AMERICAN TOBACCO COMPANY; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.; THE TOBACCO INSTITUTE, INC.; and HILL & KNOWLTON, INC., Defendants

Disposition: [**1] Recommended that Defendants' [Rule 12\(b\)\(6\)](#) motion to dismiss granted as to all of Fund's claims.

Core Terms

antitrust, smoking, smokers, damages, proximate cause, illnesses, costs, injuries, antitrust claim, tobacco use, tobacco-related, contingencies, recommend, initiatives, speculation, cigarette, argues, alleged misconduct, tobacco company, anti trust law, addictive, alleges, tobacco, safer, misrepresentations, remote, Funds, household purposes, tobacco product, deny a motion

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

[**HN1**](#) [] **Defenses, Demurrsers & Objections, Motions to Dismiss**

[Fed. R. Civ. P. 12\(b\)\(6\)](#) provides for dismissal of an action if that action fails to state a claim upon which relief can be granted. The degree of specificity with which the operative facts must be stated in the pleadings varies depending on the case's context. In deciding a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion, the court must accept the well-pleaded factual averments of the complaint as true, and construe these facts in the light most flattering to plaintiff's cause. Further, the court must deny a motion to dismiss if the allegations of the complaint permit relief to be granted on any theory, even one not expressly stated therein. Plaintiff is required to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.

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

[**HN2**](#) [] **Pleadings, Rule Application & Interpretation**

It is only when conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that conclusions become facts for pleading purposes.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN3 **Pleadings, Heightened Pleading Requirements**

The court has the discretion to impose heightened specificity requirements when it is concerned about plaintiff's ability to make out a cause of action based on the events as narrated in the complaint. If despite the opportunity to fine-tune a complaint, especially at the court's direction, a naked conclusion, unanchored in any meaningful set of factual averments is the asserted basis for relief, dismissal may follow.

Securities Law > RICO Actions > General Overview

HN4 **Securities Law, RICO Actions**

Both [R.I. Gen. Laws § 7-15-4\(c\)](#) and [18 U.S.C.S. § 1964\(c\)](#) provide for civil recovery for any person injured in his or her business or property by reason of a predicate RICO offense.

Governments > Legislation > Interpretation

HN5 **Legislation, Interpretation**

The Rhode Island Antitrust Act, [R.I. Gen. Laws § 6-36-1 et seq.](#), is to be construed in harmony with judicial interpretations of comparable federal antitrust laws .

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN6 **Racketeer Influenced & Corrupt Organizations, Claims**

[18 U.S.C. S. § 1964\(c\)](#)(RICO) and [15 U.S.C.S. § 15\(a\)](#) (antitrust) both characterize proper plaintiff as one who has suffered an injury to business or property by reason of a violation of the laws predicate substantive provisions. Both also require that the alleged violation of the law be a proximate cause of the injury suffered. Proximate causation requires that there be some direct relation between the injury asserted and the injurious conduct alleged. Plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by defendant's acts generally stands at too remote a distance to recover.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[**HN7**](#) [+] **Private Actions, Standing**

To determine whether an injury is too remote to allow standing under the Racketeer Influenced and Corrupt Organizations Act and antitrust law, the United States Supreme Court has developed a three factor test which requires the court to ask the following questions: (1) Are there more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general? (2) Will it be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct? And (3) will the court have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries?

Torts > ... > Damages > Collateral Source Rule > General Overview

[**HN8**](#) [+] **Damages, Collateral Source Rule**

Rhode Island's collateral source rule prevents plaintiff's damages from being reduced to the extent he or she has been reimbursed for medical expenses.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Fraud, Misconduct & Misrepresentation

Securities Law > RICO Actions > Elements of Proof > Causation & Proximate Causation

Torts > ... > Causation > Proximate Cause > General Overview

[**HN9**](#) [+] **Grounds for Relief from Final Judgment, Order or Proceeding, Fraud, Misconduct & Misrepresentation**

Both the Racketeer Influenced and Corrupt Organizations Act and the antitrust laws have been interpreted to incorporate common-law principles of causation. Contingencies, conjecture, and speculation will not support a finding of proximate cause.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN10**](#) [+] **Types of Contracts, Lease Agreements**

A private cause of action under the Rhode Island Unfair Trade Practices Act (Act), R.I. Gen. Laws § 6-13.1-5.2 (1992), exists for any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by the Act.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN11 [blue download icon] **Business Torts, Fraud & Misrepresentation**

To prevail on a fraudulent misrepresentation claim, plaintiff must be able to prove that he relied on defendant's misrepresentation and that such reliance was the proximate cause of his injury.

Torts > ... > Elements > Causation > General Overview

Torts > ... > Elements > Duty > General Overview

HN12 [blue download icon] **Elements, Causation**

A special duty claim is essentially a negligence claim and, therefore, requires proof of the underlying elements of a negligence claim, including proximate cause.

Counsel: For Plaintiff: MICHAEL SPENCER, ESQ., MILLBERG, WEISS, BERSHAD, HYNES & LERACH, NEW YORK, NEW YORK.

For Plaintiff: GEORGE L. SANTOPIETRO, ESQ., COIA & LePORE, LTD., PROVIDENCE, RI.

For Defendant: DAVID A. WOLLIN, ESQ., ADLER, POLLOCK & SHEREHAN, P.C., PROVIDENCE, RI.

For Defendant: KENNETH J. PARSIGIAN, ESQ., GOODWIN, PROCTER & HOAR, LLP, BOSTON, MA.

Judges: Robert W. Lovegreen, United States Magistrate Judge.

Opinion by: Robert W. Lovegreen

Opinion

[Class Action]

[*180] REPORT AND RECOMMENDATION

Robert W. Lovegreen, United States Magistrate Judge

Rhode Island Laborers' Health & Welfare Fund ("Plaintiff" or "Fund") has brought this proposed class action against a number of the leading tobacco companies, their research affiliates, and a public relations firm ("Defendants")¹. The Fund alleges violation of both the federal and state Racketeer Influenced and Corrupt Organizations Acts ("RICO"), violation of federal and state antitrust law, fraud, failure to perform a special duty, and violation of the Rhode Island Unfair Trade Practice and Consumer Protection Act ("RIUTPA"). Defendants [*2] have moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. In the alternative, Defendants have moved to dismiss for failure to join a party under Rule 19 pursuant to Fed. R. Civ. P. 12(b)(7). Plaintiff has opposed both motions.

This matter has been referred to me for preliminary review, findings, and recommended disposition. 28 U.S.C. § 636(b)(1)(B); Local Rule of Court 32(c). A hearing was held on June 23, 1999. After examining the memoranda submitted, listening to the arguments of counsel, and researching the applicable law, I recommend that Plaintiff's complaint be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) and, therefore, Defendants' 12(b)(7) argument will not be addressed.

¹ It is not clear from the record whether all the named defendants were served with process. Therefore, the court refers only to those defendants who were served and are properly before the court.

Background

Plaintiff [**3] is a nonprofit, multi-employer health and welfare trust fund established through collective bargaining between certain unions and employers. The purpose of the Fund is to provide participants and beneficiaries with comprehensive health care benefits. In connection with such benefits, the Fund alleges that it has expended huge sums related to coverage of its participants' tobacco-related illnesses. The Fund has brought this claim in order to recover those costs. The Fund also demands injunctive relief that would require Defendants to finance tobacco-use cessation programs for the Fund's participants.

The Fund's ninety-three page complaint notwithstanding, its claim pares down to a very simple proposition: because of Defendants' fraudulent misrepresentations about and concealment of the health-related risks of using tobacco and an agreement among Defendants to forgo development of safer tobacco products, the Fund was unable to make intelligent decisions about the management of its resources and, consequently, was unable to curtail or effect the use of tobacco by its participants, resulting in vast expenditures on tobacco-related illnesses that could have been avoided if Defendants had [**4] been honest and forthright about the information they possessed. The Defendants' seventy-two page memorandum notwithstanding, their argument also pares down to a very simple proposition: whatever injury the Fund may have suffered, it is purely derivative of the physical injuries sustained by those participants who used tobacco products [*181] and is, therefore, an indirect injury and too remote to allow recovery. Although it is important that the court be able to separate the wheat from the chaff for the purposes of narrowing and focusing on the precise issues before it, the chaff in the instant case merits explication in order that the enormity of the impact of Defendants' alleged misconduct is not unduly minimized.

According to Plaintiff, cigarette smoking is the leading cause of premature death in the United States. Each year, cigarette smoking kills more than 400,000 Americans; accounts for one of every five deaths overall; and is responsible for at least 30% of all deaths from cancer, 80% of all deaths from pulmonary diseases such as emphysema and bronchitis, and thousands of deaths from cardiovascular disease, including stroke and heart attack. In addition, smoking reduces fertility, [**5] increases the rate of miscarriages and stillbirths, and causes lower birth weights in infants. Moreover, cigarettes contain nicotine which is an addictive drug and, although it is illegal to sell cigarettes to children, virtually all smokers begin smoking before reaching maturity, often becoming addicted while they are still children. Plaintiff also alleges that the use of smokeless tobacco can cause oral cancer, cancer of the esophagus, gum disease, and dental decay.

Plaintiff describes the obstacles against which individuals, who have allegedly suffered physical injury from tobacco use, have struggled, often unsuccessfully, to hold the tobacco industry liable through initiation of products liability lawsuits. Envisioning a loss of profitability as a result of potential adverse judgments and encouraged by counsel, the tobacco companies embarked on a forty year campaign of deceit, distortion, concealment, and misrepresentation meant to undermine individual plaintiffs' ability to prove causation, a necessary element in a products liability claim. Fearing that the truth about the devastating health effects of tobacco use would cause a public outcry and consequent pressure on businesses [**6] and government to restrict smoking in the workplace, the tobacco companies, their research organizations, their public relations agents, and their attorneys worked together to suppress important scientific research tending to link tobacco use with cancer. Moreover, it is alleged that the tobacco industry strenuously denied any such link and attempted to undermine the validity of any scientific information tending to support a contrary position by pointing to studies, funded by the industry itself, that tended to discredit the causal connection. In this way, the tobacco companies attempted, successfully for the most part, to maintain the illusion of an open controversy on the issue. Such artificially created controversy allowed addicted smokers to justify their continued use of tobacco even in the face of their deteriorating health and allowed the courts to dismiss the claims of those allegedly injured by tobacco use based on the speculative nature of the causal link between such use and the injuries claimed.

Plaintiff also claims that the tobacco industry specifically targeted children in order to replenish its consumer base as older smokers died each year from tobacco-related illnesses. [**7] Marketing studies aimed at discovering how best to attract children and teenagers to smoking, use of cartoons in advertising, distribution of promotional items such as t-shirts and baseball caps were all aimed at encouraging young people to smoke, while, at the same time,

the tobacco companies knew that, if such tactics were successful, young people would become addicts and would eventually suffer the same dismal fate as those they were meant to replace.

In attempting to right what, if proved to be true, would be a horrific wrong on a grand scale, the Fund has brought claims against the Defendants grounded in fraud, antitrust, unfair trade practices, and assumption of a special duty. This, the Fund maintains, is not a subrogation claim. Instead, it argues that the Fund's [*182] injuries were direct and not based on the alleged injuries to its participants. The Fund alleges that Defendants' fraudulent misrepresentations and concealment were directed at the Fund itself and were intended to facilitate the shifting of tobacco-related health care costs from the tobacco companies to health care payors like the Fund. Furthermore, the Fund alleges that Defendants manipulated the market in tobacco [**8] products in order to prevent development of safer, less addictive tobacco products, thereby making any potential preventative care initiatives by the Fund virtually impossible and causing the Fund to spend more on tobacco-related illnesses than would otherwise have been necessary.

Fed.R.Civ.P. 12(b)(6) Standard

HN1 [↑] [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) provides for dismissal of an action if that action fails to state a claim upon which relief can be granted. The First Circuit Court of Appeals has recognized a tension among precedents regarding the particularity of pleading required to overcome a [Rule 12\(b\)\(6\)](#) motion and has noted that "the degree of specificity with which the operative facts must be stated in the pleadings varies depending on the case's context." [Boston & Maine Corp. v. Town of Hampton, 987 F.2d 855, 863 \(1st Cir. 1993\)](#) (quoting [United States v. AVX Corp., 962 F.2d 108, 115 \(1st Cir. 1992\)](#)).

In deciding a [Rule 12\(b\)\(6\)](#) motion, "the court must accept the well-pleaded factual averments of the . . . complaint as true, and construe these facts in the light most flattering to the [plaintiff's] cause . . ." [Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 \(1st Cir. 1988\)](#) [**9] (quoting [Chongris v. Board of Appeals, 811 F.2d 36, 37 \(1st Cir. 1987\)](#)). Further, "the Court must deny a motion to dismiss if the allegations of the complaint permit relief to be granted on any theory, even one not expressly stated therein." [O'Neil v. Q.L.C.R.I., 750 F. Supp. 551, 553 \(D.R.I. 1990\)](#). "Nevertheless, minimal requirements are not tantamount to nonexistent requirements." [Gooley v. Mobil Oil Corp., 851 F.2d at 514](#). "[A] plaintiff . . . is . . . required to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." [Id. at 515](#).

In connection with run-of-the-mine motions brought under [Rule 12\(b\)\(6\)](#), a reviewing court is obliged neither to "credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions or outright vituperation," nor to honor subjective characterizations, optimistic predictions or problematic suppositions. "Empirically unverifiable" conclusions, not "logically compelled, or at least supported by the stated facts," deserve no deference.

[United States v. AVX Corp., 962 F.2d at 115](#) [**10] (citations omitted). **HN2** [↑] "It is only when such conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that 'conclusions' become 'facts' for pleading purposes." [The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 \(1st Cir. 1989\)](#).

HN3 [↑] The Court has the discretion to impose heightened specificity requirements when it is concerned about the plaintiff's ability to make out a cause of action based on the events as narrated in the complaint. See [Boston & Maine Corp. v. Town of Hampton, 987 F.2d at 867](#). If despite the opportunity to fine-tune a complaint, especially at the Court's direction, "'a naked conclusion, unanchored in any meaningful set of factual averments' is the asserted basis for relief, dismissal may follow." [Id.](#) (quoting [Gooley v. Mobil Oil Corp., 851 F.2d at 515](#)).

Discussion

RICO and Antitrust: Claims for Damages

This court is aware of at least eleven federal district courts and three circuit courts, all presented with claims by health care trust funds against most or all [**11] of the defendants being sued in the instant case [*183] for RICO and/or antitrust violations, that concluded that those claims should be dismissed on grounds of proximate cause and/or standing. See, e.g., Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3rd Cir. 1999) (RICO and antitrust); Laborers Local 17 Health & Benefit Fund v. Philip Morris, 172 F.3d 223 (2nd Cir. 1999) (RICO) withdrawn from bound volume at request of the court; Oregon Laborers & Operating Eng'rs Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc., __ F.3d __ 1999 WL 493306 (9th Cir.) (RICO and antitrust); Laborers' & Operating Eng'r's Util. Agreement Health & Welfare Trust Fund v. Philip Morris, 42 F. Supp. 2d 943 (D.Ariz. 1999) (RICO and antitrust); Hawaii Health & Welfare Trust Fund for Operating Eng'r's v. Philip Morris, Inc., 42 F. Supp. 2d 943 1999 WL 399860 (D.Haw. 1999) (RICO and antitrust); International Brotherhood of Teamsters Local 734 Health & Welfare Trust Fund v. Phillip Morris, Inc., 34 F. Supp. 2d 656 (N.D.Ill. 1998) (antitrust); [**12] Kentucky Laborers Dist. Council Health & Welfare Trust Fund v. Hill & Knowlton, Inc., 24 F. Supp. 2d 755 (W.D.Ky. 1998) (antitrust and some RICO claims); Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 7 F. Supp. 2d 277 (S.D.N.Y. 1998) (antitrust); New Jersey Carpenters Health Fund v. Philip Morris, Inc., 17 F. Supp. 2d 324 (D.N.J. 1998) (antitrust); Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 17 F. Supp. 2d 1170 (D.Or. 1998) (RICO and antitrust); Seafarers Welfare Plan v. Philip Morris, 27 F. Supp. 2d 623 (D.Md. 1998) (RICO and antitrust); Southeast Fla. Laborers Dist. Health & Welfare Trust Fund v. Philip Morris, 1998 U.S. Dist. LEXIS 5440, 1998 WL 186878 (S.D.Fla. Apr. 13, 1998) (RICO and antitrust); Stationary Eng's Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc., 1998 U.S. Dist. LEXIS 8302, 1998 WL 476265 (N.D.Cal. Apr. 30, 1998) (RICO and antitrust); Texas Carpenters Health Benefit Fund v. Philip Morris, Inc., 21 F. Supp. 2d 664 (E.D.Tex. 1998) (RICO and antitrust).

Only a minority of federal district courts and no circuit courts of appeal have [**13] upheld RICO and/or antitrust claims brought by health care trust funds against these defendants. See, e.g., Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc., 23 F. Supp. 2d 771 (N.D.Ohio 1998) (denying motion to dismiss RICO and antitrust claims); Kentucky Laborers Dist. Council Health & Welfare Trust Fund v. Hill & Knowlton, Inc., 24 F. Supp. 2d 755 (W.D.Ky. 1998) (denying motion to dismiss some RICO claims); Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 7 F. Supp. 2d 277 (S.D.N.Y. 1998) (denying motion to dismiss RICO claims); Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 23 F. Supp. 2d 321 (E.D.N.Y. 1998) (denying motion to dismiss RICO claim); New Jersey Carpenters Health Fund v. Philip Morris, Inc., 17 F. Supp. 2d 324 (D.N.J. 1998) (denying motion to dismiss certain RICO claims).

After an independent review of the issues presented, this court finds that the very practical concerns imbedded in the concepts of standing and proximate cause weigh against allowing the Fund to go forward with its claims. As the Ninth Circuit recently observed in Oregon Laborers, [*14] a case practically on all fours with the instant case, proximate cause is a judicial tool which "at bottom . . . reflects ideas of what justice demands, or of what is administratively possible and convenient." 1999 WL 493306, at *3 (quoting Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)). Although Defendants have urged a number of grounds for dismissal of Plaintiff's RICO and antitrust claims, for the following reasons this court finds the related issues of proximate cause and standing to be dispositive.

HN4 [↑] Both the Rhode Island and federal RICO statutes provide for civil recovery for any person "injured in his or her business or property by reason of" a predicate RICO offense. R.I. Gen Laws § 7-15-4(c); [*184] 18 U.S.C. § 1964(c). Therefore, the requirements for standing under both statutes require a similar analysis. Vitone v. Metropolitan Life Ins. Co., 943 F. Supp. 192, 200 (D.R.I. 1996). In addition, **HN5** [↑] the Rhode Island Antitrust Act, R.I. Gen. Laws § 6-36-1 through § 6-36-26, is to be "construed in harmony with judicial interpretations of comparable federal [**15] antitrust laws . . ." R.I. Gen. Laws § 6-36-2(b); see also UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp., 599 A.2d 1033, 1035 (R.I. 1991). Therefore, the court will apply a unified analysis to the federal and state RICO claims (hereinafter "RICO") and a unified analysis to the federal and state antitrust claims (hereinafter "antitrust"), guided by federal law.

Furthermore, the requirements for standing to maintain a civil action under RICO and the antitrust laws are also similar. Oregon Laborers, 1999 WL 493306, at *3 (citing Holmes, 503 U.S. at 268). HN6[] RICO and antitrust law both characterize a proper plaintiff as one who has suffered an injury to "business or property by reason of" a violation of the laws' predicate substantive provisions. 18 U.S.C. § 1964(c)(RICO); 15 U.S.C. § 15(a) (antitrust). "Both also require that the alleged violation of the law be a 'proximate cause' of the injury suffered." Oregon Laborers, 1999 WL 493306, at *3 (citing Holmes, 503 U.S. at 268) (RICO); Blue Shield v. McCready, 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) [**16] (antitrust)).

Since the causes of an action or condition may be traced backward to the dawn of time and effects may reverberate forever forward, the concept of proximate causation has traditionally included the requirement that there be "some direct relation between the injury asserted and the injurious conduct alleged." Holmes, 503 U.S. at 268. This direct relationship has been one of the central elements necessary to establish proximate causation in RICO and antitrust claims. Oregon Laborers, 1999 WL 493306, at *3 (citing Holmes, 503 U.S. at 269 (citing Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 540, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)))). Therefore, "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. (quoting Holmes, 503 U.S. at 268-69).

In support of its antitrust claim, the Fund alleges that Defendants "engaged in a decades-long conspiracy to restrain trade and inhibit competition by suppressing the development [**17] 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. As a result of [Defendants'] conduct, competition in the market for alternative safe (or safer) tobacco products . . . has been restrained, causing the Fund[] to incur substantial costs to treat the tobacco-related illnesses of [its] participants." Plf.'s Mem. at 30-31 (citations to the complaint omitted). Further, the Fund argues that the injury it has suffered as a result of Defendants' anti-competitive agreement was a direct injury and not derivative of the physical injuries allegedly suffered by its participants.

Similarly, in support of its RICO claim, the Fund argues that Defendants' fraud was meant to maintain the illusion of an open controversy over the causal connection between tobacco use and ill health and/or addiction and, consequently, the Fund was unable to provide a comprehensive health care program to address the subsequently recognized need to discourage and reduce tobacco use so as to decrease costs associated with tobacco-related illness. Its inability to have an [**18] impact on those costs is alleged as a direct injury to the Fund.

HN7[] To determine whether an injury is too remote to allow RICO and/or antitrust standing, the United States Supreme Court has developed a three factor test [*185] which requires the court to ask the following questions: (1) are there more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) will it be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) will the court have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. Holmes, 503 U.S. at 269-70 (RICO); Associated General, 459 U.S. at 545 (antitrust).

1. Are There More Direct Victims Who Can Vindicate the Law?

The Fund argues that it has standing to assert its Rico and antitrust claims because it has suffered a direct injury to its business or property in the form of economic losses attributable to reimbursing Fund participants for medical expenses in connection with their tobacco-related diseases. Furthermore, the Fund maintains that its "economic losses are [**19] not a form of compensation for personal injuries suffered by smokers." Plf.'s Mem. at 51. Moreover, since "the Fund participants cannot and will not assert such claims," there are no more direct victims that can vindicate violation of RICO and the antitrust laws. See Plf.'s Mem. at 50. In essence, "without the Fund's action, Defendants' misconduct would remain undeterred and the purposes of RICO [and the antitrust laws would be] thwarted." Id.

Although the Fund characterizes its injury as direct, it would have suffered no injury at all if its participants had not used tobacco and had not suffered diseases caused by tobacco use. Therefore, in order for the Fund to have been

harmed by Defendants' alleged misconduct, the Funds participants must first have chosen to smoke and, subsequently, must have suffered an illness caused by smoking that they would not otherwise have contracted. It is clear that whatever injury the Fund may have suffered, it was contingent upon the actions and injury of others, which in each particular case requires its own causal connection to be established. Assuming that the Fund has in fact been injured, the most that can be said about that injury is [**20] that it is indirect. See Oregon Laborers, WL 493306, at *4.

However, the Fund argues that the injured smokers cannot bring RICO or antitrust claims to recover medical expenses related to their personal injuries. While, the Fund may be right about this, see id., it does not necessarily make the Fund a proper party to bring these claims. As the Ninth Circuit noted in Oregon Laborers, "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." Id. (quoting Associated General, 459 U.S. at 534). "Some injuries caused by an antitrust [or RICO] violation may thus be left unremedied for lack of a proper plaintiff." Id. The court pointed out that the policy objective of limiting standing to those more directly injured is to "promote the general interest in deterring injurious conduct," id. at *5, thus suggesting that the focus of the direct injury requirement for RICO and antitrust standing is less on vindicating the kind of injury sustained and more on deterring the kind of misconduct that may lead to various injuries and theories of recovery.

In the instant [**21] case, Defendants' alleged misconduct may arguably constitute a RICO and/or antitrust violation. However, because of the indirectness of the Fund's injuries, it cannot be said that those violations were the proximate cause of the harm suffered by the Fund. In addition, there are injured persons, i.e., the smokers, capable and motivated to bring suit, thus "promoting the general interest in deterring injurious conduct." Therefore, because there are more direct victims of Defendants' alleged misconduct who can be counted on to vindicate a direct injury caused by the alleged misconduct, this factor of the test for RICO and/or [*186] antitrust standing weighs in favor of dismissing those claims. See id.

2. Would Damages be Difficult to Ascertain?

The Fund claims as damages monies spent to reimburse its participants for their medical care due to smoking related illnesses. The Fund alleges that its harm arose from its inability, due to Defendants' fraud and collusive anticompetitive conduct, to take initiatives aimed at reducing the incidence of smoking among its participants, which allegedly would have reduced costs associated with medical care for smoking-related illnesses. Although [**22] the fund's actual expenditures would not be difficult to ascertain, because of the many variables that might have affected those costs, it would be extremely difficult to ascertain which of those costs would or would not have been lowered. Such variables include whether individual smokers would have quit or cut down on their smoking as a result of the Fund's preventative initiatives and whether smokers would have chosen to continue with the type of cigarettes they had always smoked despite the availability of "safer" alternatives. Furthermore, the term "smoking-related illness" is only another way of saying "illness caused by smoking" and the causal link in each case would need to be established.

Nonetheless, the Fund argues that the risk that the damages will be uncertain should be born by the wrongdoer. Plf.'s Mem. at 41 (citing Bigelow v. RKO Pictures, 327 U.S. 251, 265, 90 L. Ed. 652, 66 S. Ct. 574 (1946)). However, in the instant case, the problem is not in calculating the actual amount spent to reimburse smokers for their medical expenses, rather the problem is in establishing to what extent smokers and potential smokers might have been affected by the initiatives [**23] that the Fund might have taken to discourage or reduce smoking among its participants. In this respect, it is not only the amount that is uncertain; the link between how the Fund might have acted and how smokers might have reacted is highly speculative as well.

As the Third Circuit stated in analyzing the identical issue, "It is apparent why the Funds argue that they can demonstrate all of this through aggregation and statistical modeling: it would be impossible for them to do so otherwise. Yet we do not believe that aggregation and statistical modeling are sufficient to get the Funds over the hurdle of the [Associated General] factor focusing on whether the 'damages claim is . . . highly speculative.'" Steamfitters, 171 F.3d at 929; accord Oregon Laborers, 1999 WL 493306, at *5; This court agrees with the circuit

courts of appeal that have addressed this issue and finds that the difficulty of ascertaining the damages in this case weighs in favor of dismissing the Fund's claims.

3. Would There be Potential for Duplicative Recovery and/or Would Complex Apportionment of Damages be Required?

In the past two years, there have been several **[**24]** cases filed in the United States District Court for the District of Rhode Island by individual smokers or their family members against one or more of the tobacco company defendants in this case. It is not unlikely that we will see more of these cases in years to come. The individual plaintiffs seek the same recovery as the Fund, i.e., their medical expenses, among their other claims for damages. Moreover, [HN8](#)[↑] Rhode Island's collateral source rule prevents a plaintiff's damages from being reduced to the extent he or she has been reimbursed for medical expenses, *see Gelsomino v. Mendonca, 723 A.2d 300, 301 (R.I. 1999)*, thus increasing the potential for duplicative recovery should the Fund's claims be allowed to go forward. In addition, the potential for multiple recovery would intensify if indirect injury claims like the Fund's were recognized in this context. Employers might well assert an interest as distinct from that of the Fund **[*187]** and might claim that, had they been properly informed of the dangers of tobacco use, they too would have instituted different policies in order to discourage smoking, which might have allowed employers to negotiate a lesser amount payable into **[**25]** the Fund.

It is clear that all three factors weigh in favor of finding the Fund's injury too remote to confer standing on the Fund to bring its RICO and antitrust claims for damages. Therefore, I recommend that Defendants' 12(b)(6) motion to dismiss these claims be granted.

Antitrust and RICO: Claims for Injunctive Relief

Assuming, *arguendo*, that injunctive relief is available in private civil RICO actions, *cf. Lincoln House, Inc. v. Dupre, 903 F.2d 845, 848 (1st Cir. 1990)* (assuming without deciding that relief may be available), and that all three factors of the RICO/antitrust remoteness test need not be met in order to demand injunctive relief because the calculation and apportionment of damages would no longer be an issue, the Fund must still show that its injury was proximately caused by Defendants' alleged misconduct. [HN9](#)[↑] Both RICO and the antitrust laws have been interpreted to incorporate common law principles of causation. *See, e.g., Holmes, 503 U.S. at 268* (RICO); *Associated General, 459 U.S. at 533-34*, and n. 29, 536, n. 33 (antitrust). Contingencies, conjecture, and speculation will not support a finding of proximate **[**26]** cause. *See, e.g., Holmes, 503 U.S. at 271* (applying common law interpretation of proximate cause to RICO claim and finding 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"); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 712, 132 L. Ed. 2d 597, 115 S. Ct. 2407 (1995)* (O'Connor, J., concurring) (explaining that "by the use of the word 'actually,' the regulation clearly rejects speculative or conjectural effects, and thus itself invokes principles of proximate causation").

Here, the Fund's theory of its case is full of contingencies and necessarily invites unacceptable levels of speculation and conjecture. The court has already found that whatever injury the Fund has suffered, if indeed there was an injury, it was indirect and contingent. If not for the alleged smoking-related injuries to the smokers, the Fund would not have sustained any injury itself.

The Fund argues, however, that because of the intentional nature of Defendants' alleged misconduct (misrepresentations directed toward the Fund and its participants **[**27]** and collusion to abandon efforts to develop a "safer" cigarette) and because the actions and injuries of the individual smokers was foreseeable and their addiction intended, the smokers themselves, although, perhaps, an intervening force, do not constitute a superceding cause that would break the chain of causation between Defendants' actions and the Fund's injury.

However, as discussed above in connection with the difficulty of calculating the Funds' damages, the problem with the Fund's argument is not that the amount of actual damages would be so difficult to calculate, after all the Fund

can document the amount it has spent on each smoker's health care, rather the problem lies in the number of contingencies that would first have to be realized before the Fund could sustain an injury.

First, the Fund would have to show what initiatives it would or could have taken to reduce the incidence of smoking among its participants had the Defendants been honest about the health effects of smoking and had they not agreed to abandon development of a safer cigarette. Second, it would have to show whether and to what extent smokers would have responded to the Fund's initiatives and whether and [**28] to what extent their responses would [*188] have reduced the occurrence and complexity of their illnesses and thus lowered their reimbursable health care costs. Assuming that a significant number of the Fund's participants and beneficiaries are smokers, there would necessarily be a significant amount of contingency and speculation involved in figuring out who, if anyone, might have quit smoking due to the Fund's initiatives as opposed to other influences; who, if anyone, might have reduced the number of cigarettes smoked and to what level; who, if anyone, would have smoked a "safer" cigarette; what, if any, effect the different levels of response would have had on the illnesses suffered; and what, if any, reduction in reimbursable health care costs would have been realized.

The number of possible scenarios linking the Defendants' alleged misconduct to the Funds' purported injury could only be narrowed by a significantly limited imagination as to the scope of potential influences on human action and motivation and the nature of the individual's capacity to exercise free will. Allowing the factfinder to wander freely through such a philosophical, psychological, and biological bazaar is exactly [**29] what the concept of proximate cause was meant to prevent. Therefore, because proximate cause is an essential element of the Fund's claim and because the Fund has not pled the alleged causal connection in a way that substantially removes the claim from the realm of contingency, speculation, and conjecture, I recommend that the Fund's RICO and antitrust claims for injunctive relief be dismissed.

Rhode Island Unfair Trade Practices Act ("RIUTPA" or "Act")

RIUTPA makes unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . ." [R.I. Gen. Laws § 6-13.1-2](#) (1992). [HN10](#) A private cause of action under RIUTPA exists for "any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful" by the Act. [R.I. Gen. Laws § 6-13.1-5.2](#) (emphasis added).

The Fund argues that it has standing to bring its RIUTPA claim because a "person," under the Act, includes "trusts." See Plf.'s Mem. at [**30] 25 (citing [R.I. Gen. Laws § 6-13.1-1\(3\)](#) ("Person" means natural persons, corporations, trusts . . .)). However, the Fund ignores the further requirement that such person be a purchaser or lessee of "goods or services primarily for personal, family, or household purposes . . ." See § 6-3.1-5.2.

In [Schroeder v. Lotito, 577 F. Supp. 708 \(D.R.I. 1983\)](#), District Judge Selya, now Circuit Judge, was presented with a Rule 12(b)(6) motion to dismiss plaintiff's RIUTPA claim on the ground that plaintiff lacked standing. The plaintiff was a union who claimed that defendants had used a trademark similar to the union's mark in order to fool the public into thinking that defendants employed union labor in their printing business when that was not the case. Although the court found that the union had alleged an injury that was linked to the deception, it emphasized that "the inescapable inference which flows from [RIUTPA's] legislative scheme is that the General Assembly intended the entitlement to sue under its Deceptive Trade Practices Act to be limited to those classes of persons designated thereunder." [Schroeder, 577 F. Supp. at 717](#). Further, since [**31] RIUTPA provided a private action only to those who purchased or leased "goods or services primarily for personal, family or household purposes," the court found that "plaintiffs [could not] by any stretch of the imagination tuck themselves within the citizen suit provision of [§ 6-13.1-5.2](#)." Id.; accord [Scully Signal Co. v. Joyal, 881 F. Supp. 727, 741 \(D.R.I. 1995\)](#) (dismissing corporate plaintiff's RIUTPA claim for lack of standing because the Act only provides private [*189] rights of action to the Attorney General and to "person[s] who purchase or lease goods or services primarily for personal, family, or household purposes . . ."); [ERI Max Entertainment, Inc. v. Streisand, 690 A.2d 1351, 1354 \(R.I. 1997\)](#) (dismissing plaintiff

video store's RIUTPA claim for lack of standing because plaintiff was clearly not a person who's injury stemmed from the purchase or lease of "goods or services primarily for personal, family, or household purposes").

The Fund has not alleged, nor do the facts suggest, that it was a purchaser or lessee of any of Defendants' goods or services that were intended to be used primarily for personal, family, or household purposes. [**32] Therefore, the Fund lacks standing to bring its RIUTPA claim and I recommend that the claim be dismissed.

Fraud

HN11 [↑] To prevail on a fraudulent misrepresentation claim in Rhode Island, plaintiff must be able to prove, *inter alia*, that he relied on defendant's misrepresentation and that such reliance was the proximate cause of his injury. See, e.g., *Ralston Dry-Wall Co., Inc. v. United States Gypsum*, 926 F.2d 99, 102 (1st Cir. 1991) (applying Rhode Island law). As discussed above in connection with the Fund's RICO claim based on fraud, the Fund will not be able to meet its burden as to the necessary showing of proximate cause.

The Fund alleges that Defendants' intentional false statements about the health effects of tobacco use were directed at both smokers and at "payors of tobacco-related health care costs, including the Fund[]." Plf.'s Mem. at 54. Defendants' false statements were intended to deceive smokers and the Fund and "to divert liability for paying substantial sums to treat . . . tobacco-related illnesses onto the Fund[] and other health care payors." *Id.* In addition, because the Fund justifiably relied on those statements, it was prevented [**33] from discouraging and reducing tobacco use by its participants, which resulted in higher medical costs to the Fund than otherwise would have been incurred. Further, the Fund maintains, because Defendants' conduct was intentional and morally blameworthy, the remoteness of the Fund's injury is not dispositive of the proximate cause analysis. Moreover, the Fund argues, the Fund's increased costs for health care was intended, foreseeable, and substantially likely to occur as a result of Defendants' acts. Finally, in these circumstances, the Fund urges the court to equate substantial cause with proximate cause.

Assuming, *arguendo*, that Defendants' alleged misrepresentations were intended to preclude the Fund from implementing initiatives to reduce or eliminate smoking among its participants and to shift medical care costs from the tobacco companies to the Funds and even assuming that such consequences were foreseeable and such conduct is morally blameworthy, the Fund cannot escape the fact that there exist innumerable contingencies through which a factfinder would have to sort in order find that the Fund's purported injury was substantially likely to result from Defendants' conduct. [**34] Therefore, even accepting a formula that equates substantial cause with proximate cause, as discussed above in connection with the Fund's RICO and antitrust claims, the gap between Defendants' conduct and the Fund's purported injury can only be filled with contingency, speculation, and conjecture. The path chosen in an attempt to bridge that gap would inevitably be arbitrary. Accordingly, I recommend that the Fund's fraud claim be dismissed.

Failure to Perform a Special Duty

As the Third Circuit noted in *Steamfitters*, **HN12** [↑] a special duty claim is essentially a negligence claim and, therefore, requires proof of the underlying elements of a negligence claim, including proximate cause. *171 F.3d at 936*. For the reasons discussed at length above, the Fund will be unable to prove this element of its claim [*190] and, therefore I recommend that the Fund's special duty claim be dismissed.

Conclusion

For the reasons stated, I recommend that Defendants' *Rule 12(b)(6)* motion to dismiss be granted as to all of the Fund's claims. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. *Fed. R. Civ. P. 72(b)*; Local Rule 32. Failure to file timely, specific objections to the report constitutes waiver of both the right to review by the district court and the right to appeal the

99 F. Supp. 2d 174, *190 (1999 U.S. Dist. LEXIS 12400, **35

district court's decision. *United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).*

Robert W. Lovegreen

United States Magistrate Judge

August 11, 1999

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JTC Petroleum Co. v. Piasa Motor Fuels, Inc.

United States Court of Appeals for the Seventh Circuit

May 20, 1999, Argued ; June 22, 1999, Decided

Nos. 98-3919, 98-4251

Reporter

190 F.3d 775 *; 1999 U.S. App. LEXIS 38876 **

JTC Petroleum Company, Plaintiff-Appellant, v. Piasa Motor Fuels, Inc., et al., Defendants-Appellees.

Subsequent History: [**1] Counsel Amended July 19, 1999. As Amended on Partial Grant of Rehearing of August 17, 1999.

Prior History: Appeals from the United States District Court for the Southern District of Illinois. No. 96-334-GPM--G. Patrick Murphy, Judge.

[JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 179 F.3d 1073, 1999 U.S. App. LEXIS 13802 \(7th Cir. Ill., 1999\)](#)

Disposition: Reversed.

Core Terms

producers, applicators, cartel, conspiracy, monopolize, asphalt, competitors, emulsified, collusion, plants, prices, summary judgment, Sherman Act, antitrust

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Types of Evidence > Circumstantial Evidence

[HN1](#) [] Antitrust & Trade Law, Sherman Act

An inference of conspiracy can be drawn from circumstantial evidence as well as from admissions or other direct testimony of the conspirators' communications with each other.

Antitrust & Trade Law > Sherman Act > General Overview

[HN2](#) [] Antitrust & Trade Law, Sherman Act

Attempt to monopolize differs from conspiracy to monopolize primarily in dispensing with the requirement of an agreement, and the usual case therefore is one in which the defendant has or seeks to obtain monopoly power all by itself.

Counsel: For JTC PETROLEUM COMPANY, Plaintiff - Appellant (98-3919): Glenn E. Davis, ARMSTRONG, TEASDALE, SCHLAFLY & DAVIS, St. Louis, MO.

For PIASA MOTOR FUELS, INCORPORATED, Defendant - Appellee (98-3919): David W. Harlan, GALLOP, JOHNSON & NEUMAN, St. Louis, MO USA. Gordon R. Broom, BURROUGHS, HEPLER, BROOM, MACDONALD & HEBRANK, Edwardsville, IL USA.

For MACOUPIN [**2] COUNTY ASPHALT, INC., Defendant - Appellee (98-3919): Lyndon P. Sommer, SANDBERG, PHOENIX & VON GONTARD, St. Louis, MO USA.

For DOUGHERTY OIL & STONE SUPPLY, INCORPORATED, Defendant - Appellee (98-3919): Steven H. Schwartz, BROWN & JAMES, St. Louis, MO USA.

For JTC PETROLEUM COMPANY, Plaintiff - Appellant (98-4251): Daniel D. Doyle, ARMSTRONG, TEASDALE, SCHLAFLY & DAVIS, St. Louis, MO.

For PIASA MOTOR FUELS, INCORPORATED, Defendant - Appellee (98-4251): David Streubel, David W. Harlan, GALLOP, JOHNSON & NEUMAN, St. Louis, MO USA. Gordon R. Broom, BURROUGHS, HEPLER, BROOM, MACDONALD & HEBRANK, Edwardsville, IL USA.

For DOUGHERTY OIL & STONE SUPPLY INCORPORATED, Defendant - Appellee (98-4251): Charles E. Reis, IV, Steven H. Schwartz, BROWN & JAMES, St. Louis, MO USA.

For MACOUPIN COUNTY ASPHALT, INC., Defendant - Appellee (98-4251): Jonathan Ries, SANDBERG, PHOENIX & VON GONTARD, St. Louis, MO USA.

Judges: Before Posner, Chief Judge, and Easterbrook and Rovner, Circuit Judges.

Opinion by: POSNER

Opinion

Posner, [*776] *Chief Judge*. The plaintiff seeks damages for violations of [sections 1](#) and [2](#) of the Sherman Act arising out of the road-repair business in southern [**3] Illinois. [15 U.S.C. §§ 1, 2](#). There are two groups of defendants: the road contractors themselves, called "applicators," and producers of the emulsified asphalt that the applicators apply to the surface of the roads. After the plaintiff, itself an applicator, settled with all three of the producers and three of the six applicator defendants, the district court granted summary judgment for the remaining applicator defendants, who are the appellees in this court.

Before going further, we note a problem of appellate jurisdiction, namely that two claims against one of the applicator defendants were dismissed without prejudice, and indeed with express leave to reinstate should this appeal fail. The circuits and indeed the cases in this court are divided over whether this form of dismissal affects the finality of the district court's judgment, but most hold, we think correctly (see also Rebecca A. Cochran, "Gaining Appellate Review by 'Manufacturing' a Final Judgment Through Voluntary Dismissal of Peripheral Claims," [48 Mercer L. Rev. 979 \(1997\)](#)), that such a form of dismissal does not terminate the litigation in the district court [**4] in any realistic sense and so is not a final decision within the meaning of [28 U.S.C. § 1291](#), which authorizes the appeal of such decisions. Compare [Union Oil Co. v. John Brown E & C.](#), [121 F.3d 305 \(7th Cir. 1997\)](#); [Horwitz v. Alloy Automotive Co.](#), [957 F.2d 1431, 1435-36 \(7th Cir. 1992\)](#); [Construction Aggregates, Ltd. v. Forest Commodities Corp.](#), [147 F.3d 1334 \(11th Cir. 1998\)](#) (per curiam); [Chappelle v. Beacon Communications Corp.](#), [84 F.3d 652 \(2d Cir. 1996\)](#); [Dannenberg v. Software Toolworks Inc.](#), [16 F.3d 1073 \(9th Cir. 1994\)](#); [Cook v. Rocky Mountain Bank Note Co.](#), [974 F.2d 147 \(10th Cir. 1992\)](#); [Ryan v. Occidental Petroleum Corp.](#), [577 F.2d 298 \(5th](#)

Cir. 1978), with *United States v. Kaufmann*, 985 F.2d 884, 890-91 (7th Cir. 1993); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266 and n. 1 (7th Cir. 1976) (per curiam); *State ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102, 1106 (8th Cir. 1999); *Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987) (per curiam). [**5] That makes this an interlocutory appeal, and one that does not fit into any of the pigeonholes that permit such appeals in the federal courts. But when we raised this point at argument, the plaintiff's lawyer quickly agreed that we could treat the dismissal of the two claims as having been with prejudice, thus [*777] winding up the litigation and eliminating the bar to our jurisdiction. *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 1999 U.S. App. LEXIS 18470, slip op. at 6 (7th Cir. 1999). And so we can proceed to the merits of the appeal.

The plaintiff presented evidence both that the applicator defendants had agreed not to compete with one another in bidding on local government contracts and that the producers had agreed not to compete among each other either, both agreements being (if proved) per se violations of *section 1* of the Sherman Act. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 112 L. Ed. 2d 349, 111 S. Ct. 401 (1990) (per curiam); *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1256 (7th Cir. 1995); *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 843-44 (9th Cir. 1996). [**6] There is a long history of bid-rigging and related practices of collusion in the road construction and road maintenance business. See, e.g., *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 42 L. Ed. 2d 378, 95 S. Ct. 392 (1974); *United States v. Azzarelli Construction Co.*, 612 F.2d 292 (7th Cir. 1979); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973). (In recent years most criminal antitrust prosecutions have been of road contractors.) These are local markets, with a limited number of competitors, selling a rather standardized service to local governments constrained to give their business to the lowest bidder, a constraint that makes it easy for colluding bidders to determine whether one of their number is cheating on the agreement to divide markets. The conditions are thus ripe for effective collusion, making it unsurprising that there is evidence that the applicator defendants in fact colluded with one another to allocate the applicator business in their region. (In discussing the evidence, we emphasize that we are construing it in the light most favorable to the plaintiff, as we are required to do in reviewing [*7] the grant of summary judgment to the defendants.)

As for the producers of the asphalt used by these applicators, the record contains evidence that the product is both heavy relative to value and prone to deteriorate when transported long distances, and that as a result the practical radius within which a plant can supply applicators is only about 70 miles. This has limited to three the number of producers that can supply applicators in the region served by the plaintiff and by the applicator defendants. The plants are specialized to the production of emulsified asphalt, meaning that they can't readily be switched to producing other products. This gives the producers an incentive to produce emulsified asphalt up to the capacity of their plants (because there is no profitable use of the plants other than producing this product), and, since it is a fungible product, about the only way of increasing output is by cutting price. But since the demand for emulsified asphalt is inelastic--that is, lower prices do not yield commensurate increases in volume--the effect of price competition would be to diminish profits. So the producers, like the applicators, have much to gain by eliminating [**8] competition among themselves. And since the product is standard and the number of competing producers few, an agreement not to compete should not be too difficult to enforce; that is, at the producer level as at the applicator level, cheating should be readily observable and hence quickly checked by a retaliatory price cut. Therefore a cartel agreement would not be quickly eroded by cheating, and so again the conditions for collusion are ripe and again the record contains evidence of such collusion.

But the only defendants remaining in the case are applicators, which is to say the plaintiff's competitors. The producers have settled out. Suppose that all that the plaintiff were complaining about, therefore, was a conspiracy of the applicators to raise prices or (what amounts to the same thing) to allocate customers or markets. The complaint would fail at the threshold. A conspiracy of a firm's competitors to do these things could only help the firm, by providing an umbrella under which it could sell a large quantity at a supracompetitive price generating supracompetitive profits [*778] just by setting price in between the conspirators' price and the lower, competitive price that [**9] would prevail in the absence of the conspiracy. *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, *supra*, 61 F.3d at 1256-57. You want your competitors to charge high prices. The fact that it was in JTC's interest that the other applicators agree not to compete with each other would be irrelevant if the Department of Justice were suing the applicators, but it is not; this is a private suit by a competitor that, since it cannot show harm to itself from its competitors' eliminating competition among themselves, cannot obtain relief under the

antitrust laws. *Id.*; [*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#). To put it bluntly, you cannot obtain damages without proving injury. (This is a general principle of both common law tort law and statutory tort law, rather than anything special to antitrust.) As a purchaser of emulsified asphalt, JTC could of course be hurt by a producers' cartel, but, to repeat, no producer remains as a defendant.

So what JTC has tried to show is that the applicators enlisted the producers in their conspiracy, assigning them the role [**10] of policing the applicators' cartel by refusing to sell to applicators who defied the cartel--such as JTC, which has bid for jobs that the cartel had assigned to other applicators. JTC, a maverick, was a threat to the cartel--but only if it could find a source of supply of emulsified asphalt. The claim is that the applicators got the producers to deny JTC this essential input into its business, and as a result injured it. The producer was the cat's paw; the applicators were the cat.

[*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, supra, 475 U.S. at 587](#), however, teaches that an antitrust claim which makes no economic sense can on that ground be dismissed on summary judgment. See also [*In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 614 \(7th Cir. 1997\)](#). And it might seem to make no sense from the producers' standpoint to shore up a cartel of their customers. Cartels, as we have pointed out, raise price above the competitive level and by doing so reduce the demand for their product. The less asphalt the members of the applicators' cartel sell (perhaps because the higher, cartel price induces municipalities to defer [**11] road maintenance), the less they will buy, and so the producers will be hurt. But if the producers have nowhere else to turn to sell their product, as may be the case here because of the specialized character of their plants and the limited radius within which they can ship their product from the plant, the applicator defendants may be able to coerce them into helping to police their cartel by threatening to buy less product from them or pay less for it, as in the well-known case of [*Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 58 L. Ed. 1490, 34 S. Ct. 951 \(1914\)](#); see also [*Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 n. 4, 99 L. Ed. 2d 808, 108 S. Ct. 1515 \(1988\)](#); [*United States v. General Motors Corp.*, 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 \(1966\)](#); [*Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1438 \(7th Cir. 1986\)](#); [*Rossi v. Standard Roofing Inc.*, 156 F.3d 452, 462 \(3d Cir. 1998\)](#).

Alternatively, and more plausibly (at least on this record), the cartelist may have been paying the producers to perform the policing function, rather [**12] than coercing them, by threats, to do so. [*In re Brand Name Prescription Drugs Antitrust Litigation*, supra, 123 F.3d at 614](#). If by refusing to sell to mavericks the producers increase the profits of the applicators' cartel, they create a fund out of which the cartel can compensate them, in the form of a higher price for the purchase of the product, for their services to the cartel. Cf. Elizabeth Granitz & Benjamin Klein, "Monopolization by 'Raising Rivals' Costs': The Standard Oil Case," [*39 J. Law & Econ.* 1 \(1996\)](#). The record contains evidence that one of the producers obtained from applicators in the cartel area [*779] prices that were 4 to 18 (or maybe even 28) percent higher than the prices it obtained from presumably noncolluding applicators in the adjacent region, though there is no suggestion that the producer's costs were any higher in that region. The evidence is contested by the defendants, but the resolution of the contest is for trial. There is also evidence (again contested, and again this is irrelevant to whether summary judgment was properly granted) that the reasons the producers gave for refusing to sell to JTC were pretextual, [**13] as in [*Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 484, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#); [*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 \(1973\)](#)--for example, that JTC was not a good credit risk, even though when JTC offered to pay cash the producers still refused to sell to it. This suggests that the real reason for the refusal was one that the producers didn't want to acknowledge--namely that they were being compensated by the cartel for refusing to sell to a customer whom otherwise they would have been happy to sell to. The combination of the price difference with the evidence of pretext support an inference that the producers were being compensated by the applicators for shoring up the cartel by boycotting an applicator that was competing with the cartel. If so--if the producers were working for the cartel--they were part of the applicators' conspiracy, and for the injury that they inflicted on JTC as agents of the applicators' cartel by denying JTC a source of supply the members of the cartel, three of which are the remaining defendants, would be culpable under elementary principles [**14] of both conspiracy law and agency law. E.g., [*Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 743 \(7th Cir. 1982\)](#); [*Rossi v. Standard Roofing Co.*, supra, 156 F.3d at 472](#).

There may be an innocent explanation for why producers would charge lower prices elsewhere or why they refused to sell to JTC. But the only issue for us, in reviewing the grant of summary judgment for these defendants, is whether a rational jury, having before it the evidence developed to date, could conclude (construing the evidence as favorably to the plaintiff as the record permits) that the reason for the producers' refusal to deal with JTC was that they were in cahoots with the cartel to discourage competition in the applicator market. Given the evidence of cartelization at both the applicator and producer level, the suspicious producer price behavior (suggestive of the producers' having been "paid off" by the cartel to boycott JTC and other upstarts), and the pretextual character of the reasons the producers gave for the refusal to deal, a rational jury could conclude that JTC was indeed the victim of a producers' boycott organized by the applicator defendants. [\[**15\]](#) All the evidence that we have discussed is circumstantial, but of course [HN1](#)[↑] an inference of conspiracy--of, in this case, an informal agreement among the applicators and the producers to deny supply to firms that tried to break into the applicators' cosily divided market--can be drawn from circumstantial evidence as well as from admissions or other direct testimony of the conspirators' communications with each other. [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#); [Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1171-73 \(7th Cir. 1990\)](#); [Petrucci's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1233 \(3d Cir. 1993\)](#). JTC has some direct evidence as well. It strikes us as equivocal, and we have not thought it necessary to discuss it; but we do not mean to suggest that it should not be admitted at the trial to which, we conclude, JTC was entitled.

We have finally to consider whether JTC is entitled to proceed to trial on its [section 2](#) claims as well. One claim is that the defendants engaged in a conspiracy to monopolize the local applicator market. See, e.g. [\[**16\]](#), [Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 540-41 \(7th Cir. 1986\)](#). This is a puzzling offense, as it seems entirely duplicative of a claim under [section 1](#) [\[*780\]](#) of a conspiracy to restrain trade. IIIA Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law: An Analysis of Antitrust Principles and Their Application](#) P 809, pp. 370-71 (1996). But there are cases with facts like those of the present case in which [section 2](#) claims have been allowed, e.g., [Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745, 1999 U.S. App. LEXIS 14616, 1999 WL 435807, at *6, *10 \(10th Cir. 1999\)](#); [Movie 1 & 2 v. United Artists Communications, Inc., 909 F.2d 1245, 1247-48, 1255-56 \(9th Cir. 1990\)](#), and the appellees here do not argue that the jury would be confused to be instructed under [section 2](#) as well as under [section 1](#). Cf. [Gehring v. Case Corp., 43 F.3d 340, 343 \(7th Cir. 1994\)](#); [McDonald v. Sandvik Process Systems, Inc., 870 F.2d 389, 395 \(7th Cir. 1989\)](#).

The second [section 2](#) claim pressed by JTC is that the defendants attempted to monopolize the local applicator market. [\[**17\]](#) [HN2](#)[↑] Attempt to monopolize differs from conspiracy to monopolize primarily in dispensing with the requirement of an agreement, and the usual case therefore is one in which the defendant has or seeks to obtain monopoly power all by itself. E.g., [Elliott v. United Center, 126 F.3d 1003 \(7th Cir. 1997\)](#). There is no suggestion of that here. JTC's argument rather is that the defendants were acting jointly to exclude JTC from the market; there is no evidence that had any single one of the defendants boycotted a producer who sold emulsion to JTC, the producer would have kowtowed. So this theory of violation merges with JTC's last and most audacious theory, that [section 2](#) can be violated by purely tacit collusion. Each of the defendants knew that if all of them boycotted a producer who supplied JTC, that producer would knuckle under; it was thus in their common interest to act jointly. But if they acted jointly in this manner without any agreement to do so, it would be novel to characterize their behavior as conspiratorial within the meaning of either [section 1](#) or [section 2](#) of the Sherman Act.

The question whether purely tacit collusion, or as it is sometimes called oligopolistic [\[**18\]](#) interdependence, might violate the Sherman Act has been much mooted in academic circles, as discussed in IIIA Areeda & Hovenkamp, *supra*, PP 810 et seq. A number of cases treat it as open. [Morgenstern v. Wilson, 29 F.3d 1291, 1295 n. 2 \(8th Cir. 1994\)](#); [Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477, 490 \(9th Cir. 1988\)](#); see also [Springfield Terminal Ry. v. Canadian Pacific Ltd., 133 F.3d 103, 108 \(1st Cir. 1997\)](#). We cannot find a case that squarely supports the theory; the Second Circuit appears to have rejected it, [H.L. Hayden Co. v. Siemens Medical Systems, Inc., 879 F.2d 1005, 1018 \(2d Cir. 1989\)](#); [Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 291 n. 1 \(2d Cir. 1983\)](#) (Friendly, J.); we threw some cold water on it in [Indiana Grocery Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1416 \(7th Cir. 1989\)](#); and the Ninth Circuit rejected it outright in [Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1443 \(9th Cir. 1995\)](#). We cannot agree that it derives any support at all from the fact that [section 2](#), unlike [section 1](#) [\[**19\]](#) (which is limited to combinations, contracts, and conspiracies), does

not require an agreement (unless the specific charge is conspiracy to monopolize). If oligopolistic interdependence can be described as "joint monopolization" or "attempted joint monopolization" (JTC's terms), equally it can be described as a combination or a (tacit) conspiracy.

The most compelling objection to JTC's theory has nothing to do with the language of the Sherman Act but rather is the difficulty of formulating effective relief without transforming the district court into a regulatory agency, here for example charged with compelling producers of emulsion to sell to JTC. At all events the theory is a novel one and when a litigant wants a court to buy a novel theory it has to do more than assert it, wholly ignoring the objections that have been made to it and the cases that have questioned or rejected it. *Huntzinger v. Hastings Mutual Ins. Co.*, 143 F.3d 302, 308 n. 7 (7th Cir. [*781] 1998); *Colburn v. Trustees of Indiana University*, 973 F.2d 581, 593 (7th Cir. 1992); *Turner v. Chicago Housing Authority*, 969 F.2d 461, 463 (7th Cir. 1992); *Burdett v. Miller*, 957 F.2d 1375, 1382 (7th Cir. 1992). [**20] The Second Circuit has put it well: "We have no obligation to review issues that are raised, but not independently and sufficiently developed, in an appellant's main brief." *Karibian v. Columbia University*, 14 F.3d 773, 777 n. 1 (2d Cir. 1994). Indeed not; and so JTC will have to prove an agreement in order to prevail on remand.

Reversed.

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Center for Legal Studies, Inc. v. Lindley

United States District Court for the District of Oregon

August 18, 1999, Decided

Civil No. 99-473-JO

Reporter

64 F. Supp. 2d 970 *; 1999 U.S. Dist. LEXIS 12784 **; 1999-2 Trade Cas. (CCH) P72,667

CENTER FOR LEGAL STUDIES, INC.; ET AL., Plaintiffs, v. RAY LINDLEY; ET AL., Defendants.

Disposition: [**1] Defendants' motion for summary judgment (# 27) as to all claims GRANTED and case dismissed. Any other pending motions denied as moot.

Core Terms

plaintiffs', conspiracy, paralegal, rights, official capacity, defendants', commerce, immunity, training, unreasonable restraint, state official, licensure, deprive, summary judgment motion, summary judgment, civil rights, monopoly, exempt, restraint of trade, antitrust claim, state tort, Certificate, Regulations, interstate, antitrust, damages

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 [down arrow] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact.

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

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

HN2 [down arrow] **Summary Judgment, Entitlement as Matter of Law**

The substantive law governing a claim determines whether a fact is material.

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

HN3 **Summary Judgment, Entitlement as Matter of Law**

Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. Inferences drawn from facts are viewed in the light most favorable to the non-moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

HN4 **Entitlement as Matter of Law, Appropriateness**

Summary judgment regarding whether conduct was within the scope of employment is appropriate when only one reasonable conclusion can be drawn from the facts.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Constitutional Law > State Sovereign Immunity > Abrogation of Immunity

Constitutional Law > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > Waiver > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN5 **State Sovereign Immunity, State Immunity**

The *U.S. Const. amend. XI* bars citizens from bringing claims against a state or state agency in federal court unless the state has waived its immunity or Congress abrogates it under the *U.S. Const. amend. XIV*.

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 prevail on a claim under *15 U.S.C.S. § 1*, plaintiffs must satisfy the following elements: (a) the existence of a combination or conspiracy, (b) entered into by the parties in order to achieve monopoly power and effectuate an unreasonable restraint of trade, and (c) causal antitrust injury.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN7 **Regulated Practices, Price Fixing & Restraints of Trade**

64 F. Supp. 2d 970, *970LÁ999 U.S. Dist. LEXIS 12784, **1

The focus of a [15 U.S.C.S. § 1](#) analysis is on evidence of an unreasonable restraint of trade resulting from action undertaken pursuant to the conspiracy or agreement.

Antitrust & Trade Law > Sherman Act > General Overview

[HN8](#) Antitrust & Trade Law, Sherman Act

With respect to the evidence adduced in support of an antitrust claim in a [15 U.S.C.S. § 1](#) context, [antitrust law](#) limits the range of permissible inferences from ambiguous evidence.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN9](#) Sherman Act, Claims

To prevail on a monopolization of trade or commerce claim under [15 U.S.C.S. § 2](#), plaintiffs must establish the following elements: (1) defendants possess monopoly power in the relevant market, (2) defendants willfully acquired or maintained their monopoly power, and (3) causal antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[HN10](#) Monopolies & Monopolization, Attempts to Monopolize

A claim that defendants attempted to monopolize must establish the following facts: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN11](#) Monopolies & Monopolization, Attempts to Monopolize

The Sherman Act, [15 U.S.C.S. §§ 1](#) and [2](#), also is violated if an organization takes action in furtherance of a plan with the purpose of imposing an unreasonable restraint other than monopoly or price-fixing.

Governments > State & Territorial Governments > Employees & Officials

[HN12](#) State & Territorial Governments, Employees & Officials

State officials who are sued in their official capacities are not persons for purposes of the suit because they assume the identity of the government that employs them.

Governments > State & Territorial Governments > Employees & Officials

64 F. Supp. 2d 970, *970LÁ999 U.S. Dist. LEXIS 12784, **1

HN13 [blue icon] State & Territorial Governments, Employees & Officials

Civil Rights Law > Protection of Rights > Contractual Relations & Housing > Civil Rights Act of 1866

Civil Rights Law > ... > Elements > Color of State Law > General Overview

HN14 [blue icon] Contractual Relations & Housing, Civil Rights Act of 1866

There are two essential elements to a claim brought under [42 U.S.C.S. § 1983](#): (1) that the defendant acted under color of state law and (2) that the conduct deprived a person of rights, privileges, or immunities conferred by the Constitution or laws of the United States.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Environmental Law > Federal Versus State Law > Federal Preemption

Transportation Law > Interstate Commerce > Federal Powers

HN15 [blue icon] Congressional Duties & Powers, Commerce Clause

The negative [commerce clause](#) denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.

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

HN16 [blue icon] Commerce Clause, Dormant Commerce Clause

In analyzing a law under the negative [commerce clause](#), the initial inquiry centers on whether the law is discriminatory or regulates evenhandedly with only incidental effects on interstate commerce. Regulations falling into the latter category are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

Constitutional Law > Equal Protection > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN17 [blue icon] Conspiracy Against Rights, Elements

To prevail on a claim of civil rights conspiracy, plaintiffs must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

Constitutional Law > Equal Protection > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN18[] Conspiracy Against Rights, Elements

A conspiracy under [42 U.S.C.S. § 1985\(3\)](#) is an agreement between two or more individuals to deprive a person of some protected right, where one individual acts in furtherance of the objective of the conspiracy, which causes an actual injury to a person or property, or deprives a person of exercising any right or privilege as a United States citizen. Each member of the conspiracy must have knowledge of the nature and scope of the agreement.

Counsel: For Plaintiffs: James L. Hiller, HITT & HILLER, Portland, OR.

For Plaintiffs: Craig William Barber, CRAIG WILLIAM BARBER, P.C., Golden, CO.

For Defendants: Cynthia A. Botsios, DEPARTMENT OF JUSTICE, Salem, OR.

Judges: ROBERT E. JONES, U.S. District Judge.

Opinion by: ROBERT E. JONES

Opinion

[*972] OPINION AND ORDER

JONES, Judge:

Plaintiffs Center for Legal Studies, Inc. ("CLS") and Scott Hatch, Director of CLS, bring this action against defendants Ray Lindley, Lin Fleming, David Young (both in his official capacity and individually), Oregon Department of Education ("ODE"), Oregon Office of Educational Support Services ("OEES"), State of Oregon, and John Does 1 through 9. Plaintiffs allege claims arising from the actions of ODE and OEES regarding CLS's licensure to operate a paralegal training program in Oregon.

Specifically, plaintiffs allege the following claims and damages: federal antitrust claims (treble damages), defamation and misrepresentation (\$ 500,000), slander per se, interference with contractual relations (\$ 500,000), negligence and **[[**2]]** negligence per se (\$ 250,000), restraint of trade, slander, outrageous conduct, trademark disparagement (\$ 500,000), violations of federally protected rights, violation of civil rights (\$ 250,000), conspiracy to violate protected **[*973]** rights, and unlawful trade practices. Plaintiffs also seek \$ 900,000 in punitive damages, interest, and attorneys' fees.

The case is now before the court on defendants' motion for summary judgment (# 27). For the reasons explained below, defendants' motion is granted in its entirety.

FACTUAL BACKGROUND

Plaintiffs contracted with Western Oregon University ("WOU") to provide a paralegal course at WOU during the fall of 1997 and the spring, summer, and fall of 1998. First Amended Complaint ("Complaint") P 14. The tasks associated with providing the course were to be shared or allocated between WOU and CLS. Complaint P 14; Memorandum in Support of Defendant's Motion for Summary Judgment ("MSJ"), Ex. 3, p. 3. With respect to advertising, CLS developed a flyer, approved by WOU, for the Paralegal Certificate Course, which contained the following statement: "This **Professional Certificate** establishes that an individual has achieved the level of professional [**3] knowledge and competency necessary to work within the legal field." MSJ, Ex. 5.

On September 25, 1997, defendant Young, who was the Administrator of the Office of Degree Authorization ("ODA") at the time, received a letter from Pioneer Pacific College ("PPC") raising concerns regarding the marketing of the WOU program as one for paralegal professional training that prepares the novice for work as a paralegal. Defendant's Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Reply"), Ex. 1, p. 1. Young investigated the course between September 19, 1997 and April 6, 1998 to determine whether CLS needed to be licensed to offer the training program in Oregon. Affidavit of David Young ("Young Aff.") PP 10-17.

As a result of that investigation, Young filed a formal complaint with ODE Specialist Lindley, and both the ODE and ODA corresponded with CLS to determine if an exemption could be crafted for CLS. Affidavit of Ray Lindley ("Lindley Aff.") PP 6-17; Young Aff. PP 10-17; MSJ, Exs. 2-4, 6-10; Affidavit of Scott Hatch ("Hatch Aff."), Exs. 6, 12, 13. These efforts failed, however, because CLS did not seek licensure and WOU did not seek to "sponsor" [**4] CLS and assume responsibility for the program. MSJ, Ex. 9; Affidavit of Michele Price ("Price Aff.") P 13. Some efforts were made to bring the CLS course into compliance, including the development of a new flyer, Hatch Aff., Ex. 15, the distribution of a disclaimer to students, Hatch Aff. P 26, and verification that all students were professionals before entering the course, Hatch Aff., Exs. 16, 18.

WOU terminated its agreement with CLS on June 18, 1998, effective August 2, 1998, after having offered the course three times for total revenue of \$ 25,440, seventy percent (\$ 17,808) of which went to plaintiffs. Price Aff. PP 12, 14. CLS notified Oregon of its intent to sue on May 5, 1998. Complaint P 26.

STANDARD

HN1[] Summary judgment should be granted 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\(c\)](#). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. [Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#). A scintilla of evidence, [**5] or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. [United Steelworkers of America v. Phelps Dodge, 865 F.2d 1539, 1542 \(9th Cir. 1989\)](#).

HN2[] The substantive law governing a claim determines whether a fact is material. [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#); see also [T.W. Elec. Service v. Pacific Elec. Contractors, 809 F.2d 626, 630 \(9th Cir. 1987\)](#). **HN3**[] Reasonable doubts as to [*974] the existence of a material factual issue are resolved against the moving party. [T.W. Elec. Service, 809 F.2d at 631](#). Inferences drawn from facts are viewed in the light most favorable to the non-moving party. [Id. at 630-31](#).

DISCUSSION

Plaintiffs' claims involve state tort claims as well as federal antitrust and civil rights claims. As discussed below, under the Oregon Tort Claims Act ("OTCA"), the state of Oregon is the only proper defendant for state tort claims,

and the state is immune from suit in federal court under the [Eleventh Amendment](#). Plaintiffs' federal claims also fail for the reasons explained [**6] below. I thus conclude that summary judgment in favor of defendants is appropriate.

A. State Tort Claims

1. Oregon Tort Claims Act

Plaintiffs bring a variety of tort claims against defendants, as noted above. The state argues that the OTCA substitutes the state as the only defendant in actions based on alleged torts of a public body or its employees, officers, and agents acting "within the scope of their employment or duties." See [ORS 30.265](#). The OTCA's definition of a "public body" includes departments, agencies, boards, commissions, and political subdivisions of the state as well as intergovernmental organizations. See [ORS 30.260\(4\)](#). The statute thus covers all named defendants, including Lindley, Fleming, and Young, as long as they were acting within the scope of their employment or duties. Plaintiffs do not allege that defendants Lindley or Fleming were acting outside the scope of their employment. Thus, under the OTCA, the state is substituted as the only proper defendant in this suit against the ODE, OEES, and defendants Lindley and Fleming.

Plaintiffs do contend that defendant Young was not acting within the scope of his employment in his contact with [**7] CLS, arguing that Young, "on his own volition and motivated by his personal agenda, which was not related to the ODA, maliciously raised the claims that CLS was allegedly violating ORS 345.603." Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Response"), p. 7. This claim evidently is founded on plaintiffs' belief that Young had a relationship with PPC which motivated his investigation of CLS. Response, p. 7; Plaintiffs' Statement of Material Fact in Opposition to Defendants' Motion for Summary Judgment ("Response Facts") P 10; Hatch Aff. P 19. Plaintiffs further argue that under [Berry v. Dept. of Gen'l. Services, 141 Ore. App. 225, 228, 917 P.2d 1070 \(1996\)](#), defendant Young cannot gain automatic immunity via the OTCA based solely on the Attorney General's determination that the state is the only proper defendant.

In [Brungardt v. Barton, 69 Ore. App. 440, 443, 685 P.2d 1021 \(1984\)](#), the Oregon Court of Appeals laid out the following considerations in analyzing whether a defendant was acting within the scope of his or her employment within the meaning of [ORS 30.265\(1\)](#): (a) whether the conduct was of the kind the defendant was hired [**8] to perform, (b) whether the conduct occurred within an "authorized time and space," and (c) whether the defendant was "motivated, at least in part, by a purpose to serve the employer." [69 Ore. App. at 443](#) (citing [Stanfield v. Laccoarce, 284 Ore. 651, 655, 588 P.2d 1271 \(1978\)](#)). [HN4](#) Summary judgment regarding whether conduct was within the scope of employment is "appropriate when only one reasonable conclusion can be drawn from the facts." *Id.* (citing [Stanfield, 284 Ore. at 655](#); [Thomas v. Parker Refrigerated Services, Inc., 61 Ore. App. 234, 240, 657 P.2d 692 \(1983\)](#)) (affirming the trial court's grant of defendant's motion for summary judgment where, under the facts before the court, the excessive use of force was not necessarily outside the scope of employment since defendant was authorized to use force under some circumstances).

[*975] In support of the claim, plaintiffs offer little more than statements made in plaintiff Hatch's own affidavit. Indeed, the only other evidence cited by plaintiffs is a statement made at the end of a two-page letter from Young to WOU provost Betty Youngblood, asking, "Do you not agree that my relationship [**9] with officials of other schools is irrelevant?" Hatch Aff., Ex. 6, p. 2.

An analysis of the *Brungardt* factors in the circumstances presented here leaves no doubt that defendant Young's conduct in "raising the claims" against CLS fell within the scope of his employment. [Brungardt, 69 Ore. App. at 443](#).

1. Conduct of kind defendant was hired to perform

Young conducted an investigation upon receiving the complaint from PPC, contacted defendant Lindley, and reported his investigation findings to WOU and to CLS as was his responsibility. Reply, Ex. 1, 2; Hatch Aff., Ex. 2, 6,

10. Young's conduct was authorized, even required, by state regulations and was, therefore, of the type he was hired to perform. See [ORS 348.603](#);¹ OAR 583-040-0005;² [\[**10\] ORS 345.030](#).³

Plaintiffs contend that [ORS 345.015\(4\)](#) exempted them from state regulation under ORS Chapter 345 because it exempts training that is "advertised or promoted to be in the nature of professional self-improvement but *is not advertised or promoted* as leading to or fulfilling the requirements for licensing, certification, accreditation or education credentials." (Emphasis added.) However, the statute clearly does not exempt those programs that are promoted as leading to certification, and it was plaintiffs' promotion of the program as leading to a "Professional Certificate" that apparently prompted the complaint and subsequent investigation of the program. Thus, plaintiffs' program is not exempt under [ORS 345.015](#), [\[**11\]](#) and defendant Young's conduct in dealing with CLS was of the kind he was hired to perform.

b. *Conduct occurred in authorized time and space*

There is no allegation that Young's conduct was performed outside of the space and time related to his employment.

c. *Conduct motivated by purpose to serve employer*

While plaintiffs allege that Young was motivated by "his personal agenda," Response, p. 7, they provide no evidentiary support for this assertion and none can be inferred from the record, particularly as Young initiated the investigation only upon receiving a complaint and was responsible for responding to the complaint. Thus, the only reasonable conclusion to be drawn from the facts is that Young was motivated by a purpose to serve his employer, the ODA and state of Oregon. Hence, Young's conduct was within the scope of his employment.

Plaintiffs' argument that, under *Berry*, the court cannot simply accept the Attorney General's assertion of immunity is accurate but does not alter my decision today. *Berry* held that the court should determine for itself whether the defendant [\[*976\]](#) was acting within the scope of employment and should not dismiss the claims against a defendant [\[**12\]](#) in his or her individual capacity "until it is satisfied that there is either no legal or no factual basis for them." [141 Ore. App. at 231](#). In that case, the trial court had not made an independent determination of either the factual or legal basis for immunity. In contrast, I have analyzed whether defendant Young was acting within the scope of his employment and determined that he was within the scope of his employment in the conduct alleged here, thus *Berry* is not controlling. I conclude that the state of Oregon is the only proper defendant for all of the state tort claims.

2. *Eleventh Amendment Immunity*

It is well established that [HNS](#)⁴ the [Eleventh Amendment](#) bars citizens from bringing claims against a state or state agency in federal court unless the state has waived its immunity or Congress abrogates it under the [Fourteenth Amendment](#). See [Alden v. Maine](#), 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999); [Seminole Tribe of Florida v. Florida](#), 517 U.S. 44, 54, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996); [Duffy v. Riveland](#), 98 F.3d 447, 452 (9th Cir. 1996) (citing [Atascadero State Hospital v. Scanlon](#), 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)).⁵ The state of Oregon has not consented to the suit, MSJ, p. 5, and plaintiffs have not shown a basis

¹ [ORS 348.603](#) delegates to the ODA the responsibility of terminating "substandard or fraudulent degree activities" and reviewing "proposed new publicly funded post-secondary programs and locations." (WOU is a publicly funded post-secondary school.)

² OAR 583-040-0005(1) gives the ODA the "responsibility to prevent new publicly funded post-secondary programs or locations from causing detrimental duplication or significantly adverse intersegmental impact."

³ [ORS 345.030](#) requires the licensure of career schools, defined in [ORS 345.010](#) as "any private proprietary professional, technical, home study, correspondence, business or other school instruction, organization or person that offers any instruction or training *for the purpose or purported purpose* of instructing, training or preparing persons for any profession." (Emphasis added.)

for federal court jurisdiction over the state for these claims. Thus, the [Eleventh Amendment](#) bars the state tort claims raised in plaintiffs' complaint from being heard in this court.

B. Antitrust Claims

Plaintiffs claim that defendants violated the Sherman Act, [15 U.S.C. §§ 1, 2](#), "in restraining trade and intent to monopolize trade in a specific geographic area through activities prohibited by law including 'sham' complaints to governmental agencies designed to restrain trade and to drive [plaintiffs] from a specific geographic market through harassment rather than through legitimate process." Complaint P 31.

HN6[¹⁴] To prevail on a claim under [15 U.S.C. § 1](#), plaintiffs must satisfy the following elements: "(a) the existence of a combination or conspiracy, (b) entered into by the parties in order to achieve monopoly power and effectuate an unreasonable restraint of trade, and (c) causal antitrust injury." [Foremost Int'l. Tours, Inc. v. Qantas Airways Ltd., 478 F. Supp. 589, 594 \(D. Haw. 1979\)](#) (citing [Knutson v. Daily Review, Inc., 548 F.2d 795 \(9th Cir. 1976\)](#)). [¹⁴]

HN7[¹⁵] The focus of a [§ 1](#) analysis is on "evidence of an unreasonable restraint of trade resulting from action undertaken pursuant to the conspiracy or agreement." [Foremost, 478 F. Supp. at 595](#). **HN8**[¹⁶] With respect to the evidence adduced in support of an antitrust claim in a [§ 1](#) context, "[antitrust law](#) limits the range of permissible inferences from ambiguous evidence." [Pacific Exp., Inc. v. United Airlines, Inc., 959 F.2d 814, 816 \(9th Cir. 1992\)](#)(quoting [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#)).

HN9[¹⁷] To prevail on a monopolization of trade or commerce claim under [15 U.S.C. § 2](#), plaintiffs must establish the following elements: (1) defendants possess monopoly power in the relevant market, (2) defendants willfully acquired or maintained their monopoly power, and (3) causal antitrust injury. See [Pacific Express, 959 F.2d at 817](#) (citing [Movie 1 & 2 v. United Artists Communications Inc., 909 F.2d 1245, 1254 \(9th Cir. 1990\)](#)). **HN10**[¹⁸] A claim that defendants *attempted* to monopolize must establish the following facts: (1) specific [¹⁵] intent to control prices or destroy competition; (2) predatory or anti-competitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury. [Pacific Express, 959 F.2d at 817](#) (citing [Movie 1 & 2, 909 F.2d at 1254](#)). Within the meaning of [§ 2](#), "monopoly" means "the acquisition of power to fix prices, limit production, and deteriorate quality." [Lynch v. Magnavox, Co. \[**977\] et al., 94 F.2d 883, 888 \(9th Cir. 1938\)](#) (citing [Standard Oil Co. v. United States, 221 U.S. 1, 52, 53, 61, 55 L. Ed. 619, 31 S. Ct. 502 \(1911\)](#)). **HN11**[¹⁹] The Sherman Act also is violated if an organization takes action in furtherance of a plan with the purpose of imposing an "unreasonable restraint" other than monopoly or price-fixing. See [Lynch, 94 F.2d at 890](#).

Defendants do not maintain monopoly power in the paralegal training market. Defendants regulate plaintiffs and plaintiffs' competition in the relevant market; they do not compete with plaintiffs in the relevant market. Plaintiffs allege that defendants restrain trade through "sham" complaints, presumably referring to the complaint lodged [¹⁶] by PPC. Plaintiffs further allege that defendants used harassment, rather than legitimate process, to effectuate this restraint of trade. While the correspondence between Oregon's agents and CLS was somewhat heated, plaintiffs' evidence falls short of demonstrating that defendants harassed them. Indeed, defendant Lindley repeatedly attempted to resolve the dispute, while plaintiffs responded both by objecting to the demands and, occasionally, by acquiescing to them. Thus, plaintiffs also fail to establish an unlawful motive on behalf of defendants.

In summary, plaintiffs have not shown that defendants intended to destroy competition in the paralegal training market, or that defendants' regulatory efforts were predatory or anti-competitive and aimed at achieving an illegal purpose such as unreasonable restraint of trade. Thus, plaintiffs have failed to establish an antitrust claim under either [§ 1](#) or [§ 2](#) of the Sherman Act. Because plaintiffs' claim for treble damages under the Clayton Act, [15 U.S.C. § 15](#), is based upon their antitrust claim, plaintiffs' claim for treble damages also fails.

C. Federal Civil Rights Claims

1. [Section 1983](#)

Plaintiffs [**17] allege that defendants infringed upon their civil rights "to engage in interstate commerce and to be free from unreasonable restraints of trade." Complaint P 86. Because plaintiffs also allege that this court has jurisdiction under [42 U.S.C. § 1983](#), I assume that they mean to bring their civil rights claim under [§ 1983](#).⁴ Plaintiffs further allege that the defendants' uneven enforcement of [ORS 345.030](#) constitutes unconstitutional discrimination, because the statute's predecessor, [ORS 348.835](#), was ruled unconstitutional in part because it applied differently to out-of-state schools operating in Oregon. See [City University v. State of Oregon, Office of Educational Policy and Planning, 126 Ore. App. 459, 870 P.2d 222 \(1994\)](#); Response, pp. 10-11.

[**18] Because claims brought against state officials in their official capacity and claims brought against state officials in their personal or individual capacity are treated differently, these claims are addressed separately here.

a. Defendants Sued in Official Capacity

The Supreme Court determined in [Will v. Michigan Dept. of State Police, 491 U.S. 58, 64, 105 L. Ed. 2d 45, 109 S. Ct. 2304 \(1989\)](#), that "a State is not a person within the meaning of [§ 1983](#)." [491 U.S. at 64](#); see also [Thompson v. City of Los Angeles, 885 F.2d 1439, 1443 \(9th Cir. 1989\)](#) (determining that the University of California is "an arm of the state" and therefore not a person within the meaning of [§ 1983](#)). Suits against state officials in their official capacity are suits "against the official's office" and thus "no different from a suit against the State itself." [Will, 491 U.S. at 71.](#)

To resolve any doubts regarding state officials' liability in [§ 1983](#) claims, the Supreme Court held in [Hafer v. Melo, 502 U.S. 21, 27, 116 L. Ed. 2d 301, 112 S. Ct. 358 \(1991\)](#), that [HN12](#)[↑] state officials who are sued in their official capacities [**19] "are not 'persons' for purposes of the suit because they assume the identity of the government that employs them." [502 U.S. at 27](#) (citing [Will, 491 U.S. 58 at 71](#)). However, [HN13](#)[↑] state officials who are sued in their personal capacities are "persons" within the meaning of [§ 1983](#). See [Hafer, 502 U.S. at 27-29](#). As such, the focus of analysis is not on "the capacity in which the officer inflicts the alleged injury" but on the capacity in which the state official is sued. [Id. at 26.](#)

In this case, plaintiffs sue all of the defendants in their official capacities only, except defendant Young. Thus, the [§ 1983](#) claims against defendants ODE, OEES, the State of Oregon, Lindley, Fleming, and Young in his official capacity are not properly before this court, because the state officials sued in their official capacities, arms of the state, and the state itself, are not persons within the meaning of [§ 1983](#) and therefore are not liable under [§ 1983](#). See [Will, 491 U.S. at 64](#); [Thompson, 885 F.2d at 1443](#); see also [Peters v. Lieuallen, 693 F.2d 966 \(9th Cir. 1982\)](#) (finding that a suit brought [**20] under either [§ 1981](#) or [§ 1983](#) against the Oregon State Board of Higher Education is "a suit against the state qua state" and hence barred by the [Eleventh Amendment](#)); [Jackson v. Hayakawa, 682 F.2d 1344, 1350 \(9th Cir. 1982\)](#) (finding the University of California and the Board of Regents to be "instrumentalities of the state for purposes of the [Eleventh Amendment](#)").

b. Defendant Sued in Personal Capacity

With respect to their [§ 1983](#) claim against defendant Young in his personal capacity, plaintiffs fail to satisfy the elements of a [§ 1983](#) claim, because defendant Young's conduct remained within the confines of his official authority. [HN14](#)[↑] There are two essential elements to a claim brought under [§ 1983](#): (1) that the defendant acted under color of state law and (2) that the conduct deprived a person of rights, privileges, or immunities conferred by

⁴ Plaintiffs claim that this court has subject matter jurisdiction pursuant to [42 U.S.C. § 1983](#), but [§ 1983](#) contains no jurisdictional provision. Congress provided for federal jurisdiction over federal civil rights claims in [28 U.S.C. § 1343](#). See [Ybarra v. Town of Los Altos Hills, 503 F.2d 250, 252 \(9th Cir. 1974\)](#); [York v. Story, 324 F.2d 450 \(9th Cir. 1963\)](#). Strictly speaking, federal courts have subject matter jurisdiction over [§ 1983](#) claims pursuant to [28 U.S.C. § 1331](#), as long as the complaint alleges "a right to recover under the Constitution and laws of the United States," and is not "wholly insubstantial and frivolous." [Keniston v. Roberts, 717 F.2d 1295, 1298 \(9th Cir. 1983\)](#) (quoting [Jackson Transit Authority v. Local Division 1285, 457 U.S. 15, 21 n.6, 72 L. Ed. 2d 639, 102 S. Ct. 2202 \(1982\)](#)).

the Constitution or laws of the United States. See [West v. Atkins, 487 U.S. 42, 48, 101 L. Ed. 2d 40, 108 S. Ct. 2250 \(1988\)](#); [Daniels v. Williams, 474 U.S. 327, 88 L. Ed. 2d 662, 106 S. Ct. 662 \(1986\)](#).

With respect to the first element, Young's actions fell within the purview of his responsibilities [**21] as defined by Oregon law, as discussed previously, and he was, therefore, acting under color of state law. See [ORS 348.603](#), [ORS 345.030](#), OAR 583-040-0005.

With respect to the second element, however, Young's conduct did not violate rights conferred to plaintiffs by either the Constitution or federal statutes. Plaintiffs assert that Young violated their right to "engage in interstate commerce" and "be free from unreasonable restraints of trade." Complaint P 86. Young did not violate the constitutional rights, conferred to plaintiffs in the "negative" [commerce clause](#),⁵ when he required that CLS either seek licensure or obtain sponsorship from WOU to continue operating as a career school in Oregon.

[*979] [HN15](#)[↑] The "negative" [commerce clause](#) "denies the States the power unjustifiably to discriminate [**22] against or burden the interstate flow of articles of commerce." [Oregon Waste Systems, Inc. v. Environmental Quality Comm'n. of the State of Oregon, 511 U.S. 93, 98, 128 L. Ed. 2d 13, 114 S. Ct. 1345 \(1994\)](#). [HN16](#)[↑] In analyzing a law under the negative [commerce clause](#), the initial inquiry centers on whether the law is discriminatory or "regulates evenhandedly with only "incidental" effects on interstate commerce." *Id.* (quoting [Hughes v. Oklahoma, 441 U.S. 322, 336, 60 L. Ed. 2d 250, 99 S. Ct. 1727 \(1979\)](#)). Regulations falling into the latter category are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* (quoting [Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 \(1970\)](#)).

Plaintiffs contend that [ORS 345.030](#) is discriminatory in its enforcement, but they apparently concede that it is not discriminatory on its face. See Complaint, pp. 10-11. Thus, the focus of this analysis is on the incidental effects of the law on interstate commerce. The law in question is not excessively burdensome, as it merely requires the licensure of career [**23] schools. See [ORS 345.030](#). The standards for licensure are codified in [ORS 345.325](#), which plaintiffs do not challenge. Plaintiffs did not seek licensure, nor do they assert that the standards were too stringent to permit compliance. Thus, plaintiffs have failed to demonstrate that defendant Young violated [§ 1983](#) in his contact with CLS.

2. [Section 1985\(3\)](#)

Plaintiffs also claim that defendants conspired to interfere with plaintiffs' civil rights, in violation of [42 U.S.C. § 1985\(3\)](#). [HN17](#)[↑] To prevail on a claim of civil rights conspiracy, plaintiffs must allege and prove four elements:

- (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

[Keenan v. Allan, 889 F. Supp. 1320, 1364 \(E.D. Wash. 1995\)](#), aff'd., [91 F.3d 1275 \(9th Cir. 1996\)](#).

[HN18](#)[↑] A conspiracy under [§ 1985\(3\)](#) is "an [**24] agreement between two or more individuals to deprive a person of some protected right, where one individual acts in furtherance of the objective of the conspiracy, which causes an actual injury to a person or property, or deprives a person of exercising any right or privilege as a United States citizen." [Rios v. Navarro, 766 F. Supp. 1158, 1162 \(S.D. Fla. 1991\)](#). Each member of the conspiracy "must have knowledge of the nature and scope of the agreement." *Id.*

The second element of a civil rights conspiracy claim requires a showing of both (a) a "legally protected right" and (b) "deprivation of that right motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory

⁵ Plaintiffs do not specify what federal statute or portion of the Constitution defendants allegedly violated. Given the nature of the rights plaintiffs assert, I analyze their claim under the "negative" [Commerce Clause](#).

animus behind the conspirators" action." *Keenan, 889 F. Supp. at 1364* (quoting *Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992)*) (dismissing the conspiracy claim on motion for summary judgment, primarily due to plaintiffs' insufficient showing under the second element, finding that "persons who complain about sexual harassment" is not a qualifying class"). The "class" that is targeted by the defendant must be "something more [**25] than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors." *Keenan, 889 F. Supp. at 1364*; see also *Lopez v. Arrowhead Ranches, et al., 523 F.2d 924, 928 (9th Cir. 1975)* ("Of itself, the creation of a class of victims by tortious conduct does not bring a claim within § 1985(3); such a class is created by every tort").

Aside from the bare allegations, plaintiffs provide no evidence to support [*980] even an inference of conspiracy to deprive plaintiffs of the rights conferred under the negative *commerce clause* or of Young's alleged intent to drive CLS from the paralegal training market. Indeed, though CLS did not attempt to gain licensure, defendants did attempt to craft an exemption for CLS.

Certainly, the second element is not satisfied here. Plaintiffs appear to claim that defendants violated their federally protected rights by conspiring "together and with employees of Oregon . . . to drive Plaintiffs from the marketplace." Complaint P 89. Plaintiffs apparently claim that this action violated their "right to conduct commerce in Oregon and to be free from unreasonable restraints, free from arbitrary and [**26] selective government interference, and free from conspiracies involving government employees to violate Plaintiff's protected rights." Complaint P 82.

Plaintiffs' claim appears to be precisely the type to which the Ninth Circuit referred in *Lopez*, in that the "class" plaintiffs assert here is comprised of "paralegal training programs regulated by defendants." Thus, plaintiffs have failed to satisfy the legal requirements for a civil rights conspiracy claim. Even if plaintiffs stated a claim under § 1985(3), they failed to provide any evidence to survive defendants' motion for summary judgment.

CONCLUSION

Defendants' motion for summary judgment (# 27) as to all claims is GRANTED, and this case is dismissed. Any other pending motions are denied as moot.

DATED this 18th day of August, 1999.

ROBERT E. JONES

U.S. District Judge



SMS Sys. Maintenance Servs. v. Digital Equip. Corp.

United States Court of Appeals for the First Circuit

August 19, 1999, Decided

No. 99-1009

Reporter

188 F.3d 11 *; 1999 U.S. App. LEXIS 19715 **; 1999-2 Trade Cas. (CCH) P72,617

SMS SYSTEMS MAINTENANCE SERVICES, INC., Plaintiff, Appellant, v. DIGITAL EQUIPMENT CORPORATION, Defendant, Appellee.

Subsequent History: Certiorari Denied February 28, 2000, Reported at: [2000 U.S. LEXIS 1585](#).

Prior History: [\[**1\]](#) APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Edward F. Harrington, U.S. District Judge.

Disposition: Affirmed.

Core Terms

warranty, aftermarket, customers, manufacturer, consumers, switching, purchasers, installed, hardware, products, software, costs, mid-range, prices, monopoly power, relevant market, foremarket, antitrust, markets, brand, terms, locked-in, package, firms, market power, anticompetitive, three-year, machines, offering, lock-in

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Defenses

Criminal Law & Procedure > Defenses > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Sherman Act > General Overview

[**HN1**](#) Sherman Act, Defenses

The single product defense is customarily invoked to rebut allegations of an illegal tie brought under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Sherman Act > General Overview

[**HN2**](#) [down] **Sherman Act, Defenses**

The success of a single product defense invoked to rebut allegations of an illegal tie brought under [§ 1](#) of the Sherman Act, [15 U.S.C. § 1](#), ordinarily hinges on observations of actual market practices. If evidence shows that there is significant demand for separate components of what is alleged to be a single product and the product is in fact sold in those forms, there is no single product. Conversely, if all or substantially all competing firms always or almost always, discounting occasional accommodations for customers with special needs, sell two seemingly separate items together, then the two attributes may be treated as components of a single product.

Antitrust & Trade Law > Sherman Act > Claims

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

[**HN3**](#) [down] **Sherman Act, Claims**

To prove a violation of [§ 2](#) of the Sherman Act, [15 U.S.C. § 2](#), the plaintiff must show both that the defendant has monopoly power in a relevant market and that it has maintained or increased that power through anticompetitive conduct.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

[**HN4**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

The purpose of defining a relevant market is to assist in determining whether a firm has market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

[**HN5**](#) [down] **Regulated Practices, Market Definition**

The monopolist's market power consists of having sufficient economic muscle to permit it to raise prices well in excess of competitive levels without inducing customers to turn elsewhere.

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

[**HN6**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

A traditional product or geographic market definition exercise would be the starting point in an aftermarket case if, but only if, a large market share in such a derivative market invariably translated into (or at least reliably indicated) monopoly power in that market.

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

[**HN7**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

Most firms that service their manufactured products can be expected to have a very high percentage of the services aftermarket for those products.

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

[**HN8**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

The foremarket does not always exert sufficient competitive pressure to insulate the aftermarket from monopolistic practices.

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

[**HN9**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

A court may conclude that the aftermarket is the relevant market for antitrust analysis only if the evidence supports an inference of monopoly power in the aftermarket that competition in the primary market appears unable to check.

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

[**HN10**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

In any market with some degree of product differentiation, goods of a single brand will enjoy a certain degree of uniqueness. While that uniqueness may account for a manufacturer having a large market share in the services aftermarket for its own brand, that fact, without more, does not suffice to establish that the manufacturer enjoys monopoly power in that market.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

[**HN11**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

Unless the evidence shows that the manufacturer can exert raw power in the aftermarket without regard for commercial consequences in the foremarket, the aftermarket is not the relevant market. This means that, for antitrust cases involving derivative markets, courts cannot reflexively resort to traditional product market definition methods, but must look to other modes of scrutinizing the existence and measure of market power.

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

[**HN12**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

In aftermarket situations, market power vel non must be assessed by weighing the complete package of primary equipment, parts, and services.

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

[**HN13**](#) [+] **Monopolies & Monopolization, Actual Monopolization**

As long as a warranty does not limit a customer's choice of service provider, there is usually no antitrust problem.

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

[**HN14**](#) [+] **Monopolies & Monopolization, Actual Monopolization**

Unless a substantial number of preexisting customers are locked-in, defections from the manufacturer's installed base, coupled with losses in the foremarket, in all probability will sabotage any effort to exploit the aftermarket.

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

[**HN15**](#) [+] **Monopolies & Monopolization, Actual Monopolization**

To make out a claim under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), the plaintiff must show that the alleged monopolist has engaged in improper exclusionary conduct.

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

[**HN16**](#) [+] **Monopolies & Monopolization, Actual Monopolization**

Antitrust law is designed to protect competition, not competitors. If there is no objective indication of harm to competition, a court cannot stifle a firm's ability to compete in the primary market just because some of its aftermarket competitors complain that they have lost business as a result. Such harm frequently occurs due to the specialized and dependent nature of the investment made by aftermarket firms rather than as the anticompetitive exercise of market power by manufacturers.

Counsel: Ronald S. Katz, with whom Anne Fiero, Coudert Brothers, Ronald F. Kehoe, and Warner & Stackpole LLP were on brief, for appellant.

J. Anthony Downs, with whom Shepard M. Remis, P.C., Anthony S. Fiotto, and Goodwin, Procter & Hoar LLP were on brief, for appellee.

Judges: Before Torruella, Chief Judge, Campbell, Senior Circuit Judge, and Selya, Circuit Judge.

Opinion by: SELYA

Opinion

[*13] **SELYA, Circuit Judge.** In a complaint filed in the United States District Court for the District of Massachusetts, SMS Systems Maintenance Services, Inc. (SMS) accused Digital Equipment Corporation (DEC) of violating Section 2 of the Sherman Act, 15 U.S.C. § 2, by integrating three-year warranties with sales of computer systems. SMS, an equipment servicer, asserted that deploying warranties in this manner unfairly constrained consumers' ability to choose their preferred service providers and thereby paved the way for a monopoly in the services aftermarket for DEC computers. The district judge granted summary judgment in DEC's favor. See [*2] SMS v. DEC, 11 F. Supp. 2d 166 (D. Mass. 1998). Although our reasoning does not mirror that of the lower court, we nonetheless affirm.

I

We sketch the facts, viewing them as favorably to SMS as reason and the record will permit. See Conward v. Cambridge Sch. Comm., 171 F.3d 12, 17 (1st Cir. 1999) (articulating summary judgment standard). We furnish additional details as they become relevant to the ensuing analysis.

DEC manufactures an array of hardware, ranging from personal computers (PCs) to mainframes. In the market for mid-range computers, DEC battles other heavyweights (e.g., IBM, Sun Microsystems, and Hewlett-Packard) for the attention and affection of consumers. In April 1994, DEC introduced its "Alpha" line, consisting largely of mid-range servers. These models were more powerful and more versatile than their predecessors and embodied certain distinctive technological advances. DEC included a three-year warranty as part of the mid-range Alpha [*14] package. Although multi-year warranties for PCs had become standard fare in the early 1990s, a three-year warranty in the mid-range server market was uncommon in 1994. One-year warranties were the [*2] norm -- indeed, DEC itself provided a one-year warranty in respect to its pre-Alpha products and continued to offer one-year warranties in connection with sales of its established "VAX" line of mid-range computers even after it introduced the Alpha models.¹

DEC's conception of a warranty as an instrument of competition is scarcely original. See, e.g., 3A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, P 761, at 55 (1996) (referring to warranty protection as a tool of "non-price competition" that has particular importance for firms competing in robust product-differentiated markets for durable equipment). A warranty functions essentially as an insurance policy. See generally Thomas J. Holdych and Bruce D. Mann, The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties, 45 DePaul L. Rev. 781, 794-99 (1996). The customer pays the purchase [*4] price and receives not only the purchased product itself but also the manufacturer's promise to repair defects and supply replacement parts without extra charge (usually under certain conditions and during a certain interval). Because a warranty is a mechanism through which a consumer can protect himself against the uncertainties inherent in owning a product that likely will require parts and service over time, the product's allure increases as the warranty terms become more generous. This attraction is magnified in some cases because a strong warranty signals a manufacturer's faith in the quality of its product. In theory, then, warranties boost sales (and, ultimately, profits).

Given this general experience, SMS's claim that DEC's warranty is anticompetitive appears odd at first blush. There is, however, a certain offbeat logic to SMS's position. The aftermarket for servicing computers is both dynamic and lucrative. While manufacturers usually seek to service the hardware that they produce, other firms compete with them for this business. Many of these independent service organizations (ISOs) operate nationally or regionally and some specialize in servicing particular brands of [*5] equipment. A manufacturer's customers may in fact prefer to use these ISOs for a variety of reasons, including loyalty, convenience, response time, pricing, and perceived quality of service.

Against this backdrop, SMS -- an ISO that operates nationally and specializes in servicing DEC equipment -- puts a sinister cast on DEC's introduction of "mandatory" warranties (that is, warranties that accompany the product at no extra charge). SMS contends that current users of DEC equipment, known in the industry argot as its "installed base," are effectively "locked-in" to buying DEC computers in the future because of the magnitude of their sunk

¹ In 1995, DEC extended the three-year warranty policy to new versions of the mid-range VAX systems.

costs (e.g., outlays related to training employees to work with DEC systems and to the acquisition of expensive software that is compatible with those systems). This lock-in phenomenon, SMS warns, creates an environment in which a warranty can function as a vehicle for aftermarket monopolization by creating a disincentive for computer purchasers to consult service firms other than the manufacturer itself. In SMS's view, a purchaser who has a warranty will not readily take his service business to an ISO because no consumer wants to pay twice for the [**6] same service -- and the longer the warranty, the less the opportunity for ISOs to compete. SMS predicts that, if such practices are left unchecked, lost business opportunities will ruin ISOs, eliminate competition, and [*15] eventually enable manufacturers to raise aftermarket prices.

II

Before moving to an analysis of SMS's claim, we must put a Trojan horse out to pasture. DEC suggests that this case involves only a "single product," because the challenged three-year warranty is nothing but an "attribute" of the hardware. If this were true, the primary equipment market would constitute the relevant market and DEC's share of it (according to its estimates, at least) would be far below what SMS would need to show a credible threat of monopolization, and, thus, the case would vanish quietly into the night.

HN1[] The single product defense is customarily invoked to rebut allegations of an illegal tie brought under Section 1 of the Sherman Act ([15 U.S.C. § 1](#)). See, e.g., [Jefferson Parish Hosp. Dist. No. 2 v. Hyde](#), [466 U.S. 2, 18-25, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). In the context of SMS's Section 2 monopoly claim, DEC appears to wield the [**7] defense in a different manner, i.e., as a means of eliminating the possibility that its warranty has any relevant connection with the services aftermarket. Although we are tempted to dismiss DEC's assertion simply as a matter of common sense, the best indication of its infirmity resides in the record.

HN2[] The success of a single product defense ordinarily hinges on observations of actual market practices. If evidence shows that there is significant demand for separate components of what is alleged to be a single product and the product is in fact sold in those forms, there is no single product. See [Eastman Kodak Co. v. Image Tech. Servs., Inc.](#), [504 U.S. 451, 462-63, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#); 10 Areeda & Hovenkamp, *supra*, P 1744, at 203. Conversely, if all or substantially all competing firms always or almost always (discounting occasional accommodations for customers with special needs) sell two seemingly separate items together, then the two attributes may be treated as components of a single product. See *generally* 10 Areeda & Hovenkamp, *supra*, P 1744, at 197-98.

In mounting its single product defense, DEC relies heavily on the affidavit [**8] of Professor Jerry Hausman, a distinguished economist, who explains uncontroversially that warranties are tools used by manufacturers to promote the attractiveness of their products and thus to gain a competitive edge. Using this statement as a springboard, DEC vaults to the conclusion that hardware and warranty are a single product. But DEC leaps without looking. The record is pellucid that, while some other computer manufacturers bundle warranties with their machines, the practice, especially with regard to mid-range computers, is anything but universal.

Vendors of mid-range computers offer a variety of ancillary packages with their products, including service contracts, warranties of differing lengths, or nothing at all. Indeed, a DEC official, Jane Heaney, affirmed in the course of pretrial discovery that differing service packages are items that customers can (and do) use to differentiate between competing computer brands. In competitive markets, suppliers' offerings generally reflect consumer demand. See, e.g., [Digital Equipment Corp. v. Uniq Digital Tech., Inc.](#), [73 F.3d 756, 762 \(7th Cir. 1996\)](#). We therefore conclude -- at least for the purpose of summary [**9] judgment -- that the mid-range computer market treats warranty and equipment as separate products.

III

Having laid to rest DEC's attempt to shortstop the requisite analysis, we turn to the parameters of SMS's burden. **HN3**[] To prove a violation of Section 2 of the Sherman Act, the plaintiff must show both that the defendant has

monopoly power in a relevant market and that it has maintained or increased that power through anticompetitive conduct. See [United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#); [Town of Concord v. Boston Edison Co., 915 F.2d 17, 21 \(1st Cir. 1990\)](#); [Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 373 \(7th Cir. 1986\)](#). SMS's monopolization hypothesis begins with the proposition that, before all else, we must define the relevant market. Relying on traditional product market definition cases, see [Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#); [United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 404, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#), SMS contends that, because [**10] DEC's aftermarket products are "unique" and servicing DEC computers requires specialized expertise, the relevant market must be the aftermarket for servicing DEC mid-range servers.

The argument, if successful, would place SMS at a distinct advantage. Market share often serves as a proxy for market power. See, e.g., [Town of Concord, 915 F.2d at 30](#); [Grappone, Inc. v. Subaru of New Engl., Inc., 858 F.2d 792, 797 \(1st Cir. 1988\)](#). If we were to agree with SMS that the relevant market is DEC's aftermarket for services, then, given that DEC predominates in that market (as evidenced by its large market share), SMS would have traveled far on the road to establishing DEC's monopoly power. But we believe that SMS's single-minded focus on traditional concepts of product market definition oversimplifies the route it must take. Cases involving aftermarkets are *sui generis*.

HN4[] The purpose of defining a relevant market is to assist in determining whether a firm has market power. See [Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1252-53 \(7th Cir. 1995\)](#); see also [U.S. Healthcare Inc. v. Healthsource, Inc., 986 F.2d 589, 598 \(1st Cir. 1993\)](#) [**11] (noting the importance of remembering what antitrust question the court is trying to answer when it engages in market definition). In its most basic iteration, **HN5**[] the monopolist's market power consists of having sufficient economic muscle to permit it to raise prices well in excess of competitive levels without inducing customers to turn elsewhere. See [Town of Concord, 915 F.2d at 31](#). It follows inexorably that **HN6**[] a traditional product or geographic market definition exercise would be the starting point in an aftermarket case if, but only if, a large market share in such a derivative market invariably translated into (or at least reliably indicated) monopoly power in that market.

This condition does not obtain as a matter of course. **HN7**[] Most firms that service their manufactured products can be expected to have a very high percentage of the services aftermarket for those products. See generally Daniel Wall, *Aftermarket Monopoly Five Years After Kodak*, 11 Antitrust 32, 32-33 (1997). Virtually by definition, manufacturers possess relative expertise in repairing their own products (an expertise that increases in importance as the good increases in technological [**12] complexity) and consumers typically are reluctant to incur the transaction costs associated with locating and hiring alternative service providers.

But the naked fact that a manufacturer has a high percentage of the market for servicing its own products does not mean that it can raise the price of services or parts with impunity in that market. See 10 Areeda & Hovenkamp, *supra*, P 1740, at 170-71. Reputation is important to a firm that constantly competes for new customers, and a manufacturer's behavior in the aftermarket probably will be scrutinized by customers shopping for the firm's products in the primary market. If the firm has a bad reputation, that will prompt potential customers to go elsewhere. Moreover, such a firm eventually will suffer defections from its installed base as well, for firms concerned with the long term cannot afford to bite the hands that feed them. See *id.* P 1740, at 153; see also Joseph Kattan, *Market Power in the Presence of an Installed Base*, 62 Antitrust [*17] L. J. 1, 15-16 (1993); Wall, *supra*, at 33. Under such circumstances, it ordinarily captures the reality of the marketplace to envision a firm's behavior in the aftermarket [**13] as having a direct effect on the "cross-elasticity of demand," *du Pont, 351 U.S. at 400*, with respect to its products in the primary market.

Of course, markets do not always function in the manner we have just described. *Kodak* is a case in point. There, a group of ISOs complained that a copy-machine manufacturer which competed with ISOs in servicing its brand of copiers had engaged in exclusionary behavior in its parts and services aftermarket (*Kodak* had stopped supplying the ISOs with the parts required to service *Kodak* copy machines, while at the same time entering into pacts with independent parts manufacturers that prohibited them from supplying the ISOs with copier parts). See [Kodak, 504 U.S. at 455-56](#). Then, the manufacturer told its customers that they could not purchase parts unless they agreed to use the manufacturer's aftermarket services. See [id. at 456-58](#). Coupling evidence of this scheme with evidence

that Kodak was charging supracompetitive prices in the aftermarket, the ISOs accused Kodak of improperly expanding its monopoly in the services aftermarket. See *id.*

Kodak countered that, as a matter of law, a manufacturer [**14] cannot wield monopoly power in a derivative market because competitive primary markets, by definition, always check aftermarket behavior. The Court granted certiorari to consider the bona fides of this argument. See [*id. at 454-55*](#). Ultimately, it rejected Kodak's contention as a matter of law and affirmed the remand for further proceedings because data in the record suggested that Kodak might in fact have been exacting monopoly prices in its derivative market and there was no sign that competition in the primary market deterred it from doing so. See [*id. at 477-78*](#).

Kodak, then, stands for the proposition that [**HN8**](#) the foremarket does not always exert sufficient competitive pressure to insulate the aftermarket from monopolistic practices. It does not hold, as SMS entreats, that the foremarket *never* exerts sufficient competitive pressure to keep the aftermarket pristine. And the fact that the primary market at times may fail to discipline a derivative market does not mean that the latter necessarily constitutes the relevant market for antitrust analysis. Rather, a litigant who envisions the aftermarket as the relevant market must advance hard evidence [**15] dissociating the competitive situation in the aftermarket from activities occurring in the primary market. Cf. [*id. at 477*](#) (noting that the plaintiff adduced evidence that the defendants were able to -- and did -- charge supracompetitive prices in the aftermarket). Put another way, [**HN9**](#) a court may conclude that the aftermarket is the relevant market for antitrust analysis only if the evidence supports an inference of monopoly power in the aftermarket that competition in the primary market appears unable to check. See [*id. at 481-82*](#); see also 10 Areeda & Hovenkamp, *supra*, P 1740, at 170-71.

We summarize succinctly. [**HN10**](#) In any market with some degree of product differentiation, goods of a single brand will enjoy a certain degree of uniqueness. See 3A Areeda & Hovenkamp, *supra*, P 761, at 55-56. While that uniqueness may account for a manufacturer having a large market share in the services aftermarket for its own brand, that fact, without more, does not suffice to establish that the manufacturer enjoys monopoly power in that market. [**HN11**](#) Unless the evidence shows that the manufacturer can exert raw power in the aftermarket without regard for commercial [**16] consequences in the foremarket, the aftermarket is not the relevant market. This means that, for antitrust cases involving derivative markets, courts cannot reflexively resort to traditional product market definition methods, but must look to [*18] other modes of scrutinizing the existence and measure of market power. As *Kodak* teaches, [**HN12**](#) in aftermarket situations, market power *vel non* must be assessed by weighing the complete package of primary equipment, parts, and services.²

[**17] IV

We turn next to the question of whether SMS has managed to create a genuine issue of material fact as to DEC's alleged monopoly power. We think it has not.

A

Laboring to dispel the customary expectation that competition in the primary market may serve as a substantial deterrent to anticompetitive behavior in an aftermarket, SMS first asserts that this is a case in which information

² Although SMS lobbies for a different legal standard, the focal point of its consumer exploitation thesis is that DEC is attempting to exploit its installed base and achieve a monopoly (or a near-monopoly market share) in the services aftermarket by imposing a three-year warranty on all hardware purchases. In the last analysis, this theory depends on the proposition that DEC asserts power in the services aftermarket only by forcing matters in the primary computer equipment market, and thus raises questions characteristic of those situations in which monopolists are alleged to have parlayed power from one market into another. See, e.g., [*Kodak, 504 U.S. at 461-62*](#) (discussing tying); [*United States v. Griffith, 334 U.S. 100, 107-08, 92 L. Ed. 1236, 68 S. Ct. 941 \(1948\)*](#) (discussing leveraging). This approach, in and of itself, invites us to look at the primary market, and thus tends to confirm our conclusion that, in determining whether DEC enjoys an aftermarket monopoly, we cannot ignore the impact of the foremarket.

costs have distorted market behavior. The argument has its genesis in *Kodak*, where the Court suggested that, under some circumstances, the foremarket's inability to obtain needed information about the aftermarket could foil the former's ability to act as a check on the latter. See [*Kodak, 504 U.S. at 473-76*](#). Because this information could be difficult for ordinary copy-machine buyers to obtain, and Kodak apparently treated informed purchasers more favorably than uninformed purchasers (through price and term discrimination), the Court suggested that these facts might explain Kodak's ability to charge suprareactive prices in the aftermarket without suffering adverse consequences in the foremarket. See [*id. at 473-74*](#).

DEC counters that the purely prospective [\[**18\]](#) nature of its warranty policy removes this case from *Kodak*'s sphere of influence. DEC explains that the only customers affected by the warranty policy are those who purchase new DEC mid-range systems; contracts between ISOs and current owners of DEC platforms are unimpaired. Furthermore, purchasers are keenly aware of the warranty terms. If a customer does not like the warranty, DEC continues, he will shop elsewhere, either for a different brand of computer or for a DEC computer without a warranty. See, e.g., [*Digital, 73 F.3d at 762*](#) (explaining that customers will shop for other brands if a manufacturer does not satisfy their needs).

We agree that both the transparency of DEC's warranty policy to buyers in the primary market and the policy's prospective outlook militate in DEC's favor. Let us begin with transparency. The *Kodak* Court's discussion of information costs stemmed exclusively from the concern that the type of information necessary for allowing the primary market to check anticompetitive behavior in the aftermarket was unavailable to the average copy machine purchaser. See [*504 U.S. at 473-76*](#). Given the specific means that [\[**19\]](#) Kodak had adopted to stifle competition, the information relevant to the primary market would be lifecycle costing, which, the Justices concluded, was difficult to access. See [*id. at 473-74*](#).

The information deficits that concerned the *Kodak* Court are largely absent here. SMS cites the three-year warranty as the instrument of market dominance. But, unlike [\[*19\]](#) the precise cost of owning a machine for its useful life (the *Kodak* scenario), the warranty's existence is obvious to any purchaser in the primary market and, therefore, SMS's ruminations about each purchaser's need to engage in lifecycle costing for installed hardware are beside the relevant point.³ Hence, the only datum that bears on alleged anticompetitive activity in the aftermarket is readily available to the foremarket. Given that the primary market's ability to check a firm's behavior in its own aftermarket hinges in substantial part on whether information about the latter is sufficiently reflected in the former, the transparency of DEC's allegedly monopolistic policy represents a salient departure from the *Kodak* scenario. Accord [*PSI Repair Serv., Inc. v. Honeywell, Inc., 104 F.3d 811, 819-20, 822*](#) [\[**20\]](#) (6th Cir.) (concluding that the fact that the defendant's policies were "generally known" was a central datum in barring a *Kodak*-type claim), cert. denied, 520 U.S. 1265, 138 L. Ed. 2d 195, 117 S. Ct. 2434 (1997).

[\[**21\]](#) The prospective nature of the warranty further distinguishes this case from *Kodak*. Kodak had entered into agreements that precluded the distribution of Kodak parts to ISOs. See [*Kodak, 504 U.S. at 458*](#). These agreements were tantamount to a retroactive change in the rules because many customers had purchased Kodak machines against a background understanding that they would be able to procure parts from ISOs. Accordingly, this tergiversation detrimentally affected the expectations of those who had already sunk considerable sums of money into the acquisition of Kodak equipment. Such "bait and switch" tactics can be problematic from an antitrust standpoint when they enable exploitation. See [*Digital, 73 F.3d at 763*](#) (concluding that "the material dispute that called for a trial [in *Kodak*] was whether the change in policy enabled Kodak to extract supra-competitive prices from customers who had already purchased its machines"); [*Lee v. Life Ins. Co. of N. Am., 23 F.3d 14, 20*](#) (1st Cir.

³ In addressing the question of information deficits between a foremarket and an aftermarket, perfect information about the aftermarket is not required. Rather, the focus should be on whether the primary market is in possession of information that sufficiently reveals the anticompetitive tendencies of a manufacturer in its aftermarket. The nature of this information will depend on the product, the plaintiff's theory, and the particular facts. In some cases (like *Kodak*), lifecycle costing may be significant. In others, however, primary market consumers will not need to calculate lifecycle costs to gain an appreciation for what is happening in an aftermarket. Here, SMS points to no aftermarket behavior on DEC's part that would necessitate a foremarket consumer's inquiry into lifecycle costs. And in all events, SMS's theory of the case makes lifecycle costing irrelevant.

1994) (noting that Kodak's policy change jeopardized its customers' ability to protect themselves). Like the easy availability of information, the purely **[**22]** prospective nature of the warranty helps to take this case out of *Kodak*'s precedential orbit. See [PSI Repair, 104 F.3d at 820, 822.](#)

B

Although this constellation of factors undermines SMS's rote reliance on *Kodak*, the scenario would be fully dispositive of SMS's [Section 2](#) claim only if all purchasers in the primary market were free agents. But SMS says that is not the case. It endeavors to draw an analogy between the *Kodak* plaintiffs' need to buy copier parts and the perceived need of those who already own DEC computers to purchase any new hardware from DEC (rather than its competitors). The linchpin of this analogy is SMS's insistence that repeat purchasers of computers are more or less compelled to patronize the manufacturer with whom they originally dealt because of the concomitant investment in, among other things, specialized training and software. As to these "locked-in" firms, SMS asseverates, integrating a three-year warranty into new computer systems is akin to the "policy change" that the *Kodak* Court decried because, at the time of the initial purchases, these consumers **[*20]** had no idea that future generations of DEC computers would bear **[**23]** such warranty terms.

This argument has some conceptual footing. In theory, aftermarkets may be insulated from the competitive atmosphere of primary markets if, and to the extent that, current owners of a manufacturer's products find it prohibitively dear to "switch" to another product because of the large investment they have made. See [Kodak, 504 U.S. at 476.](#) Because of switching costs, these owners might be harmed even if information about anticompetitive behavior is reflected in the primary market (for example, the manufacturer may offer better purchase terms to first-time buyers). Withal, we do not believe that the evidence suffices to create a genuine issue as to whether this theoretical possibility has been realized here.

Even though SMS's lock-in argument relies heavily on *Kodak*, there is an important factual distinction between the two cases in regard to the nature of the alleged switching costs. When the *Kodak* Court spoke of switching costs, it referred specifically to the cost of purchasing new copying equipment. See [Kodak, 504 U.S. at 476-77.](#) What prompted the Court to suggest that switching would be necessary was Kodak's policy **[**24]** of offering parts only to those customers who also purchased service from it. This meant that if a customer did not turn to Kodak for service, it could not get parts, and its copy machine eventually would be rendered useless.

Here, by contrast, DEC neither withholds parts nor otherwise precludes any hardware purchaser from using another service provider. If a customer prefers to retain an ISO, it does not need to switch to another computer system. Indeed, the record shows not only that customers do continue to hire ISOs to service DEC machines that are under warranty, but that SMS itself bids for (and has procured) such contracts. Thus, the only switching cost at issue is the cost of writing off the portion of the equipment's purchase price that represents the warranty. If the behavior of consumers and ISOs is any indication, the switching cost is not particularly significant. (Although SMS presents some conclusory testimony that this cost is the rough equivalent of the outlays for regular service contracts, it has absolutely no solid evidence to back up the claim -- and, indeed, this testimony is at variance with its announced position that the warranty is in actuality a "loss leader" **[**25]** for DEC. See *infra* note 5.) At any rate, SMS has not proffered significantly probative evidence sufficient to create a fact question as to whether this alleged switching cost is material to a large enough segment of DEC's installed base to harm competition.

To sum up, while the warranty at issue here may act, at least in some cases, as a subtle disincentive that inhibits customers from consulting ISOs (because the customer would, by retaining an ISO, in effect write off whatever extra cost the manufacturer had built into the computer's purchase price to permit it to offer the warranty), there is nothing inherently anticompetitive about the warranty. Unlike *Kodak*, this is not a case in which a manufacturer effectively forces consumers to use one, and only one, service outfit. Moreover, nothing in the record before us (except for conclusory, self-serving testimony by SMS officers, which we need not credit on summary judgment) suggests that the existence of the warranty dissuades a sufficient number of customers who otherwise would have used ISOs' from doing so. Testimony of unbearable switching costs by a mere handful of disaffected customers does not satisfy SMS's burden of **[**26]** showing that consumers are generally worse off as a result of DEC's warranty policy. See, e.g., 10 Areeda & Hovenkamp, *supra*, P 1740, at 152-53.

That is essentially what the Eighth Circuit concluded in a post-*Kodak* case when it indicated that, [HN13](#) as long as a warranty does not limit a customer's choice of service [*21] provider, there is usually no antitrust problem. See *Marts v. Xerox, Inc.*, 77 F.3d 1109, 1112 (8th Cir. 1996); see also *Digital*, 73 F.3d at 761-62 (reaching a similar conclusion with respect to installed operating systems). We agree with this conclusion. Many manufacturers offer the market bundled products that have separable components. Every day, consumers purchase these products because "buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively -- conduct that is entirely consistent with the Sherman Act." *Jefferson Parish*, 466 U.S. at 12.

Of course, some consumers may not like all the components, but the overall package fits their needs, they are not constrained in looking elsewhere for alternative components, and they will not have [**27] to scrap their prior investments just because the new package is not a perfect fit. Given this commonplace, it cannot be that every time some consumer or group of consumers does not like one component of a complex product, the manufacturer will be exposed to an antitrust claim on the ground that it has circumscribed consumer choice. The antitrust laws do not require manufacturers to customize their offerings to the precise specifications of each and every customer.

At the expense of carting coal to Newcastle, we note a second serious shortcoming that permeates SMS's lock-in argument. Throughout its analysis in this case, SMS assumes that all current DEC customers fall into the locked-in category. This taxonomy does not hold together: being part of an installed base and being locked-in are not synonymous. A lock-in phenomenon must be shown, not assumed. See *Kodak*, 504 U.S. at 476; see also 10 Areeda & Hovenkamp, *supra*, P 1740, at 152-53. Moreover, in undertaking this inquiry, the nature of the product must be taken fully into account, for that will inform an inquiring court about the degree of effective control the manufacturer may be able to exert over a consumer's [**28] purchasing decisions. That is singularly important here, for the evidence required to show that an installed base is locked-in to future purchases of computer systems is quite different from that needed to show that a copy machine owner is locked-in to buying parts for that machine.

It is an article of faith, for antitrust purposes, that [HN14](#) unless a substantial number of preexisting customers are locked-in, defections from the manufacturer's installed base, coupled with losses in the foremarket, in all probability will sabotage any effort to exploit the aftermarket. Our review of the instant record affords no reason to believe that an appreciable number of DEC users are, in fact, significantly locked-in to making repeat purchases of DEC mid-range computers. SMS's most direct evidence of lock-in comes from the testimony of individuals employed by two of DEC's customers. These individuals -- none of whom bore the ultimate responsibility for making decisions regarding new computer purchases and none of whom exhibited any specific or detailed knowledge of how management might go about calculating switching costs -- testified generally that once a company has committed to a certain brand [**29] of hardware and has acquired ancillary software (including an operating system), it would be costly to migrate to another platform. Significantly, however, the testimony fails properly to account for the nature of a company's decision to purchase new computer hardware and, therefore, we cannot put much stock in it.

The evidence to which we have just referred assumes that a company's decision to replace its computer system will be dictated solely by the hardware that it currently uses. Under certain circumstances, the assumption might hold. The best example probably derives from the analogy that *Kodak* offers. Although the owner of a copy machine might hope that he will not require parts during the machine's useful life, the hope defies reality. [*22] When the moment of need occurs, the corporate decisionmaker must be able to purchase a Kodak part -- or else, scrap the machine. The fragility of the equipment forces the owner to buy parts, and this need, linked with owners' general unwillingness to sacrifice the remaining useful life of machinery, enables the manufacturer to control and exploit the situation.⁴

⁴This schema will not be true for every copier owner. If, for example, the remaining useful life of the copier is short enough that scrapping the machine rather than submitting to suprareactive aftermarket prices becomes a viable option, there is no lock-in with respect to that customer. Where relevant, the percentage of installed base customers who have old machines as opposed to those who have purchased more recently may be important to determining whether there is a substantial lock-in. We need not pursue the matter here.

[**30] The record evidence shows that decisionmaking surrounding the purchase of a new mid-range computer, however, is qualitatively different from the decision to buy copier parts. Typically, a much wider variety of factors will enter into the computer user's decision. Although we do not discount the impact of a server's speed and power (which will lead to hardware upgrades), the record indicates that the availability of software applications designed to meet current or anticipated business needs usually is the determinative factor in this calculus.

This reality is largely borne out by a marketing survey and report that SMS considers to be one of the most significant pieces of documentary evidence in this case. The report's observations are particularly noteworthy because many of the survey respondents were chosen from DEC's installed base and the purpose of the study was to gauge their receptivity to DEC's Alpha and VAX computers. The survey concludes that end users do not focus principally on hardware when making decisions about buying new systems. Rather, in the words of the report, "applications drive the choice of platforms," because software applications represent the business solutions [**31] to the problems confronting the computer user. There is no record evidence that contradicts, or even comes close to undercutting, this telling point.

A fortiori, if software is the primary determinant in commercial decisionmaking on computer system purchases, the power of affecting a customer's purchasing decisions resides more with those who design and sell software than with hardware manufacturers. That is exactly what the survey indicates. To complicate matters further, software companies tend to develop their applications so that they can be used with the more popular operating systems. In turn, given the efficiencies of networks, many consumers tend to opt for software that is usable on such systems. The evidence in this case shows that operating systems other than DEC's VMS -- such as Windows NT and UNIX - - are becoming increasingly prevalent (which perhaps explains why DEC engineered the new Alpha line to operate with all three) and many other hardware manufacturers make systems that can accommodate these other operating systems. If DEC is to remain the company of choice for its installed base, it cannot rest on its laurels.

The complex nature of the decision to purchase a [**32] new computer system means that an analysis of switching costs in this context cannot parrot the linear inquiry that proved possible in *Kodak*. Here, the cost of shifting to another system must take into account the efficiency gains of buying new software -- gains that often may dwarf hardware price in dollar terms. This is true even if one considers the switching costs that are associated with retraining employees and discarding software designed to run exclusively on a particular platform. The record demonstrates convincingly that, in this industry, both software vendors and hardware manufacturers offer migration support for new customers in the form of significant discounts on training, installation, and software [*23] conversion, thus internalizing much of the switching costs.

The impressions that we have gathered from the marketing survey are largely confirmed by the very witnesses on whose testimony SMS relies. Quite aside from the statements these witnesses make about the magnitude of the cost of randomly switching from one currently functioning computer system to another -- testimony which, as is clear from our discussion, addresses an irrelevant scenario -- all of them acknowledge [**33] that, all things considered, if a new computer system would bring more benefits, there would be no objection to the switch. The actual behavior of these witnesses' employers illustrates the point: their firms were in fact in the process of switching some of their systems to other platforms, citing the sorts of reasons we have catalogued.

In fine, the record does not support the conclusion that a substantial number of installed base customers are locked-in -- and SMS has failed to make the case. The power of software vendors, the rapid progress of software solutions, the unpredictability of when consumers will seek to purchase a brand new system, the ready willingness of competitors to absorb migration costs, and the uncertain calculus of cost versus efficiency gains that obtains when a firm moves to new applications all distinguish the computer purchase context from the copier context. This plethora of factors strongly implies that, in most instances, DEC has no effective control over whether a customer will remain loyal when opting to purchase a new computer system.

To address these issues, which are central to assessing the existence of a lock-in, SMS ought to have focused on proof [**34] of the actual behavior of an installed base in terms of such consumers' tendency to return to the same manufacturer. It did not marshal any such proofs. Consequently, the record lacks the empirical evidence required to give us a proper glimpse into whether members of an installed base actually behave in conformity with SMS's

switching cost hypothesis. Although we do not doubt that some customers may experience the lock-in that SMS envisions, the record affords no reason to believe that such customers are numerous or that they are representative of the installed base. And -- in marked contrast to *Kodak* -- there is no evidence, direct or circumstantial, that DEC has attempted to locate or exploit vulnerable customers within its installed base (or that it has the capacity to identify and isolate such customers).

These last points are particularly important. In a product-differentiated market (such as the mid-range computer hardware market), there always will be a subset of customers whose subjective preferences, given their specific business needs, will align them more closely with one manufacturer. As we remarked in a closely related context, however, this kind of preference does [\[**35\]](#) not translate into the kind of economic power that **antitrust law** aims to mitigate. See [*Grappone*, 858 F.2d at 797](#) ("Of course, 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."). Sophisticated consumers with such preferences will know beforehand that they will lock themselves in by their choice of manufacturer and do so willingly. What would be of concern is if a firm were able to extend its control by improper means over a sufficiently sizable number of customers who did not have such a preference. The facts at hand do not fit this model. The evidence, taken most favorably to SMS, does not demonstrate a lock-in, certainly not one that raises antitrust concerns. See 10 Areeda & Hovenkamp, *supra*, P 1740, at 152-53.

[*24] C

Because this case arises on an appeal from the entry of summary judgment, it behooves us to stress further SMS's failures at the empirical level.

Here, unlike in *Kodak*, the record is devoid of any evidence of supracompetitive prices [\[**36\]](#) or other oppressive terms of business in the aftermarket.⁵ [\[**37\]](#) Here, unlike in *Kodak*, the record furnishes no reason to believe that new customers are irrelevant to DEC; to the contrary the record shows unequivocally that DEC intended to sell Alpha computers vigorously to new as well as old customers in an effort to grow its market share.⁶ Here, unlike in *Kodak*, there is also no proof indicating that DEC has attempted to discriminate between customers who are knowledgeable and those who are not, or that it discriminates in price (or in offering different warranty terms) between new and repeat purchasers.⁷ Such discrimination, the Court explained, would be one way that manufacturers would attempt to prevent sophisticated purchasers from disciplining the aftermarket through their decision to forego buying from the manufacturer. See [*Kodak*, 504 U.S. at 475](#). Moreover, data such as these -- that new customers remain important to DEC and that the warranties offered to new and installed base customers have exactly the same terms -- are further signs of the absence of aftermarket exploitation. See 10 Areeda & Hovenkamp, *supra*, P 1740, at 159.

All of these factors were crucial to the *Kodak* Court's conclusions, forming the bases for the Court's attempts to explain, through hypotheses involving information deficits and switching costs, the possible causes of the market's apparently irregular behavior. See [\[**38\]](#) [*504 U.S. at 473-78*](#). DEC's alleged behavior, however, is worlds apart

⁵ For example, there is no evidence that DEC has displayed a pattern of raising service and parts prices in the aftermarket, nor is there evidence that the price of the warranty itself represented a means of extracting monopoly profits. Indeed, SMS has taken the position that the price of the warranty -- whatever it may be -- actually represents a loss to DEC compared to what it would have gained had it kept its one-year warranties and charged for service during the second and third years.

⁶ In this regard, SMS points to evidence that DEC was not depending on its VAX models to grow market share. This evidence, however, is not damaging. Because Alpha and VAX both compete for the DEC installed base, one would expect that the terms governing the sale of VAX computers must be comparable to those of Alpha models. And if Alpha computers are competitive with computers in the mid-range computer market generally, then a transitive logic compels the conclusion that VAX terms are disciplined by the mid-range market. SMS has adduced no proof to suggest that matters are any different.

⁷ We do not mean to suggest that price discrimination is always a sign of anticompetitive behavior. It is not. See, e.g., [*Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 527-28 \(1st Cir. 1989\)](#).

from Kodak's. In the absence of comparably suspicious practices, there is no reason to assume that DEC's interest in maintaining its position in a fiercely competitive primary market is not checking any exploitative tendencies in the derivative market.

Represented by able counsel, SMS strives resourcefully to fill these evidentiary gaps. When queried at oral argument, it referred us to the affidavit of Joseph Scordino (SMS's director of marketing). That affidavit does not remedy the empirical shortcomings that we have identified. The closest it comes is the following: "It has been my experience that when [DEC] does not face competition, its prices tend to be higher. For example, [DEC] does not discount its maintenance services on the Alpha 8000s. Thus, the elimination of competition from SMS and other Independent Service Organizations, should result in price increases to customers." We fail to see how we can allow this self-serving speculation to pass for competent evidence. The third sentence is conclusory [*25] conjecture of a kind that begs the very question at issue, namely, whether the foremarket sufficiently disciplines [**39] the aftermarket. The same is true for the first sentence, because, if competition in the foremarket checks activity in the aftermarket, the absence of competitors in the aftermarket will not lead to higher prices. The second sentence, which deals with Alpha 8000s, is irrelevant; those computers are high-end servers and belong to a different product market (and the record is bereft of evidence that the market structure for high-end servers has any bearing, direct or by reasoned analogy, on the market structure for mid-range servers).

SMS also cites the report of its retained expert, Dr. William Bleuel, to the effect that DEC has a much greater share of the services aftermarket than it should enjoy, given low customer satisfaction. If DEC did not have monopoly power, this argument runs, it would not have been able to keep its large share of the aftermarket in spite of rampant dissatisfaction. Expert opinions, however, are no better than the data and methodology that undergird them -- and, on this score, Dr. Bleuel's conclusions are highly suspect. Although we find Dr. Bleuel's report deficient on several levels, it suffices to discuss only the shortcomings of his data collection.

[**40] Dr. Bleuel did not conduct a customer satisfaction survey, but based his opinion on his interpretation of certain internal DEC documents. The relevant part of his report begins with the intuitively obvious proposition that when customer satisfaction declines, chances are that a company will lose some business. Then, citing to sources which it neither attaches nor discusses, the report concludes that DEC's customer satisfaction ratings have been declining. Dr. Bleuel's conclusion may or may not be correct, but an expert must vouchsafe the reliability of the data on which he relies and explain how the cumulation of that data was consistent with standards of the expert's profession. See *Wessmann v. Gittens*, 160 F.3d 790, 804-05 (1st Cir. 1998); see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167, 1176 (1999) (directing courts "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

Not only did Dr. Bleuel fail to discuss in his report the nature of [**41] the data and its meaning, but he failed to explain whether the information-gathering technique used in the DEC documents was valid, whether the data was sufficiently representative to permit him to draw any relevant conclusions, and whether the sampling methodology used to compile these documents corresponded to methods that might be considered legitimate in his discipline. Expert testimony that offers only a bare conclusion is insufficient to prove the expert's point. See *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.").

V

We add a coda. When a party brings a Section 2 claim, it is not enough simply to show that there is monopoly power. Monopoly power may be obtained through legitimate means. An antitrust problem arises only when an improper use of that power, to the detriment of the forces of competition, occurs. Thus, HN15 to make out a Section 2 claim, the plaintiff must show that the alleged monopolist has engaged in improper exclusionary conduct. See *Kodak*, 504 U.S. at 482-83; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-05, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985); [**42] *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983).

The improper conduct identified by SMS is the inclusion of a three-year warranty [***26**] on new equipment in the purchase package.⁸ But a warranty has obvious virtue as a tool of competition, and the commercial justification for its use is compelling. Indeed, people ordinarily associate warranties with consumer welfare and highly competitive markets.

To avoid the presumption that DEC's warranty is no more [****43**] than a legitimate sales tool, SMS points to two internal documents which it claims show that DEC intended to use the warranty as a device to capture the totality of the services aftermarket. These documents appear to be a part of an ongoing series of correspondence between DEC functionaries relative to the launching of the Alpha product line. One document makes mention of the warranties having "100% penetration with all product sales" and the other makes a similar point. Read in context, neither document so much as hints at an intent to suffocate the aftermarket. The mere fact that the terms "warranty," "penetration," and "100%" appear in a single writing does not signal an improper attempt to distort market forces.

In the last analysis, SMS's monopoly power hypothesis defies common sense. If the three-year warranty is the only means toward monopolization, it will, under the assumptions that SMS adopts, prove to be a remarkably ineffective tool. SMS has taken the position that the warranty actually represents a loss to DEC because, all things being equal, DEC can make more money providing services than it can offering warranties. See *supra* note 5. If this is true, SMS's argument [****44**] takes on the flavor of the predatory pricing cases and, therefore, must afford some basis for a belief that DEC can recoup these losses at some point in the future in order to make the enterprise worthwhile.

But DEC has placed no restriction on the aftermarket for service of its products. Parts are available to all market participants, and there is no indication in the record either that there are restrictions on their availability or that such a policy is even being contemplated. Meanwhile, ISOs are free to service all DEC computers, including those that are under warranty, both during the warranty period and after its expiration. On these facts, it seems highly unlikely that DEC will recoup the sums that SMS says that it foregoes when it offers the warranties in the first place. All of this indicates that the more likely explanation for the warranty relates to its efficiency as a means of growing market share in the primary market. In any event, sacrifice now/recoup later claims do not necessarily bespeak monopolistic behavior, see, e.g., *Barry Wright, 724 F.2d at 231-36*, and we believe that this dimension of SMS's logic is yet another element that distances [****45**] its case from *Kodak* while simultaneously bringing it within the orbit of *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (noting that evidence must be even more persuasive to stave off summary judgment when the theory set forth by the party opposing the motion is implausible).

That SMS may have lost business as a result of DEC's policy is not, in and of itself, a concern of the antitrust laws. **HN16** [↑] **Antitrust law** is designed to protect competition, not competitors. See *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. If there is no objective indication of harm to competition, we cannot stifle a firm's ability to compete in the primary market just because some of its aftermarket competitors complain that they have lost business as a result. After all, such [***27**] harm frequently occurs due to the specialized and dependent nature of the investment made by aftermarket firms rather than as the anticompetitive exercise of market power by manufacturers. See 3A Areeda & Hovenkamp, *supra*, P 762, at 65-66 (explaining the phenomenon in the context [****46**] of self-distribution decisions made by manufacturers).

VI

⁸ SMS claims that the warranty also indirectly causes further damage to ISOs because of the phenomenon of "one stop" servicing. The idea is that companies that have several DEC machines will opt to go with DEC services after purchasing a new (warranty-bearing) computer because they do not want to deal with the confusion resulting from having several different service providers. As with much else in this case, concrete evidence that this supposed behavioral pattern exists, or that it is in any way significant, is wanting.

We need go no further. The *Kodak* Court resorted to economic theory in order to highlight the possibility that, under the notably sinister circumstances of the case (evidence of supracompetitive prices in the aftermarket, price discrimination favoring certain consumers, and no resulting change in sales in the primary market), information deficits and switching costs better explained the available market data than did the defendant's glib assertion that the aftermarket is never independent of the foremarket. Theory is powerful when it explains reality. But when evidence for the trumpeted reality is lacking, the theory is of no practical value. Here, the record contains no significantly probative evidence that DEC is engaged in sinister practices or otherwise suffocating competition, and, hence, theoretical possibilities alone are inadequate to block the swing of the summary judgment ax.

Affirmed.

End of Document

Fogie v. THORN Ams., Inc.

United States Court of Appeals for the Eighth Circuit

May 10, 1999, Submitted ; August 20, 1999, Filed

No. 98-2442, No. 98-2447

Reporter

190 F.3d 889 *; 1999 U.S. App. LEXIS 19728 **

Vickie Fogie, Joan Leonard, and Angela Adams, on behalf of themselves and all others similarly situated; Plaintiffs-Appellees, v. THORN Americas, Inc., Defendant-Appellant, THORN EMI North America Holdings, Inc., a Delaware corporation, * Defendant-Appellant. Vickie Fogie, Joan Leonard, and Angela Adams, on behalf of themselves and all others similarly situated; Plaintiffs-Appellants, v. THORN Americas, Inc., formerly known as Rent-A-Center, Inc., Defendant-Appellee, THORN EMI North America Holdings, Inc., A Delaware corporation, Defendant-Appellee.

Subsequent History: [**1] As Corrected August 25, 1999.

Prior History: Appeals from the United States District Court for the District of Minnesota.

Disposition: Judgment of District Court vacated and all other respects affirmed.

Core Terms

enterprise, racketeering, plaintiffs', entities, rent-to-own, retrospective, collection, principal and interest, subsidiary, cy pres, conspiracy, damages, predicate act, leased, wholly owned subsidiary, summary judgment, cancellation, circuits, courts, harsh, retroactive application, civil suit, circumstances, conducting, designated, related business, escrow fund, challenges, consisting, customers

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > Standing

HN1[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

To recover in a civil suit for a violation of the Racketeer Influenced and Corrupt Organization Act (RICO), a plaintiff must prove: (1) that the defendant violated [18 U.S.C.S. § 1962](#); (2) that the plaintiff suffered injury to business or property; and (3) that the plaintiff's injury was proximately caused by the defendant's RICO violation. [18 U.S.C.S. § 1964\(c\) \(1994\)](#).

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

190 F.3d 889, *889 U.S. App. LEXIS 19728, **1

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN2 [down] **Racketeer Influenced & Corrupt Organizations, Claims**

See [18 U.S.C.S. § 1962\(a\) \(1994\)](#).

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN3 [down] **Racketeer Influenced & Corrupt Organizations, Claims**

Under the Racketeer Influenced and Corrupt Organizations Act, only individuals who have suffered injury from the use or investment of racketeering income have standing to bring a civil suit under [18 U.S.C.S. §§ 1962\(a\)](#) and [1964\(c\)](#).

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Penalties

Banking Law > ... > National Banks > Interest & Usury > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

HN4 [down] **Interest & Usury, Usury Litigation**

The Racketeer Influenced and Corrupt Organizations Act (RICO) forbids the predicate acts of racketeering only insofar as an enterprise is involved. RICO is not a recidivist statute with enhanced penalties for acts of racketeering that are elsewhere proscribed in the criminal code.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5 [down] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The collection of unlawful debt does not constitute a violation of [18 U.S.C.S. § 1962\(a\)](#). It does not involve the use or investment of racketeering income in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. [18 U.S.C.S. § 1962\(a\)](#).

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

190 F.3d 889, *889 U.S. App. LEXIS 19728, **1

HN6 [blue download icon] Racketeering, Racketeer Influenced & Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organization Act grants standing only to parties injured by the use or investment of the unlawfully obtained income, the completed [18 U.S.C.S. § 1962\(a\)](#) violation.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7 [blue download icon] Racketeering, Racketeer Influenced & Corrupt Organizations Act

[18 U.S.C.S. § 1962\(c\) \(1994\)](#) creates liability for those persons who conduct or participate in the conduct of a Racketeer Influenced and Corrupt Organization enterprise.

Governments > Legislation > Interpretation

HN8 [blue download icon] Legislation, Interpretation

Statutes should be read to give each word some operative effect.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN9 [blue download icon] Racketeering, Racketeer Influenced & Corrupt Organizations Act

To bring a claim under [18 U.S.C.S. § 1962\(a\)](#), a plaintiff must allege an injury from the use or investment of the racketeering income that is separate and distinct from injuries allegedly caused by the defendant's engaging in the predicate acts.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN10 [blue download icon] Racketeer Influenced & Corrupt Organizations Act, Elements

See [18 U.S.C.S. § 1962\(c\) \(1994\)](#).

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN11 [blue download icon] Racketeering, Racketeer Influenced & Corrupt Organizations Act

To be found liable for a violation of [18 U.S.C.S. § 1962\(c\)](#), the person who conducts or participates in the conduct of the Racketeer Influenced and Corrupt Organization enterprise must be distinct from the enterprise itself.

190 F.3d 889, *889 U.S. App. LEXIS 19728, **1

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN12 [blue icon] Racketeer Influenced & Corrupt Organizations Act, Elements

A corporation may serve as a "person" for purposes of the Racketeer Influenced and Corrupt Organization Act, [18 U.S.C.S. § 1962\(c\)](#).

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN13 [blue icon] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See [18 U.S.C.S. § 1961\(3\) \(1994\)](#).

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN14 [blue icon] Racketeering, Racketeer Influenced & Corrupt Organizations Act

For purposes of liability under the Racketeer Influenced and Corrupt Organization Act, a firm and its employees, or a parent and its subsidiaries, are not an enterprise separate from the firm itself.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN15 [blue icon] Racketeering, Racketeer Influenced & Corrupt Organizations Act

A subsidiary cannot be sufficiently distinct from its parent or other related subsidiaries so as to satisfy [18 U.S.C.S. § 1962\(c\)](#)'s distinctiveness requirement.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN16 [blue icon] Racketeer Influenced & Corrupt Organizations Act, Elements

To satisfy the distinctiveness requirement of [18 U.S.C.S. § 1962\(c\)](#), there must be a greater showing that the parent and subsidiary are distinct than the mere fact that they are separate legal entities.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

190 F.3d 889, *889LÁ1999 U.S. App. LEXIS 19728, **1

HN17 [blue document icon] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

See [18 U.S.C.S. § 1962\(d\) \(1994\)](#).

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > General Overview

HN18 [blue document icon] **Standards of Review, Harmless & Invited Errors**

An appellate court may affirm the district court's judgment on any basis supported by the record.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN19 [blue document icon] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

As a matter of law a parent corporation and its wholly owned subsidiaries are legally incapable of forming a conspiracy with one another.

Contracts Law > Defenses > Usury

HN20 [blue document icon] **Defenses, Usury**

Minnesota usury law permits a victim of usury to retain goods purchased through a usurious contract without paying full value for them.

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

Contracts Law > Defenses > Usury

Banking Law > ... > National Banks > Interest & Usury > General Overview

HN21 [blue document icon] **Interest & Usury, Usury Litigation**

The Minnesota usury statute provides two remedies for victims of usury: recovery of all interest paid pursuant to [Minn. Stat. § 334.02](#); and a declaration that the usurious contract is canceled as void pursuant to [Minn. Stat. §§ 334.03](#) and [334.05](#).

Contracts Law > Remedies > Equitable Relief > General Overview

Contracts Law > Defenses > Usury

HN22 [blue document icon] **Remedies, Equitable Relief**

When a victim of usury cancels a usurious contract, the victim does not need to compensate the user for the goods obtained under the usurious contract as a condition for receiving cancellation.

190 F.3d 889, *889 U.S. App. LEXIS 19728, **1

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

Contracts Law > Defenses > Usury

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

HN23 [blue icon] **Performance, Rights of Buyers**

Under Minnesota law, if a seller commits usury when selling goods, the buyer may keep the goods purchased without paying the seller the full value of the goods. The buyer also may cancel the contract pursuant to [Minn. Stat. §§ 334.03](#) and [334.05](#) and demand that the usurious seller repay all interest collected as required by [Minn. Stat. § 334.02](#).

Contracts Law > Defenses > Usury

Real Property Law > Financing > Mortgages & Other Security Instruments > Usury

HN24 [blue icon] **Defenses, Usury**

When a usurious loan is canceled, the one guilty of usurious exaction must bear the legal consequences flowing from such violation. As such he must lose not only the interest on the money risked, but also the principal, including as well all security given to secure performance.

Contracts Law > Defenses > Usury

HN25 [blue icon] **Defenses, Usury**

Under some circumstances, forfeiture of the interest alone is the proper remedy for usury because forfeiture of both the principal and interest would be too harsh a remedy.

Governments > Courts > Judicial Precedent

HN26 [blue icon] **Courts, Judicial Precedent**

In Minnesota, the general rule is that a judicial decision is to be given retroactive effect. But Minnesota courts recognize that sometimes retroactive application of a judicial decision is inappropriate.

Governments > Courts > Judicial Precedent

HN27 [blue icon] **Courts, Judicial Precedent**

To determine when a legal principle should be applied prospectively only, Minnesota courts employ a three-factor standard. The three factors to consider are: (1) whether the decision overrules clear precedent or resolves an issue of first impression in a manner not clearly foreshadowed; (2) whether, considering the history, purpose, and effect of the legal principle at issue, retroactive application will retard, not further, that principle; and (3) whether the

inequities that would result from retroactive application provide an ample basis for applying the legal rule prospectively only.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Discharge & Payment > General Overview

HN28 [+] **Standards of Review, Clearly Erroneous Review**

An appellate court reviews factual determinations for clear error.

Counsel: Counsel who presented argument on behalf of the appellant was Janice M. Symchych of Minneapolis, Minnesota. In addition the names of Peter W. Carter and David M. Genrich of Minneapolis, Minnesota, appear on the brief of the appellant.

Counsel who presented argument on behalf of the appellee was Kay Nord Hunt of Minneapolis, Minnesota. In addition the names of Phillip A. Cole, David L. Ramp, Seymour J. Mansfield and Richard J. Fuller of Minneapolis, Minnesota, appear on the brief of the appellee.

Judges: Before RICHARD S. ARNOLD, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

Opinion by: BOWMAN

Opinion

[*892] BOWMAN, Circuit Judge.

Vickie Fogie, Joan Leonard, and Angela Adams filed a class-action lawsuit against THORN Americas, Inc. and its parent companies, including THORN EMI North America Holdings, Inc. (TEMINAH),¹ alleging the companies had violated Minnesota and federal law while operating a rent-to-own business. The District Court entered judgment for the plaintiff class on its claim that THORN Americas and TEMINAH committed usury in violation of Minnesota law by charging excessive interest rates on credit sales of consumer goods. The plaintiffs recovered approximately \$ 30 million in damages on their usury claim, and the District Court dismissed their other claims. THORN Americas and TEMINAH appeal several aspects of the District Court's damage award on the usury claim. The plaintiffs cross-appeal, claiming the District Court erred when it dismissed their claims that the defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C. §§ 1961-1968 \(1994\)](#).

[*893] I.

As described in this Court's previous opinion, [Fogie v. THORN Americas, Inc., 95 F.3d 645 \(8th Cir. 1996\)](#), appellant THORN Americas operates stores called Rent-A-Centers (RAC)² that offer household goods, including furniture and appliances, for sale or lease. Customers choosing to lease goods enter rent-to-own agreements with RAC. Under the agreements, customers pay [*3] a portion of the goods' purchase price plus interest and take

¹ THORN Americas, Inc. is a wholly owned subsidiary of THORN EMI, Inc., which is a wholly owned subsidiary of TEMINAH, the ultimate North American parent company. TEMINAH, in turn, is a wholly owned subsidiary of THORN EMI, plc, a British conglomerate that owns and operates businesses worldwide. The plaintiffs originally sued additional related companies such as THORN EMI (USA) Holdings, Inc., but these companies subsequently merged into THORN Americas or TEMINAH, thereby ceasing to have a separate corporate existence.

² This opinion, like our earlier opinion, uses RAC to refer collectively to THORN Americas and its parent companies, including appellant TEMINAH. We also capitalize "THORN," even when citing to other opinions, to reflect THORN's own practice.

possession of the goods for an initial period of a week or month. At the end of this period, a customer either returns the goods or renews the agreement. Once a rent-to-own agreement has been renewed a designated number of times, the customer obtains ownership of the goods.

In 1991, several RAC customers in Minnesota (plaintiff class representatives Fogie, Leonard, and Adams) filed a class-action lawsuit against RAC, alleging that RAC had engaged in usury and deceptive and unlawful business practices. The plaintiffs claimed these practices violated several Minnesota statutes, including the Consumer Credit Sales Act (CCSA), [Minn. Stat. § 325G.15-16](#) (1998), and the General Usury Statute, [Minn. Stat. § 334.01](#). [\[**4\]](#) 20 (1998). The plaintiffs also claimed that THORN Americas and its parent companies' actions violated several federal statutes, including RICO, § [18 U.S.C. §§ 1961-1968](#). Defending its practices, RAC argued that its rent-to-own agreements complied with Minnesota and federal law, in particular with Minnesota's Rental Purchase Agreement Act (RPAA), [Minn. Stat. § 325F.84-97](#) (1998).

In March 1993, the District Court certified the plaintiff class to include "all persons who have entered into rent to own contracts on or after August 1, 1990 in the State of Minnesota with the defendants or any of their predecessors or successors in interest in a written form substantially similar to that executed by plaintiff Fogie." [Fogie v. Rent-A-Center, Inc., 867 F. Supp. 1398, 1407 \(D. Minn. 1993\)](#) (Memorandum Opinion and Order). The class certification encompasses individuals who entered approximately 58,000 agreements. The District Court also determined the rent-to-own agreements were "consumer credit sales" governed by the CCSA and entered partial summary judgment for the plaintiffs on their CCSA claim. See [867 F. Supp. 1398, 1407](#). The court's decision to [\[**5\]](#) treat rent-to-own agreements as consumer credit sales governed by the CCSA was subsequently endorsed by the Minnesota Supreme Court in its response to the District Court's certified questions, [Fogie v. Rent-A-Center, Inc., 518 N.W.2d 544 \(Minn. 1994\)](#), and in a separate case, [Miller v. Colortyme, Inc., 518 N.W.2d 544 \(Minn. 1994\)](#).

When answering the District Court's certified questions, the Minnesota Supreme Court also directed the District Court to apply the Minnesota General Usury Statute's limitation on interest rates to the rent-to-own agreements. See [Fogie, 518 N.W.2d at 544](#). The District Court therefore declared RAC's rent-to-own agreements usurious as a matter of law under CCSA and the Minnesota General Usury Statute and "unlawful debt" under RICO. It permanently enjoined RAC from entering into rent-to-own agreements with interest rates exceeding the General Usury Statute's limits, voided the existing rent-to-own agreements with the plaintiff class *ab initio*, ordered rescission of all payments made by the plaintiff class to RAC, and prohibited RAC from collecting or receiving future payments from class members under the [\[**6\]](#) voided agreements. RAC appealed the award of injunctive relief and this Court affirmed, conducting interlocutory review only of the injunctive relief and interdependent matters. See [Fogie, 95 F.3d at 648, 654](#).

The District Court later modified its original order, directing the defendants to [\[*894\]](#) hold in escrow all payments received from rent-to-own customers during the litigation. Appointing a special master to determine the quantum of damages owed to the plaintiff class on its usury claim and to plan the damage distribution, the District Court also entered summary judgment for the defendants on the plaintiffs' non-usury claims, including their claims that THORN Americas and its parent companies had violated RICO.

The special master submitted his report and recommendations, and the District Court essentially adopted them. It entered judgment in favor of the plaintiffs in the amount of \$ 29,898,250 plus \$ 3418 per day from December 9, 1997, to April 15, 1998. The District Court also adopted the special master's recommended plan for depositing and distributing the damages, determined fees for the plaintiffs' attorneys, and ordered that all funds remaining unclaimed after [\[**7\]](#) complete distribution be placed in a *cy pres* fund. This appeal followed.

II.

We consider first the issues raised in the plaintiffs' cross-appeal, which challenges the District Court's dismissal of the plaintiffs' RICO claims. [HN1](#) To recover in a civil suit for a violation of RICO, a plaintiff must prove: (1) that the defendant violated [18 U.S.C. § 1962](#); (2) that the plaintiff suffered injury to business or property; and (3) that the plaintiff's injury was proximately caused by the defendant's RICO violation. See [18 U.S.C. § 1964\(c\) \(1994\)](#); [Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 265-68, 117 L. Ed. 2d 532, 112 S. Ct. 1311 \(1992\)](#); see also

United HealthCare Corp. v. American Trade Ins. Co., 88 F.3d 563, 572 (8th Cir. 1996). The plaintiffs alleged that RAC violated subsections (a), (c), and (d) of § 1962 and that each of those violations caused the plaintiffs injuries for which they can recover under § 1964(c). The District Court for various reasons dismissed the plaintiffs' claims for alleged violations of § 1962(a), (c) and (d). We evaluate the plaintiffs' claims under each subsection separately.

A.

[**8] The District Court ruled the plaintiffs could not recover for alleged violations of § 1962(a) because they did not have standing under § 1964(c) to bring such claims. Section 1962(a) states that

It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest . . . any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in . . . interstate or foreign commerce.

HN2 [↑] 18 U.S.C. § 1962(a) (1994). Under § 1964(c), only those injured "by reason of" a § 1962 violation have standing to bring a civil suit. See 18 U.S.C. § 1964(c); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985); Appletree Square I, L.P. v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994). The District Court determined that RAC's usury constituted the collection of unlawful debts and that the plaintiffs were individuals injured by that [**9] unlawful debt collection. But the District Court concluded that only individuals injured by a completed violation of § 1962(a), those injured by the use or investment of the racketeering income, have been injured "by reason of" a § 1962(a) claim as § 1964(c) requires. Therefore, since the collection of unlawful debts was not by itself a violation of § 1962(a), the District Court dismissed the plaintiffs' § 1962(a) claim for lack of standing.

Determining whether only those injured by the use or investment of racketeering income have standing to bring a civil suit for violation of § 1962(a), or whether those injured by the predicate acts of the racketeering activity also have standing, involves an issue of first impression for this Court, one that has split the other circuits. Seven of the eight circuits that have addressed the issue [*895] agree with the District Court that §§ 1962(a) and 1964(c) limit standing only to plaintiffs who have suffered injury from the use or investment of the racketeering income. See, e.g., Vemco, Inc. v. Camardella, 23 F.3d 129, 132 (6th Cir.), cert. denied, 513 U.S. 1017, 130 L. Ed. 2d 495, 115 S. Ct. 579 (1994); Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 437 (9th Cir. 1992), [**10] cert. denied, 508 U.S. 908, 124 L. Ed. 2d 247, 113 S. Ct. 2336 (1993); Parker & Parsley Petroleum v. Dresser Indus., 972 F.2d 580, 584 & n.4 (5th Cir. 1992); Glessner v. Kenny, 952 F.2d 702, 708-10 (3d Cir. 1991); Danielsen v. Burnside-Ott Aviation Training Ctr., Inc., 291 U.S. App. D.C. 303, 941 F.2d 1220, 1229-30 (D.C. Cir. 1991); Quaknne v. MacFarlane, 897 F.2d 75, 82 (2d Cir. 1990); Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1149-51 (10th Cir.), cert. denied, 493 U.S. 820, 107 L. Ed. 2d 43, 110 S. Ct. 76 (1989). The Fourth Circuit, however, allows plaintiffs whose injuries flow from the predicate acts as well as to those injured by the use or investment of the racketeering income to bring a § 1962(a) claim. See Busby v. Crown Supply, Inc., 896 F.2d 833, 836-40 (4th Cir. 1990).

After examining the matter de novo, we believe that the majority position is correct: **HN3** [↑] under RICO, only individuals who have suffered injury from the use or investment of racketeering income have standing to bring a civil suit under §§ 1962(a) and 1964(c). As has been discussed by the other circuits, two grounds support this conclusion. First, § 1964(c) allows [**11] only persons injured "by reason of" a § 1962 violation to bring a civil suit under RICO. A person injured by predicate racketeering acts, such as RAC's unlawful debt collection, is not injured "by reason of" a violation of § 1962(a). Rather, that person is injured by conduct constituting only a predicate act. Cf. Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982) ("Significantly, **HN4** [↑] [RICO] forbids the predicate acts of racketeering only insofar as an 'enterprise' is involved. . . . RICO is not a recidivist statute with enhanced penalties for acts of racketeering that are elsewhere proscribed in the criminal code."), cert. denied, 464 U.S. 1008 (1983). In this case, for example, the plaintiffs were injured by RAC's collection of unlawful debt. They have recovered substantial damages for this injury under Minnesota usury law, and later in this opinion we uphold that recovery. RAC's **HN5** [↑] collection of unlawful debt, however, does not constitute a violation of § 1962(a): it does not involve the use or investment of racketeering income "in acquisition of any interest in, or the establishment or operation of,

any enterprise which is engaged in, or the activities [**12] of which affect, interstate or foreign commerce." [18 U.S.C. § 1962\(a\)](#). Therefore, the plaintiffs' injuries did not flow from a violation of [§ 1962](#) as [§ 1964\(c\)](#) requires. Rather, RAC violated [§ 1962\(a\)](#) only when it used or invested income from its unlawful debt collection in a manner prohibited by [§ 1962\(a\)](#). [HN6](#)¹⁵ RICO grants standing only to parties injured by the use or investment of the unlawfully obtained income, the completed [§ 1962\(a\)](#) violation, and the plaintiffs are not such injured parties. See also [Nugget Hydroelectric, 981 F.2d at 437](#) (criticizing [Busby](#) because, by not requiring that a plaintiff suffer injury from the use or investment of the racketeering income, the Fourth Circuit allows "an individual to recover for injuries caused by an action that does not constitute a violation of [§ 1962\(a\)](#)").

Second, if individuals injured only by predicate acts could bring a civil action under [§ 1962\(a\)](#), [§ 1962\(c\)](#) would be rendered superfluous. [HN7](#)¹⁶ [Section 1962\(c\)](#) creates liability for those persons who "conduct or participate . . . in the conduct" of a RICO enterprise. See [18 U.S.C. § 1962\(c\) \(1994\)](#); [**13] see also [Reves v. Ernst & Young, 507 U.S. 170, 178-79, 122 L. Ed. 2d 525, 113 S. Ct. 1163 \(1993\)](#). If [§ 1962\(a\)](#) were read to allow any person harmed by a predicate act to bring a civil suit under RICO, a defendant could be held liable for violating RICO when that defendant engaged in a predicate act, whether or not [*896] that defendant also conducted or participated in the conducting of a RICO enterprise. The restriction of [§ 1962\(c\)](#) liability to those in management positions would be meaningless. Reading [§ 1962\(a\)](#) so broadly that it renders [§ 1962\(c\)](#) meaningless runs contrary to [HN8](#)¹⁷ the interpretive canon that statutes should be read to give "each word some operative effect." [Walters v. Metropolitan Educ. Enters., 519 U.S. 202, 209, 136 L. Ed. 2d 644, 117 S. Ct. 660 \(1997\)](#) (citing [United States v. Menasche, 348 U.S. 528, 538-39, 99 L. Ed. 615, 75 S. Ct. 513 \(1955\)](#)). To prevent almost unlimited civil liability plainly contrary to the statutory scheme of [§ 1962](#), standing to bring a civil suit for a violation of [§ 1962\(a\)](#) must be limited to those plaintiffs whose injuries flow from the use or investment of the racketeering income.

The plaintiffs claim they can satisfy a use-or-investment requirement because RAC reinvested the income [**14] it obtained from the unlawful debt collection in the operation and maintenance of the rent-to-own business. Such allegations of reinvestment do not suffice to give the plaintiffs standing under [§§ 1962\(a\)](#) and [1964\(c\)](#). Rather, [HN9](#)¹⁸ to bring a claim under [§ 1962\(a\)](#), a plaintiff must allege an injury from the use or investment of the racketeering income that is separate and distinct from injuries allegedly caused by the defendant's engaging in the predicate acts. See [Vemco, 23 F.3d at 132-33](#). A distinct injury is required because, if reinvestment "were to suffice, the use-or-investment injury requirement would be almost completely eviscerated when the alleged pattern of racketeering is committed on behalf of a corporation. . . . Over the long term, corporations generally reinvest their profits, regardless of source." [Brittingham v. Mobil Corp., 943 F.2d 297, 305 \(3d Cir.1991\)](#). The plaintiffs have not and apparently cannot allege an injury from a use or investment distinct or separate from the predicate acts they allege. Therefore, the District Court properly dismissed the plaintiffs' [§ 1962\(a\)](#) claim for lack of standing.

B.

The plaintiffs also appeal [**15] the District Court's grant of summary judgment to the defendants on the plaintiffs' [§ 1962\(c\)](#) claim. [Section 1962\(c\)](#) makes it "unlawful for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce[] to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." [HN10](#)¹⁹ [18 U.S.C. § 1962\(c\) \(1994\)](#). [HN11](#)²⁰ The person who conducts or participates in the conduct of the RICO enterprise must be distinct from the enterprise itself. See [United HealthCare, 88 F.3d at 570](#). The District Court concluded the plaintiffs failed to show the requisite distinctiveness of the persons and enterprise, so it granted the defendants summary judgment on the plaintiffs' [§ 1962\(c\)](#) claim.

The plaintiffs assert that the persons allegedly conducting the RICO enterprise, THORN Americas and TEMINAH, are sufficiently distinct from the enterprise, RAC. The plaintiffs explain that THORN Americas conducts the usurious rental-purchase business nationwide while TEMINAH, the ultimate North American parent company, receives much of the [**16] illegal income. By "RAC," the plaintiffs say they refer to the alleged RICO enterprise, the "conglomerate of corporate entities that conduct the corporate affairs of THORN EMI, plc." Appellee/Cross-Appellant's Br. at 45. The plaintiffs also describe the roles of some of the other corporate entities that made up the RAC conglomerate: THORN EMI, Inc., for example, was "involved in the cash management," including paying

THORN Americas' bills and transferring the usurious profits to other related entities; and THORN EMI, plc headed the international corporate structure. See id.

HN12[] A corporation such as THORN Americas or TEMINAH may serve as a "person" for purposes of RICO § 1962(c). HN13[] See 18 U.S.C. § 1961(3) (1994) (defining [*897] "person" as including "any individual or entity capable of holding a legal or beneficial interest in property"); see also Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 995 (8th Cir. 1989) (involving a RICO enterprise allegedly conducted by two corporate persons). An association of business entities such as RAC also may serve as an "enterprise." See United HealthCare., 88 F.3d at 570; Atlas Pile Driving, 886 F.2d at 995 n.7. [**17] In this case, however, the plaintiffs allege that the RICO enterprise consists solely of wholly owned, related business entities, and that some of the wholly owned subsidiaries conducted the racketeering activities for the enterprise.

This Court has not previously considered whether the § 1962(c) distinctiveness requirement may be satisfied when wholly owned subsidiaries are the persons who conduct a RICO enterprise consisting only of the parent company and other related business entities that comprise the defendants' corporate family. When we look to the other circuits, we find little direct guidance, but we do find substantial indications that to impose liability on a subsidiary for conducting an enterprise comprised solely of the parent of the subsidiary and related businesses would be to misread the statute. Ten other circuits require that the person and enterprise be distinct.³ Most of these circuits have suggested some limits on when related business entities, or business entities and their employees, may serve as both the person and enterprise under § 1962(c). See, e.g., Bachman v. Bear, Stearns & Co., 178 F.3d 930, 1999 WL 335343, at *2 (7th Cir. 1999); [**18]⁴ Brannon v. Boatmen's First National Bank, 153 F.3d 1144, 1146-47 (10th Cir. 1998); Compagnie de Reassurance D'Ile De France v. New England Reinsurance Corp., 57 F.3d 56, 92 (1st Cir. 1995); Davis v. Mutual Life Ins. Co., 6 F.3d 367, 377 (6th Cir. 1993), cert. denied, 510 U.S. 1193, 127 L. Ed. 2d 650, 114 S. Ct. 1298 (1995); NCNB Nat'l Bank v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987), overruled on other grounds by Busby, 896 F.2d at 841-42; Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438, 440-41 (5th Cir.) (per curiam), cert. denied, 483 U.S. 1032, 97 L. Ed. 2d 780, 107 S. Ct. 3276 (1987). Much of the controversy among these circuits concerns whether officers or employees of an entity may conduct an enterprise consisting of the employing entity. Compare, e.g., Jaguar Cars, Inc. v. Royal Oaks Motor Co., 46 F.3d 258, 268-69 (3d Cir. 1995) (stating the distinctiveness requirement is satisfied with allegations of "conduct by officers or employees who operate or manage a corporate enterprise"); Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1534 (9th Cir. 1992) (determining that employees [**19] may conduct their employer as a RICO enterprise), with Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30 F.3d 339, 344-45 (2d Cir. 1994) (stating that a [*898] group allegedly consisting of a corporation and two of its employees could not "conduct" the corporation itself as the RICO enterprise). The plaintiffs have not claimed that any employees or officers of RAC were the persons conducting the RICO enterprise, however, so we need not address this issue.

[**20] But we must consider whether HN15[] a subsidiary may be sufficiently distinct from its parent or other related subsidiaries so as to satisfy § 1962(c)'s distinctiveness requirement. We believe it cannot. A parent

³The sole exception is the Eleventh Circuit, which does not require distinctiveness between the person and enterprise. See Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1398 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995).

⁴The plaintiffs claim the Seventh Circuit has determined that allegations that subsidiaries conducted a parent-company enterprise are sufficient. The plaintiffs base their argument on Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606, 87 L. Ed. 2d 437, 105 S. Ct. 3291 (1985), in which the Seventh Circuit asserted that it is "virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation." 747 F.2d at 402-03. More recently, however, the Seventh Circuit has indicated that related business entities may not serve as both the person and enterprise. In Bachman v. Bear, Stearns & Co., 178 F.3d 930, 1999 WL 335343 (7th Cir. 1999), the court appears to reject the conclusion it suggested in Haroco. Stating that it deliberately omitted four corporations when it described the alleged RICO enterprise, the Court explains, "HN14[] A firm and its employees, or a parent and its subsidiaries, are not an enterprise separate from the firm itself." Id. at *2; see also Fitzgerald v. Chrysler Corp., 116 F.3d 225, 226-27 (7th Cir. 1997) (affirming dismissal on distinctiveness grounds of a complaint that alleged Chrysler Corporation was the person conducting an enterprise comprised of the "Chrysler family").

company and a subsidiary are separate legal entities, but this is not enough. Nor is it enough that the parent and subsidiary corporations have different roles in the alleged enterprise, as would be typical of every parent-subsidiary relationship. Rather, [HN16](#)¹ there must be a greater showing that the parent and subsidiary are distinct than the mere fact that they are separate legal entities. To conclude otherwise would be to read the distinctiveness requirement out of RICO.

Turning our attention to the present case, the plaintiffs have not shown sufficient distinctiveness between THORN Americas; TEMINAH; THORN EMI, plc; or any of the other related business entities that allegedly comprise the RAC enterprise. All these entities are part of one corporate family operating under common control. Therefore, we affirm the District Court's granting of summary judgment to the defendants on the plaintiffs' [§ 1962\(c\)](#) claim.

C.

The plaintiffs' final RICO argument is that the District Court [\[*21\]](#) incorrectly granted the defendants summary judgment on a claim that THORN EMI, plc; THORN Americas; and TEMINAH violated [§ 1962\(d\)](#) by conspiring to violate RICO. Subsection (d) makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of [\[§ 1962\]](#)." [HN17](#)¹ [18 U.S.C. § 1962\(d\) \(1994\)](#). The District Court concluded the plaintiffs' [§ 1962\(d\)](#) claim necessarily failed because the plaintiffs lacked standing to bring a [§ 1962\(a\)](#) claim and their [§ 1962\(c\)](#) claim failed as a matter of law.

We affirm the District Court's grant of summary judgment on a different basis. Cf. [Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1116 \(8th Cir. 1999\)](#) ("[HN18](#)¹ We may affirm the district court's judgment on any basis supported by the record."). The plaintiffs allege that the only participants in this conspiracy were THORN EMI, plc and its wholly owned subsidiaries THORN Americas and TEMINAH. See Third Amended Complaint at 18. Such allegations fail to allege a conspiracy, because [HN19](#)¹ as a matter of law a parent corporation and its wholly owned subsidiaries are legally incapable of forming a conspiracy with one another. [\[*22\]](#) We believe that [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#), in which the Supreme Court held that a parent and its wholly owned subsidiary lacked the capacity to conspire to violate § 1 of the Sherman Act, requires the identical conclusion when the same principle is applied to alleged parent-subsidiary RICO civil conspiracies.

In [Copperweld](#), the Supreme Court stated that "in any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." [Copperweld, 467 U.S. at 769](#) (emphasis added). The Court determined that an alleged conspiracy between a parent and a subsidiary lacks this crucial element:

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.

[Id. at 771](#). The Court also noted that the whole notion of an "agreement" [\[*899\]](#) between a parent [\[*23\]](#) and a wholly owned subsidiary "lacks meaning." [Id.](#)

In our analysis of the plaintiffs' [§ 1962\(c\)](#) claim, we have already discussed the plaintiffs' failure to show any distinctiveness or independence between THORN EMI, plc and its subsidiaries THORN Americas and TEMINAH. This lack of distinctiveness or independence reinforces the conclusion derived from [Copperweld](#) that THORN EMI, plc and its subsidiaries "are common, not disparate," and that their actions are driven by a single consciousness. Cf. [id.](#) Therefore, we conclude that THORN EMI, plc; THORN Americas; and TEMINAH as wholly related business entities are incapable of conspiring with one another to violate [§ 1962\(c\)](#).⁵

⁵ We do not consider the situation in which a corporation and its officers or employees allegedly formed a conspiracy. Cf. [United States v. American Grain & Related Indus., 763 F.2d 312, 320 \(8th Cir. 1985\)](#) (concluding that a corporation may be convicted of criminal conspiracy where corporate agents conspired with each other on behalf of the corporation).

[**24] We recognize that the Seventh and Ninth Circuits have reached a conclusion different from ours. In [Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 \(7th Cir. 1989\)](#), the Seventh Circuit determined that [Copperweld](#) does not prevent a RICO conspiracy from consisting solely of a parent and its wholly owned subsidiary because, according to the Seventh Circuit, special policy considerations embodied in the Sherman Act do not apply in RICO cases. See [id. at 1281](#) (discussing the theoretical "community of interest" that causes a parent and subsidiary to pose "no threat to the goals of [antitrust law](#)-protecting competition"). The Seventh Circuit stated that liability should extend to intracorporate RICO conspiracies because "intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits." [Id.](#) In [Webster v. Omnitrition International, Inc., 79 F.3d 776, 787](#) (9th Cir.), cert. denied, 519 U.S. 865, 136 L. Ed. 2d 115, 117 S. Ct. 174 (1996), the Ninth Circuit relied upon the Seventh Circuit's reasoning to extend [§ 1962\(d\)](#) liability to a wholly intracorporate [**25] conspiracy.⁶

We find this reasoning unconvincing. Neither the Seventh nor the Ninth Circuit explains why, when two entities are under common control and there is no distinctiveness or independence of action, an agreement or understanding between them creates any of the special dangers [§ 1962\(d\)](#) targets. In the absence of such an explanation, we read the plaintiffs' allegations as essentially asserting that THORN EMI, plc conspired with its arms and hands. Such allegations are not sufficient. See [United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 \(4th Cir. 1982\)](#) ("We would not take seriously . . . an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon."), cert. denied, 459 U.S. 1105, 74 L. Ed. 2d 953, 103 S. Ct. 729 (1983).

Therefore, although [**26] we do not reach the ground upon which the District Court relied, we affirm the District Court's grant of summary judgment to the defendants on the plaintiffs' [§ 1962\(d\)](#) claim.

III.

Now we turn to the arguments raised in RAC's direct appeal regarding the damages awarded to the plaintiff class on its state-law usury claim. RAC challenges two aspects of the District Court's award of damages to individual plaintiffs. In order to give these challenges a context, we briefly summarize the District Court's damage distribution plan. The distribution plan divides plaintiffs into three groups. The first group includes two subgroups: [*900] those plaintiffs who leased goods that RAC did not designate for return and those who had previously returned their leased goods to RAC. Under the District Court's distribution plan, plaintiffs in both subgroups recover all principal and interest paid. The second group of plaintiffs consists of those plaintiffs who, when RAC designated their goods for return, elected to retain the goods. These plaintiffs receive a refund only of the interest they paid under the rent-to-own agreements. The third group also leased goods that RAC designated for return, but, unlike [**27] the second group, the third group elected to return those goods. The District Court's order grants this group, like the first group, repayment of all principal and interest paid. See [Fogie v. THORN Americas, Inc., Civ. No. 3-94-359, slip op. at 7-8](#) (D. Minn. Apr. 15, 1998) (Order for Judgment; Orders in Enforcement of Injunction, Allowing Attorneys' Fees and Costs, and Plan of Distribution) [hereinafter "Order for Judgment"].

The first aspect of the damage distribution plan that RAC challenges is that it allows some plaintiffs--apparently members of the first and second groups--to keep the goods they had leased without paying RAC the full value of those goods. According to RAC, plaintiff class members failed to pay the department-store price for the goods leased (i.e., the fair value of the goods as determined by an unrelated retail seller) in approximately 37,500 of the 58,000 rent-to-own agreements covered by the class certification. The distribution plan allows plaintiffs who entered those 37,500 agreements to keep the goods, even those goods RAC designated for return, without making further payments. RAC claims this awards such plaintiffs an improper windfall. Citing [Burney v. THORN Americas, Inc., 944 F. Supp. 762 \(E.D. Wis. 1996\)](#), [**28] RAC urges this Court to redefine the plaintiff class to exclude such plaintiffs, whom RAC calls "windfall plaintiffs."

⁶ We note that the Seventh Circuit's recent decisions regarding intracorporate liability under [§ 1962\(c\)](#), see [supra](#) note 4, appear to undercut the conclusions it reached in [Ashland Oil](#).

Reviewing this legal issue de novo, we find that the District Court's order is consistent with [HN20](#)[↑] Minnesota usury law, which permits a victim of usury to retain goods purchased through a usurious contract without paying full value for them. Since 1877, [HN21](#)[↑] the Minnesota usury statute has provided two remedies for victims of usury: recovery of all interest paid pursuant to [Minnesota Statutes § 334.02](#); and a declaration that the usurious contract is canceled as void pursuant to [§§ 334.03](#) and [334.05](#). See [Barton v. Moore, 558 N.W.2d 746, 750-51 \(Minn. 1997\)](#). Minnesota courts have long stated that, [HN22](#)[↑] when a victim of usury cancels a usurious contract, the victim does not need to compensate the usurer for the goods obtained under the usurious contract as a condition for receiving cancellation. In [Trauernicht v. Kingston, 156 Minn. 442, 195 N.W. 278 \(Minn. 1923\)](#), the Minnesota Supreme Court stated, "The general rule over the country is that a borrower on usury when he comes to a court of equity asking affirmative relief by way of the cancellation of an obligation [**29] . . . must restore the money actually received. . . . Our own rule, often announced, is that restoration need not be made." [195 N.W. at 279](#). The Minnesota Supreme Court determined that the Minnesota General Usury Statute requires this result. [See id.](#)

Trauernicht's interpretation of the Minnesota usury statute remains valid. See [First Fed. Sav. & Loan Ass'n v. Guildner, 295 N.W.2d 501, 503 \(Minn. 1980\)](#) (citing [Trauernicht](#) for the principle that a "plaintiff suing for cancellation of [a] usurious loan need not return the money actually received"); [see also In re Estate of Fauskee, 497 N.W.2d 324, 328 \(Minn. Ct. App. 1993\)](#) ("If a loan is usurious, it is unenforceable and the lender must forfeit interest and principal payments."). [HN23](#)[↑] Under Minnesota law, therefore, if a seller commits usury when selling goods, the buyer may keep the goods purchased without paying the seller the full value of the goods. The buyer also may cancel the contract pursuant to [§§ 334.03](#) and [334.05](#) and demand that the usurious seller repay all interest collected as required by [§ 334.02](#). The District Court's distribution [[*901](#)] plan grants the so-called windfall [**30] plaintiffs nothing more than that specified by Minnesota law. This Court has no reason to redefine the plaintiff class as RAC requests.

The second aspect of the District Court's damage distribution that RAC challenges is the provisions that force RAC to repay principal and interest to plaintiffs in the first and third groups. Relying on [Rathbun v. W. T. Grant Co., 300 Minn. 223, 219 N.W.2d 641 \(Minn. 1974\)](#), and its progeny, RAC argues that Minnesota law allows victims of usury to recover interest only. In [Rathbun](#), a class-action lawsuit involving usurious retail sales installment contracts, the Minnesota Supreme Court determined "that the recovery of both interest and principal provided a remedy too harsh under the circumstances." [219 N.W.2d at 653](#). Therefore, the Minnesota Supreme Court permitted the plaintiffs to recover interest only. [See id.](#) RAC claims that [Rathbun](#) provides a bright-line rule for Minnesota usury lawsuits, or at the least for usury class-action lawsuits similar to [Rathbun](#) and the present case, that limits a usury victim's recovery to interest only. We disagree.

As we have already discussed, the Minnesota General Usury Statute grants [**31] usury victims two remedies: return of all interest paid and cancellation of the contract as void. See [Barton, 558 N.W.2d at 750](#). [HN24](#)[↑] When a usurious loan is canceled, "the one guilty of usurious exaction must bear the legal consequences flowing from such violation. As such he must lose not only the interest on the money risked, but also the principal, including as well all security given to secure performance." [Midland Loan Fin. Co. v. Lorentz, 209 Minn. 278, 296 N.W. 911, 915 \(Minn. 1941\)](#); accord [United Realty Trust v. Property Dev. & Research Co., 269 N.W.2d 737, 743 n.12 \(Minn. 1978\)](#); [Fauskee, 497 N.W.2d at 328](#). The distribution plan, therefore, correctly enforces Minnesota law when it compels RAC to forfeit and repay all principal and interest collected on the usurious loans.

[Rathbun](#) and its progeny do not create a bright-line rule to the contrary. Rather, [Rathbun](#) and its progeny indicate that in some circumstances the forfeiture of both principal and interest may punish the usurer too harshly. See [Rathbun, 219 N.W.2d at 653](#) (stating "that the recovery of both interest and principal provides a remedy too [**32] harsh under the circumstances" (emphasis added)); [Katz & Lange, Ltd. v. Beugen, 356 N.W.2d 733, 735 \(Minn. Ct. App. 1984\)](#) ("Although the interest rate . . . was usurious, [the] counterclaim seeking to have the entire underlying debt declared void is too harsh under the circumstances. Forfeiture of all the charges is a sufficient remedy." (emphasis added) (citation omitted)); [Kudzia v. Weise, 1994 Minn. App. LEXIS 509](#), No. C7-[93-1906, 1994 WL 233599](#) (Minn. Ct. App. May 31, 1994) (unpublished) (citing [Rathbun](#) and [Beugen](#) for the proposition that "[HN25](#)[↑] under some circumstances . . . forfeiture of the interest alone is the proper remedy for usury because forfeiture of both the principal and interest would be too harsh a remedy" (emphasis added)).

This case does not involve circumstances in which the forfeiture of principal and interest constitutes too harsh a remedy. The Order for Judgment permits a plaintiff to recover both principal and interest only when RAC failed to designate the plaintiffs goods for return or when the plaintiff returned goods RAC designated for return. In these instances, the Order for Judgment essentially rescinds the original contract: RAC [**33] has to repay both principal and interest only when it either recovers the leased goods or declines to recover those goods, apparently because the goods have little residual value. Rescission is a common remedy that does not seem too harsh, nor does RAC argue that it is. Furthermore, Rathbun and its progeny do not involve rescission cases. Concluding the distribution plan's awarding of principal and interest to plaintiffs in the first and third groups is permitted by Minnesota law and not too harsh considering the circumstances of this case, we affirm the District Court on this matter.

[*902] IV.

RAC also claims that the District Court erred when it granted the plaintiff class a retrospective remedy based on Miller v. Colortyme, Inc., 518 N.W.2d 544 (Minn. 1994). HN26¹ In Minnesota, "the general rule is that . . . [a] decision is to be given retroactive effect." Hoff v. Kempton, 317 N.W.2d 361, 363 (Minn. 1982). But Minnesota courts recognize that sometimes retroactive application of a judicial decision is inappropriate. HN27¹ To determine when a legal principle should be applied prospectively only, Minnesota courts employ a three-factor standard the United States [**34] Supreme Court described in Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971). The three factors to consider are: (1) whether the decision overrules clear precedent or resolves an issue of first impression in a manner "not clearly foreshadowed"; (2) whether, considering the history, purpose, and effect of the legal principle at issue, retroactive application will retard, not further, that principle; and (3) whether the inequities that would result from retroactive application provide an ample basis for applying the legal rule prospectively only. See Hoff, 317 N.W.2d at 363 (quoting Chevron Oil, 404 U.S. at 106-07); see also Holmberg v. Holmberg, 588 N.W.2d 720, 726 (Minn. 1999).

This Court already considered the Chevron Oil factors and determined that retroactive application of the Miller v. Colortyme decision is appropriate. See Fogie, 95 F.3d at 651. RAC argues that our decision in Fogie does not foreclose its argument that a retrospective remedy is inappropriate because the United States Supreme Court distinguishes between retroactive application of a rule and the awarding of a retrospective [**35] remedy based upon the rule, and recognizes that sometimes retroactive-application and retrospective-remediation issues should be considered independently. See Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 754-59, 131 L. Ed. 2d 820, 115 S. Ct. 1745 (1995) (summarizing four instances when the Supreme Court observed this application-remediation distinction). Without examining the Reynoldsville Casket decision further, RAC argues this case is one in which this Court should consider the retrospective-remediation issue separately. RAC believes that, should we engage in independent retroactivity analysis of the remediation issue and use the Chevron Oil factors as directed by Hoff we will conclude that the District Court erred in granting a retrospective remedy. RAC makes such claims even though the Minnesota Supreme Court declined to apply the Miller v. Colortyme decision prospectively only. See Miller v. Colortyme, No. C2-92-2595, slip op. at 1 (Minn. Aug. 2, 1994) (Order denying petition for clarification).

In raising its retrospective-remediation argument, RAC bids us to make three substantial analytical leaps. First, there is no precedent indicating that Minnesota courts would make the [**36] application-remediation distinction the Supreme Court recognized in Reynoldsville Casket. Second, the United States Supreme Court, while recognizing the application-remediation distinction, has largely superseded Chevron Oil with a test under which we would be compelled to apply Miller v. Colortyme retroactively.⁷ Thus, while encouraging us [*903] to employ a distinction

⁷ While Reynoldsville Casket states that sometimes retrospective remediation should be considered independently from retroactive application and provides instances of when such independent consideration was appropriate, the Supreme Court in Reynoldsville Casket does not provide a test a court should use when evaluating whether a retrospective remedy is appropriate. The Supreme Court, however, largely superseded Chevron Oil when, in Harper v. Virginia Department of Taxation, 509 U.S. 86, 96-97, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993), it enunciated a new standard for assessing when a legal principle should be applied retroactively. Under this new standard, "when [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events." Id. at 97 If this Court applied the Harper standard to the present case, the Minnesota Supreme

not previously recognized by any Minnesota court, RAC urges us to use a Minnesota standard that would not be used in federal courts, the courts that have recognized the distinction. Third, RAC has not attempted to prove that, even if Minnesota courts would distinguish between retroactive application and retrospective remedy, the present case is one in which retroactive application and retrospective remedy should be

[**37] We do not explore these three analytical leaps, however, because even if we resolved each one in RAC's favor we would still conclude that the District Court did not err when it awarded a retrospective remedy. Applying the three-factor Chevron Oil standard to consider the propriety of awarding a retrospective remedy, we would first recognize that Miller v. Colortyme did not overturn a prior decision nor did it announce a legal principle not clearly foreshadowed in Minnesota law. Rather, Miller v. Colortyme "simply stated a reasonable and correct interpretation of the law which differs from the erroneous view RAC had chosen to follow." Fogie, 95 F.3d at 651. According to the Minnesota Supreme Court in Miller v. Colortyme, this interpretation flows from the only conceivable reason the Minnesota legislature amended the CCSA in 1981--because it wanted the CCSA to cover rent-to-own agreements. See Miller v. Colortyme, 518 N.W.2d at 548.

Second, awarding a retrospective remedy would further, not retard, the principles of the Minnesota usury statute as reflected in its purpose, history, and effect. The Minnesota General Usury Statute seeks [**38] "to protect the weak and necessitous from being taken advantage of by lenders who can unilaterally establish the terms of the loan transaction." Trapp v. Hancuh, 530 N.W.2d 879, 884 (Minn. Ct. App. 1995). RAC charged interest on the rent-to-own agreements ranging from 46 to 746 percent, see Fogie, 95 F.3d at 652, approximately six to ninety-three times greater than the eight percent permitted under Minnesota law. See Minn. Stat. § 334.01 (1998). The award of a retrospective remedy for such conduct, while perhaps harsh, would further the statutory purpose of discouraging business entities from charging excessive interest rates on loans to consumers. Moreover, this remedy comports with the history and traditional effects of the Minnesota usury statute, under which courts have held that a victim may recover the principal and interest paid and security given without even paying the usurer the principal borrowed. See supra Part III.

Third, we reject RAC's arguments that the inequities that would result from awarding a retrospective remedy provide a compelling basis for us to grant only prospective relief. RAC complains that a retrospective remedy [**39] will unjustly compensate plaintiffs because it will allow them to escape paying for RAC's overhead expenses and for use of and damage to the leased goods. RAC ignores that it charged interest rates far in excess of the legal limits. RAC also ignores that the Order for Judgment allows RAC to keep some income from its usurious transactions: profits included in the retail price of designated goods the second group of plaintiffs had paid for and chose to keep and income RAC made using or investing the plaintiffs' payments of principal and interest before the plaintiffs filed suit. The equities of this case do not provide a sufficient basis for us to conclude that only prospective relief is appropriate.

None of the three Chevron Oil factors weighs in favor of denying the plaintiffs a retrospective remedy. Furthermore, as we have already stated, the Minnesota Supreme Court has refused to amend Miller [*904] v. Colortyme to make it apply only prospectively. See Miller v. Colortyme, No. C2-92-2595, slip op. at 1 (Minn. Aug. 2, 1994) (Order denying petition for clarification). Reassured by the Minnesota Supreme Court's refusal to amend Miller v. Colortyme that our determination correctly [**40] interprets Minnesota law, we affirm the District Court's grant of a retrospective remedy.

V.

RAC also challenges the *cy pres* fund that the judgment of the District Court creates for unclaimed damages. According to the Order for Judgment, if any monies remain "after the Unlocated Members Subfund is closed . . . , the pay over of waived principal refunds to [THORN] is completed . . . , all disputes are resolved . . . [,] all checks issued on the Common Fund have either expired or been cashed," and certain other taxes, fees, and expenses are paid, they are to be placed in a *cy pres* fund. Order for Judgment at 12. The District Court directs class counsel at

Court's decision to apply Miller v. Colortyme to the parties before it would seem to compel us also to apply Miller v. Colortyme retroactively in this case. considered separately. Nevertheless, RAC urges us to engage in a separate remediation analysis.

that time to provide an accounting to the District Court and "petition the [District] Court for direction on distribution of the *Cy Pres* Fund." *Id.* at 13.

RAC claims that the creation of a *cy pres* fund is unprecedented and inappropriate when, as in this case, the District Court formulates an individualized remedy tied to specific transactions, and all class members are known and will receive full compensation if they come forward. RAC argues that undistributed funds should be returned so that RAC can compensate **[**41]** class members who seek payment after the common fund is closed but still within the time for enforcing a judgment set forth by Minnesota law.

Several questions regarding the *cy pres* fund remain unanswered. Most importantly, we do not yet know whether any undistributed monies will remain. For all that appears, at the end of the day there may be nothing left to go into the fund. Moreover, the District Court has not decided how any such funds will be distributed or to whom. In the absence of information regarding the existence and amount of residual funds, the District Court acted prematurely in ordering the creation of a *cy pres* fund. Accordingly, we vacate the portion of the District Court's order that creates the *cy pres* fund for unclaimed monies without prejudicing the District Court's ability to consider the creation of a *cy pres* fund if in fact there are unclaimed monies left after the plan for the payout of damages has been fully carried out. Cf. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 420 (8th Cir. 1998) (vacating without prejudice a district court's determination that an ADA plaintiff could not perform an essential function of his **[**42]** job because the plaintiff might still elect to undergo the medical testing necessary to make that determination).

VI.

Finally, RAC argues the District Court mistakenly granted the plaintiffs double recovery when it ordered RAC to return funds from an escrow account to the plaintiffs. RAC claims that the \$ 1.6 million in escrow funds were already included when the parties stipulated that RAC had received \$ 27.9 million from the plaintiff class in transactions governed by the rent-to-own agreements. The District Court found to the contrary, ordering RAC to return the \$ 1.6 million in escrow funds and to pay damages based on the \$ 27.9 million in receipts. **HN28** We review this factual determination for clear error. See *Chicago Title Ins. Co. v. FDIC*, 172 F.3d 601, 604 (8th Cir. 1999).

To determine whether the escrow funds were included in the damage stipulation, we trace the history of the two amounts. Initially, the District Court did not establish an escrow account; rather, it ordered RAC to "cease making any further collections or receiving any further payments of any kind from the Plaintiff Class on the rental purchase agreements." *Fogie v. Rent-A-Center, Inc.*, **[**43]** No. 3-94-359, slip op. at 16 (D. Minn. **[*905]** Sept. 28, 1995) (Memorandum Opinion and Order). RAC later requested that the District Court stay this requirement, claiming that, because the District Court's order prevented RAC from contacting the class members, RAC's return of payments without explanation would create unnecessary confusion. The District Court agreed with RAC that returning payments would create unnecessary confusion but declined to grant a stay. Instead, the court ordered RAC to place all payments received in a "separate, interest bearing account" until the plaintiffs were notified regarding the outcome of this litigation. See *Fogie v. THORN Americas, Inc.*, 1997 U.S. Dist. LEXIS 23562, No. 3-94-359, slip op. at 7 (D. Minn. Feb. 19, 1997) (Memorandum Opinion and Order).

The parties subsequently stipulated that the total amount of sales subject to rescission--that is, the amount "reflecting receipts on rental purchase contracts issued by [THORN] from August 1, 1990, through November 13, 1996"--totaled approximately \$ 27.9 million. See Order for Judgment at 2. The District Court used this amount to calculate interest, made other adjustments, and ordered RAC to pay approximately \$ 29.9 million **[**44]** in damages. The District Court also ordered RAC to return the \$ 1.6 million in payments that had been placed in escrow.

After reviewing the District Court's orders regarding the treatment of payments received after litigation commenced, the creation of the escrow account, and the Order for Judgment, we do not believe the District Court clearly erred when it determined that the escrow funds were not included in the total damage stipulation. The damage stipulation provided the total amount of RAC's actual receipts. Because the funds placed in escrow were never received by RAC, the District Court did not clearly err when it determined the escrow funds were not included in the damage

stipulation. Therefore, we uphold the District Court's decision to calculate damages based on the \$ 27.9 million stipulation and also order RAC to return the \$ 1.6 million in escrow funds.

VII.

For the reasons stated above, the judgment of the District Court is vacated without prejudice insofar as it creates a *cy pres* fund. In all other respects, the judgment of the District Court is affirmed.

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Modesto Irrigation Dist. v. Pacific Gas & Elec. Co.

United States District Court for the Northern District of California

August 20, 1999, Filed

No. C-98-3009 MHP

Reporter

61 F. Supp. 2d 1058 *; 1999 U.S. Dist. LEXIS 13505 **; 1999-2 Trade Cas. (CCH) P72,654

MODESTO IRRIGATION DISTRICT, Plaintiff, vs. PACIFIC GAS & ELECTRIC COMPANY, and DYNERGY POWER SERVICES, INC., as successor to DESTEC POWER SERVICES, INC., Defendants.

Disposition: **[**1]** Defendants' motion to dismiss MID's federal antitrust and Cartwright Act claims against DESTEC and PG&E GRANTED. Claims DISMISSED without prejudice.

Core Terms

electric power, substation, allegations, wholesale, transmission, retail, conspiracy, monopolization, antitrust, Sherman Act, electricity, defendants', immunity, consumers, anticompetitive, deliver, antitrust claim, anti trust law, incidental, asserts, competitors, unilateral, license, monopoly power, interconnection, lawsuit, wheel, conspiracy to monopolize, antitrust liability, motion to dismiss

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

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

HN1 [] Motions to Dismiss, Failure to State Claim

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN2 [] Defenses, Demurrsers & Objections, Motions to Dismiss

Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Fed. R. Civ. P. 12(b)(6) motion.

61 F. Supp. 2d 1058, *1058 (1999 U.S. Dist. LEXIS 13505, **1

Energy & Utilities Law > Antitrust Issues > General Overview

HN3 [down] Energy & Utilities Law, Antitrust Issues

In the Ninth Circuit, antitrust pleadings need not contain great factual specificity. There is no special rule requiring more factual specificity in antitrust pleadings. However, as noted by many courts, the court need not accept legal conclusions asserted in the complaint even if pled as facts or conclusory allegations without more.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

HN4 [down] Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > Claims

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN5 [down] Sherman Act, Claims

To state a claim for a violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must establish (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition under a per se or rule of reason analysis; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Energy & Utilities Law > Antitrust Issues > General Overview

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

HN6 [down] Conspiracy to Monopolize, Sherman Act

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. However, some types of restraints are deemed unlawful per se if they have a predictable and pernicious anticompetitive effect.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Energy & Utilities Law > Antitrust Issues > General Overview

61 F. Supp. 2d 1058, *1058 (1999 U.S. Dist. LEXIS 13505, **1

HN7 Conspiracy to Monopolize, Sherman Act

A business generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Energy & Utilities Law > Antitrust Issues > General Overview

HN8 Energy & Utilities Law, Antitrust Issues

An agreement under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

HN9 Sherman Act, Defenses

See [15 U.S.C.S. § 2](#).

Energy & Utilities Law > Antitrust Issues > General Overview

HN10 Energy & Utilities Law, Antitrust Issues

To state a claim under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), for monopolization violation, plaintiff must allege that defendant (1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power.

Energy & Utilities Law > Antitrust Issues > General Overview

HN11 Energy & Utilities Law, Antitrust Issues

"Willful acquisition" or "maintenance of monopoly power" involves exclusionary conduct, not power gained from growth or development as a consequence of a superior product, business acumen, or historic accident.

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > ... > Rates > Ratemaking Factors > Rate of Return

61 F. Supp. 2d 1058, *1058 (1999 U.S. Dist. LEXIS 13505, **1

[**HN12**](#) [blue document icon] Energy & Utilities Law, Antitrust Issues

In the case of a regulated utility struggling with dual regulation, bearing in mind that the utility is entitled to recover its costs of service and to provide its investors with a reasonable rate of return, an antitrust plaintiff must also establish a specific intent by the monopoly to engage in monopolistic conduct through the actions of the utility, taken as a whole.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

[**HN13**](#) [blue document icon] Antitrust & Trade Law, Sherman Act

To prevail on a [§ 2 attempt](#) claim under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), a plaintiff must establish: (1) a specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power," and (4) causal antitrust injury.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

[**HN14**](#) [blue document icon] Defenses, Demurrsers & Objections, Motions to Dismiss

Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Evidence > Judicial Notice > General Overview

Evidence > Judicial Notice > Adjudicative Facts > General Overview

[**HN15**](#) [blue document icon] Motions for Summary Judgment, Notice Requirement

The court can take judicial notice of facts beyond the complaint and matters of public records such as pleadings in another action and records and reports of administrative bodies in considering a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#).

Contracts Law > Types of Contracts > Unilateral Contracts > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

[**HN16**](#) [blue document icon] Types of Contracts, Unilateral Contracts

A trial court must confine its inquiry of whether a plaintiff has sufficiently stated a claim under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), to those allegations contained in the amended complaint, or incorporated by reference.

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HN17 [blue icon] Antitrust & Trade Law, Sherman Act

To state a conspiracy to monopolize claim under [§ 2](#) of the Sherman Act, [15 U.S.C. § 1 et seq.](#), a plaintiff must set forth a specific intent to monopolize and the anticompetitive acts designed to effect that intent, although in the conspiracy claim the act may be no more than the agreement itself.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

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Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN18 [blue icon] Noerr-Pennington Doctrine, Sham Exception

Under the Noerr-Pennington doctrine, one who files a lawsuit or otherwise petitions the government for redress is generally immune from antitrust liability unless such litigation or activity is a sham.

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HN19 [blue icon] Energy & Utilities Law, Antitrust Issues

The Ninth Circuit has held that a decision to accept or reject an offer of settlement is conduct incidental to the prosecution of a lawsuit and not a separate and distinct activity which might form the basis for antitrust liability.

Counsel: For MODESTO IRRIGATION DISTRICT, Plaintiff: Maxwell M. Blecher, Donald R. Pepperman, Blecher & Collins, P.C., Los Angeles, CA.

For MODESTO IRRIGATION DISTRICT, Plaintiff: Scott T. Steffen, Modesto Irrigation Dist, Modesto, CA.

For PACIFIC GAS & ELECTRIC COMPANY, defendant: Marie L. Fiala, Kirk G. Werner, M. Fehrenbacher Claire, Heller Ehrman White & McAuliffe, San Francisco, CA.

For DESTEC ENERGY, INC., defendant: Robert A. Mittelstaedt, Pillsbury Madison & Sutro LLP, San Francisco, CA.

Judges: MARILYN HALL PATEL, Chief Judge, United States District Court, Northern District of California.

Opinion by: MARILYN HALL PATEL

Opinion

[*1060] MEMORANDUM AND ORDER

On August 3, 1998, plaintiff Modesto Irrigation District, Inc. ("MID") filed this action alleging that defendants Pacific Gas & Electric Company ("PG&E") and Dynergy Power Services, Inc. ("DESTEC") refused to deliver wholesale electric power to MID in violation of federal and state antitrust laws and state tort laws. In particular, MID alleged (1) violations of section 1 of the Sherman Act, 15 U.S.C. § 1, and the Cartwright Act, Cal. Bus. & Prof. Code §§ 16720 et seq., California's antitrust statute by both PG&E and DESTEC; (2) tortious interference with contract and with prospective business relationship against PG&E alone; and, (3) breach of contract against DESTEC. The court dismissed MID's federal and state antitrust claims on February 2, 1999, on defendants' motion, but granted MID leave to amend its complaint. See Modesto Irrigation Dist. v. Pacific [**2] Gas & Elec., 1999 U.S. Dist. LEXIS 14944, Case No. 98-3009 MHP, slip op. at 12-13 (N.D. Cal., Feb. 2, 1999) ("February order").

MID subsequently filed a first amended complaint ("FAC") on March 4, 1999, adding to the factual allegations in its original complaint and raising two additional causes of action: (1) violations of section 2 of the Sherman Act, 15 U.S.C. § 2, against PG&E and DESTEC, and (2) conspiracy to violate section 2 against PG&E and DESTEC. Again before the court is defendants' motion to dismiss MID's federal and state antitrust claims. Having considered the parties' arguments and submissions, the court enters the following memorandum and order.

[*1061] BACKGROUND

Plaintiff MID is an irrigation district, a public agency created under the authority of the California Water Code, which owns and operates facilities for the generation, transmission and distribution of electric power. FAC, at P 4. MID provides retail electric service in Stanislaus, Tuolumne, San Joaquin and Contra Costa counties, and wholesale electric service throughout the western United States. Id. Defendant PG&E is an investor-owned public utility engaged in the generation, transmission and distribution [*3] of electricity in northern and central California.¹ FAC, at PP 7, 10. PG&E sells and delivers electric power to both retail and wholesale consumers and separately sells transmission services to resellers of electric power. Id. at PP 9-10. As the predominant wholesaler and retailer of electric power in northern and central California, PG&E dominates and controls facilities for the transmission of electricity within its California service territory. Id. at P 10. According to MID, PG&E and MID are in "actual and potential competition" to supply residential and industrial consumers with electric power. Id. at P 12. Finally, DESTEC, a subsidiary of Dynergy Corporation of Houston, Texas, is a wholesaler of electric power, which is also referred to as a "power marketer." Id. at PP 6, 15.

[*4] The events at issue in this action concern the purchase and use of a "substation" ("Praxair substation") originally owned by Praxair, Inc. ("Praxair"), a large industrial consumer of electricity located in Pittsburg, California, and a retail customer of PG&E. FAC at P 17. A "substation" is a facility which receives electric power at high voltage and transforms the power into lower, usable voltages. Id. at P 16. MID alleges that PG&E, as the sole supplier of retail electric power in the geographic market of Pittsburg, possessed monopoly power and could control prices or exclude competition from the Pittsburg retail electric power market. Id. at P 19. MID further alleges that significant barriers allow PG&E to limit the access of competitors such as MID to the retail electric power market in the vicinity of Pittsburg. Id. at P 20. Among these barriers include PG&E's ownership or control of all the transmission lines and services supplying wholesale and retail electric power to Pittsburg and the impracticability of duplicating PG&E's local transmission services because of cost and regulatory barriers. Id. at PP 21-22. Finally, as a result of the exclusion of MID from [*5] the retail electric power market in the vicinity of Pittsburg, MID alleges

¹ "Generation" is the conversion of energy from fuel or other sources into electricity. "Transmission" refers to the transportation of electricity via high voltage lines from generation facilities to distribution areas. "Distribution" involves the delivery and sale of electricity to ultimate retail and wholesale consumers. FAC, at P 7.

that Praxair and other residential and commercial consumers of retail electric power have been deprived of the benefits of low-cost electric power. Id. at P 28.

Prior to the events at issue in this action, DESTEC entered into a Control Area and Transmission Service Agreement ("CATSA") with PG&E which allowed DESTEC to utilize PG&E's electric transmission lines to deliver electric power to wholesale customers of DESTEC. FAC, at P 15. DESTEC intended to use PG&E's transmission facilities to sell and deliver low-cost electric power purchased in the Pacific Northwest to California electricity consumers. Among other limitations, the CATSA prohibits DESTEC from using PG&E's transmission facilities to directly deliver electric power to end-user, or retail, customers of PG&E. Id. In accordance with the requirements of the Federal Power Act ("FPA"), [16 U.S.C. § 824d\(c\)](#), and regulations promulgated thereunder, [18 C.F.R. § 35.1](#), the CATSA was submitted to the Federal Energy Regulatory Commission ("FERC") and became effective on April 14, 1995. Def. Request for Judicial Notice ("RJN"), [\[**6\] Exh. 1 \[Pacific Gas & Elec. Co., 71 F.E.R.C. P 61,045 \(April 14, 1995\)\]](#). As a result of the CATSA, DESTEC and PG&E were [\[*1062\]](#) direct competitors in the sale of wholesale electric power, but were not competitors with respect to the retail sale of electric power. FAC, at P 15.

Because DESTEC was prohibited from selling electric power at retail under the CATSA, it determined that it could service the needs of retail power consumers and sell its low-cost electric power only if two critical elements could be satisfied. First, DESTEC would have to persuade a utility company permitted under state and federal law to sell electricity to retail consumers to purchase a substation. FAC, at P 16. DESTEC could then supply its low-cost electric power on a wholesale basis to the utility company, which could then resell the electric power to retail electricity consumers via the substation. Id. at PP 16-17. Second, DESTEC would have to obtain PG&E's approval to allow DESTEC to deliver wholesale electric power to the substation under the terms of the CATSA. See id. at P 23.

To put its plan into motion, DESTEC approached MID with a proposal that MID buy the Praxair substation and [\[**7\]](#) supply retail electric power consumers, such as Praxair and other residential and commercial consumers in the Pittsburg area, with low-cost DESTEC-supplied electric power via the Praxair substation. FAC, at P 17. On March 21, 1996, DESTEC entered into a written Power Sales Agreement with MID, in which MID agreed to purchase the Praxair substation and DESTEC agreed to deliver power to MID at the substation. Id. At the same time, MID and the City of Pittsburg ("Pittsburg") entered into a "Permission Agreement" under which Pittsburg agreed to allow MID to provide retail electric power to its residents and "to offer City residents an alternative for obtaining electricity at more competitive rates." ² Id. MID and Praxair also entered into a "Equipment Sales Agreement" for the purchase of the Praxair substation that was expressly conditioned upon PG&E's approval of the substation as a valid "output point" for DESTEC under the CATSA. Id. at P 18.

[\[**8\]](#) By letter dated January 30, 1996, DESTEC sought PG&E's approval to provide the necessary transmission services needed to allow DESTEC to deliver wholesale electric power to the Praxair substation under the terms of the CATSA. FAC, at PP 23-24. MID also sought to enter into an "interconnection agreement" with PG&E setting forth the conditions under which PG&E would provide transmission services to MID at the Praxair substation. Id. at 24. On February 26, 1996, PG&E denied DESTEC's request that PG&E deliver power to the Praxair substation. Id. at P 24. In its opposition, MID also asserts that PG&E refused to grant MID's request to enter into an interconnection agreement as well. P's Opp. at 4. MID alleges that PG&E agreed to an identical request for the provision of transmission service by DESTEC in order to sell electric power wholesale to the Port of Oakland for later resale to Port tenants at retail. FAC, at P 24.

Thereafter, DESTEC and PG&E commenced proceedings in several forums to resolve their dispute. DESTEC initiated an arbitration proceeding under the terms of the CATSA to compel PG&E to provide transmission service to the Praxair substation. FAC, at P 25. PG&E filed [\[**9\]](#) suit in federal district court seeking to enjoin the arbitration, but no order issued. Id. PG&E also filed a petition with FERC to disallow the Praxair scheme, which was

² Under the Permission Agreement, approximately one-half of the capacity of the Praxair substation would have been devoted to serving Praxair. FAC, at P 18. MID intended to deliver the remaining one-half of the Praxair substation capacity to commercial and residential accounts in Pittsburg which were at that time served almost entirely by PG&E. Id. at PP 18-19.

opposed by MID and DESTEC. See RJN, Exh. 3 [Petition for Declaratory Order filed September 28, 1996]; RJN, Exhs. 4-6. Prior to any resolution of these proceedings, DESTEC and PG&E entered into a settlement of their dispute, which included an amendment of the CATSA [***1063**] which, in effect, prohibits DESTEC from supplying energy transmitted through PG&E to "substations." ³ FAC, at P 26. MID alleges that in particular PG&E and DESTEC jointly agreed that DESTEC would not supply wholesale electric power to MID via the Praxair substation using PG&E's transmission services. Id. To induce DESTEC to agree to the CATSA amendment, PG&E agreed to "functionally assign" to DESTEC certain wholesale power contracts permitting DESTEC to market its low-cost electric power at much higher rates negotiated and contracted for by PG&E. Id.

[**10] On November 1, 1996, PG&E subsequently submitted the proposed amendment to the CATSA for approval and filing by FERC. FAC, at P 27; RJN, Exh. 9 [PG&E's Application for Approval of Second Amendment to CATSA]. However, on December 12, 1996, PG&E and DESTEC jointly requested that FERC suspend consideration of the proposed amendment. Id.; RJN, Exh. 10 [Joint Req. of PG&E and DESTEC]. Although FERC has taken no action on either the application for approval or the subsequent request to suspend consideration, MID asserts that PG&E and DESTEC have abided by their agreement not to provide MID with electric power to the Praxair substation at wholesale prices. Id. As a result, MID alleges that as a result of the CATSA amendment PG&E has thwarted both the Power Sales Agreement between MID and DESTEC and the Equipment Sales Agreement between MID and Praxair. Id. Similarly, although the Power Sales Agreement required that both MID and DESTEC "use their respective good faith best efforts to timely negotiate and obtain the agreements and the regulatory approvals" necessary to implement the agreement, MID alleges that DESTEC abrogated the Power Sales Agreement. Id. at P 28. These [**11] actions, taken together, frustrated its plans to sell electric power to Praxair and to numerous commercial and residential electricity consumers in Pittsburg. Id. at PP 27-28.

MID first alleges that DESTEC and PG&E engaged in a "contract, combination and/or conspiracy" to unreasonably restrain competition in the wholesale and retail sale of electric power in PG&E's service area in northern and central California in violation of section 1 of the Sherman Act. FAC, at P 29. According to MID, DESTEC and PG&E have entered into an agreement under which DESTEC will not sell electric power at wholesale for delivery to substations and will abandon its arbitration proceeding against PG&E in exchange for the assignment by PG&E of certain wholesale power contracts. Id. at PP 29-30. MID also alleges two claims based on section 2 of the Sherman Act: actual or attempted monopolization and conspiracy to monopolize. In Count Two, MID alleges that PG&E has attempted to monopolize and/or has monopolized the market for the retail distribution of electric power to Praxair and Pittsburg's electricity consumers. Id. at P 36. Specifically, MID alleges that PG&E has refused to permit its transmission [**12] lines to be used by MID or DESTEC to supply wholesale electric power to the Praxair substation by improperly invoking various provisions of the CATSA agreement. Id. at P 38. In doing so, MID asserts that PG&E has unlawfully exercised its monopoly power over its transmission lines. FAC at P 40. In Count Three, MID also asserts that PG&E and DESTEC engaged in a conspiracy to monopolize the retail electric power market in the Pittsburg area. Id. at P 48.

LEGAL STANDARD

HN1 A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief. Conley [*1064] v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986), cert. denied, 479 U.S. 1064, 93 L. Ed. 2d 998, 107 S. Ct. 949 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. **HN2** NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined [**13] to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. Durning v.

³ Likewise, PG&E and MID reached a settlement agreement under which MID agreed to withdraw its opposition to the proposed CATSA amendment and submitted this proposed agreement to the CPUC for approval. However, the CPUC declined to approve the settlement agreement. RJN, Exh. 11 [Re: Pacific Gas & Electric Co., No. 98-06-020 (June 4, 1998)].

First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987), cert. denied sub. nom., Wyoming Community Dev. Auth. v. Durning, 484 U.S. 944, 98 L. Ed. 2d 358, 108 S. Ct. 330 (1987).

HN3[¹⁴] In the Ninth Circuit, "antitrust pleadings need not contain great factual specificity." Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 648 (9th Cir. 1981), cert. denied, 469 U.S. 1229, 84 L. Ed. 2d 368, 105 S. Ct. 1230 (1981). "There is no special rule requiring more factual specificity in antitrust pleadings." Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980) (citing Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1082 (9th Cir. 1976), cert. denied, 430 U.S. 940, 51 L. Ed. 2d 787, 97 S. Ct. 1571 (1977)). However, as noted by many [**14] courts, the court need not accept legal conclusions asserted in the complaint even if pled as "facts" or conclusory allegations without more. JM Computer Svcs. Inc. v. Schlumberger Technologies, Inc., 1996 U.S. Dist. LEXIS 21885, 1996 WL 241607, *2 (N.D. Cal., May 3, 1996) (citing Papasan v. Allain, 478 U.S. 265, 286, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986)).

DISCUSSION

I. Analytical Framework for the Sherman Act, Section 1

Section 1 of the Sherman Act makes unlawful "every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the HN4[¹⁵] States." HN5[¹⁵] 15 U.S.C. § 1. To state a claim for a violation of section 1 of the Sherman Act, a plaintiff must establish (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition under a *per se* or rule of reason analysis; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e. "antitrust injury"). McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988); [**15] see also Rickards v. Canine Eye Registration Found., Inc., 704 F.2d 1449, 1453 (9th Cir. 1983), cert. denied, 464 U.S. 994, 78 L. Ed. 2d 683, 104 S. Ct. 488 (1983) (plaintiff must show "contract, combination or conspiracy" under section 1 of the Sherman Act). HN6[¹⁵] "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." State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 279, 139 L. Ed. 2d 199 (1997). However, some types of restraints are deemed unlawful *per se* if they have a "predictable and pernicious anticompetitive effect." Id.

In noting that section 1 of the Sherman Act requires that there be a "contract, combination, . . . or conspiracy," the Supreme Court observed HN7[¹⁵] that a business "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it [**16] does so independently." Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 n. 27, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985). Thus, section 1 does not proscribe "independent action." Id. However, "agreements not to [¹⁰⁶⁵] compete, with the aim of preserving or extending a monopoly," are unlawful under the Sherman Act. Cf. Otter Tail Power Co. v. United States, 410 U.S. 366, 376, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973) (citing Schine Chain Theatres v. U.S., 334 U.S. 110, 119, 92 L. Ed. 1245, 68 S. Ct. 947 (1948), overruled on other grounds, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771-72, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)). HN8[¹⁵] "A § 1 agreement may be found when 'the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" Copperweld, 467 U.S. at 771 (quoting American Tobacco Co. v. U.S., 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)).

II. Analytical [**17] Framework for the Sherman Act, Section 2

In contrast to section 1 of the Sherman Act, section 2 claims tend to encompass a narrower range of anticompetitive behaviors specifically defined as monopolization and attempts to monopolize." Amarel v. Connell, 102 F.3d 1494, 1521 (9th Cir. 1997). 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 . . . trade shall be guilty" of an antitrust violation. [HN9](#) [↑] [15 U.S.C. § 2](#). In essence, [section 2](#) of the Sherman Act prohibits a monopolist's unilateral action, such as a unilateral refusal to deal, "if that conduct harms the competitive process in the absence of a legitimate business justification." [Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1209-10 \(9th Cir. 1997\)](#) (citations omitted), cert. denied, 523 U.S. 1094, 118 S. Ct. 1560, 140 L. Ed. 2d 792 (1998). [HN10](#) [↑] To state a claim for a [section 2](#) monopolization violation MID must allege that PG&E: "(1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that [**18] power." See [Image Tech., 125 F.3d at 1202](#). [HN11](#) [↑] "'Willful acquisition' or 'maintenance of monopoly power' involves 'exclusionary conduct,' not power gained 'from growth or development as a consequence of a superior product, business acumen, or historic accident.'" [Id. at 1208](#) (quoting [United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#)). [HN12](#) [↑] In the case "of a regulated utility struggling with dual regulation, bearing in mind that the utility is entitled to recover its costs of service and to provide its investors with a reasonable rate of return," an antitrust plaintiff must also establish a specific intent by the monopoly to engage in monopolistic conduct through "the actions of the utility, taken as a whole." [City of Anaheim v. Southern California Edison Co., 955 F.2d 1373, 1378 \(9th Cir. 1992\)](#) ("the requirement of specific intent is an appropriate way to erect a dike which is sufficient to prevent an untoward invasion of the land of legal monopolies by the sea of antitrust") (citing [City of Mishawaka v. American Elec. Power Co., Inc., 616 F.2d 976, 985-86 \(7th Cir. 1980\)](#)). [**19] cert. denied, 449 U.S. 1096, 66 L. Ed. 2d 824, 101 S. Ct. 892 (1981)).

"The traditional claim for attempted monopolization arises when the danger of monopolization is clear and present, but before a full-blown monopolization has necessarily been accomplished." [Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 541 \(9th Cir. 1991\)](#), cert. denied, 503 U.S. 977, 118 L. Ed. 2d 316, 112 S. Ct. 1603 (1992). [HN13](#) [↑] To prevail on a [section 2](#) attempt claim, MID must establish: "(1) a specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving 'monopoly power,' and (4) causal antitrust injury." See [Image Tech., 125 F.3d at 1202](#) (quoting [Rebel Oil Co., Inc. v. Atlantic Richfield, Co., 51 F.3d 1421, 1434 \(9th Cir.\)](#)), cert. denied, 516 U.S. 987, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1995). "The requirements of a [§ 2](#) monopolization claim are similar, differing primarily in the requisite intent and the necessary level of monopoly power." [Id.](#) (citing [California Computer Products, Inc. \[*1066\] v. International Business Machines Corp., 613 F.2d 727, 736-37 \(9th Cir. 1979\)](#)). [**20]

Common to both the monopolization and attempt to monopolize claims, "[section 2](#) plaintiffs must also establish antitrust injury." [Id.](#) (citing [Cost Management Services, Inc. v. Washington Natural Gas Co., 99 F.3d 937, 949 \(9th Cir. 1996\)](#)). In order to survive a motion to dismiss under [Rule 12\(b\)\(6\)](#), an antitrust complaint "need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws." [Newman v. Universal Pictures, 813 F.2d 1519, 1522 \(9th Cir. 1987\)](#), cert. denied, 486 U.S. 1059, 100 L. Ed. 2d 931, 108 S. Ct. 2831 (1988)

.III. Analysis

In support of its second motion to dismiss, defendants contend that (1) PG&E's unilateral refusal to provide transmission service to the Praxair substation is necessarily incidental to a valid petition to a federal agency immune from antitrust liability under the [Noerr-Pennington](#)⁴ doctrine; (2) MID has failed to allege a sufficient "contract, combination or conspiracy" to state a claim for a [section 1](#) of the Sherman Act violation or for a conspiracy to violate [section 2](#) of the Sherman Act; (3) MID [**21] has failed to point to a cognizable theory under which to impose [section 2](#) monopolization liability upon PG&E; and (4) that MID lacks standing because it has failed to plead a sufficient antitrust injury as a result of defendants' actions. Defendants finally ask the court to decline to exercise supplemental jurisdiction over MID's state law claims if MID's federal antitrust claims are dismissed.

A. Judicial Notice

⁴ [Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#); [United Mine Workers v. Pennington, 381 U.S. 657, 669-70, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#)

Defendants again ask the court to take judicial notice of numerous documents which relate to either the CATSA or subsequent amendments to the CATSA and regulations and other regulatory decisions promulgated by FERC. [HN14](#) [↑] "Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically [**22] attached to the pleading, may be considered in ruling on a [Rule 12\(b\)\(6\)](#) motion to dismiss." [Fecht v. The Price Co., 70 F.3d 1078, 1080 n. 1 \(9th Cir. 1995\)](#), cert. denied, 517 U.S. 1136, 134 L. Ed. 2d 547, 116 S. Ct. 1422 (1996) (quoting [Branch v. Tunnell, 14 F.3d 449, 454 \(9th Cir.\), cert. denied, 512 U.S. 1219, 129 L. Ed. 2d 832, 114 S. Ct. 2704 \(1994\)](#)); [Emrich v. Touche Ross & Co., 846 F.2d 1190, 1198 \(9th Cir. 1988\)](#) (holding that a district court's taking notice of the "proceedings and determinations" of prior related litigation does not necessitate treating the [Rule 12\(b\)\(6\)](#) motion as one for summary judgment). [HN15](#) [↑] The court can take judicial notice of facts beyond the complaint and matters of public records such as pleadings in another action and records and reports of administrative bodies. [Anderson v. Calif. Republican Party, 1991 U.S. Dist. LEXIS 18246, 1991 WL 472928, *2 \(N.D. Cal., Nov. 26, 1991\)](#), aff'd, 977 F.2d 587 (9th Cir. 1992) (table).

The court again finds that several of the documents submitted as part of PG&E's request for judicial notice are of the type capable of ready determination [**23] by resort to sources whose accuracy cannot be reasonably questioned. [See Fed. R. Evid. 201\(b\)](#). Of note is the "Joint Request of Pacific Gas and Electric Company and DESTEC Power Services, Inc. to Suspend Commission Consideration of [Second Amendment](#) to the Control Area and Transmission Service Agreement," RJN, Exh. 10 ["Joint Request"], and the PG&E Petition for Declaratory Order, RJN, Exh. 3. Both documents clearly show the date-stamp of FERC and refers to the docket number under which the request is filed, and is readily accessible through the Internet. [See RJN, Exhs. 3, 10](#). Finally, the court takes judicial notice of PG&E's submission to FERC for filing and acceptance of its "[Second Amendment](#) to the [*1067] Control Area and Transmission Services Agreement" between DESTEC and PG&E for the same reasons as stated above. RJN, Exh. 9.

B. [Section 1](#) of the Sherman Act and [Section 2](#) Conspiracy to Monopolize

In its prior order, the court held that although MID attempted to characterize

the events following PG&E's unilateral refusal to permit DESTEC to use its lines to supply wholesale electricity to the Praxair substation as some sort of "agreement" to engage in anticompetitive [**24] activity, it became clear at the hearing that defendants continue to operate under the CATSA and not as part of a speculative "agreement" intended to restrain trade. The court therefore finds that MID's allegations of an "agreement" fail to sufficiently describe an actionable "contract, combination, . . . , or conspiracy under [section 1](#).

February order, at 12. In giving MID leave to amend its complaint, the court in essence asked MID "to articulate with . . . clarity the nature of [the alleged] agreement." [Id. at 11](#).

In again arguing that there could have been no [section 1](#) violation because there was no agreement, defendants assert that MID has provided no new facts with which to support its claim that MID and DESTEC engaged in a conspiracy or concerted activity in violation of [section 1](#).⁵ MID, however, points to several allegations in its complaint which it maintains establish the existence of an agreement, combination or conspiracy. Plaintiff again initially points to its allegation that defendants:

have been engaged in a continuing contract, combination and conspiracy to unreasonably restrain competition in interstate commerce in the wholesale and retail [**25] sale of electricity in PG&E's service area in Northern and Central California in violation of [Section 1](#) of the Sherman Act.

⁵ Despite MID's protestations to the contrary, defendants again do not argue that the actions or regulatory authority of FERC or CPUC immunizes them from federal antitrust liability under the state action doctrine. [See](#) February order at 8 (noting cases holding that Federal Power Act ("FPA"), [16 U.S.C. § 824a\(b\)](#), does not insulate electric power companies from operation of antitrust laws).

FAC, at P 29; compare Compl., at P 23 (stating identical allegation). MID again asserts that this allegation is sufficient to state a claim under section 1. However, as held in the February order, "although antitrust pleadings need not contain great factual specificity, the court need not accept conclusory allegations or legal conclusions couched as facts." See February order at 10.

In subsequent paragraphs, however, MID alters somewhat the factual allegations [**26] forming the basis of its section 1 claims as alleged in its original complaint. Plaintiffs allege that:

The aforesaid contract, combination and/or conspiracy have consisted of a continuing agreement among and between the named defendants that DESTEC will not sell electricity transmitted by defendant PG&E at wholesale for delivery at substations, including substations owned or to be acquired by plaintiff MID, and specifically including the Praxair substation in Pittsburg, California. Further, that DESTEC will forego its contention, set forth and presented in an arbitration proceeding that under the CATSA agreement, that PG&E was legally obligated to deliver power to DESTEC for resale to MID at the Praxair substation.⁶ [**28]

FAC at P 30. As before, MID continues:

In furtherance of and as part of that agreement and to induce and persuade [*1068] DESTEC to abandon the arbitration proceeding and to renege its planned wholesale electric sales to MID at the Praxair substation, defendants have entered into an agreement under which PG&E functionally assigned to DESTEC certain wholesale customers at prices vastly in excess of the market price. In effect, PG&E bribed DESTEC to give [**27] up its efforts to carry out its obligations to MID under the Power Sales Agreement. This contract, combination and/or conspiracy not to provide electric power to MID for retail resale constitutes an unreasonable restraint of trade.⁷

FAC at P 31.

In contrast to its earlier allegations, MID has now shifted its focus from the "Second Amendment" to the CATSA as part of the settlement of defendants' arbitration dispute, see Compl. at P 21, to an agreement to abandon the arbitration proceeding initiated by DESTEC and to "give up its efforts to carry out its obligations to MID under the Power Sales Agreement." FAC at P 31. For instance, MID again alleges that "as arbitration was about to conclude . . . , PG&E and DESTEC entered into a settlement wherein they jointly agreed DESTEC would not supply energy to MID . . . They also formulated a formal proposed amendment [**29] of their CATSA agreement . . ." FAC at P 26; compare Compl., at P 21. MID again alleges that PG&E submitted the proposed CATSA amendment to FERC, but that PG&E and DESTEC jointly requested that FERC suspend consideration of the proposed amendment. FAC at P

⁶ In paragraph 24 of its original complaint, MID stated:

The aforesaid contract combination and conspiracy have consisted of a continuing agreement among and between the named defendants that defendant DESTEC will not sell electricity at wholesale for delivery at substations, including substations owned or to be acquired by plaintiff MID and specifically including the Linde substation in Pittsburg, California.

Compl., at P 24. It further added in its opposition that PG&E's refusal to deal with either DESTEC or MID with respect to the Praxair substation also constitutes a section 1 violation: PG&E "refused to enter into an interconnection agreement with . . . MID (and refused DESTEC's request pursuant to the CATSA) which would have permitted MID to resell electric power from the Praxair substation to Praxair and customers in Pittsburg." P's Opp., at 14 (citing Compl., at PP 18-20). MID concludes that these allegations, taken together or individually, establish that "the intended goal of defendants' concerted conduct was nevertheless achieved, i.e., block MID from competing with PG&E" regardless of whether the CATSA amendment became effective. P's Opp., at 15.

⁷ In the parallel allegations in the original complaint, MID alleged that:

In furtherance of and as part of that agreement: defendants have entered into an agreement under which PG&E functionally assigned to DESTEC certain wholesale power contracts, which will enable DESTEC to sell power to its wholesale customers at prices vastly in excess of the market price in exchange for DESTEC agreeing not to sell power for delivery at substations.

27; compare Compl. at P 21. MID finally concludes that "although the FERC never ruled upon the proposed amendment, PG&E and DESTEC have nevertheless adhered to their explicit and/or implicit agreement not to supply power to plaintiff MID at the Praxair substation utilizing PG&E's transmission services." FAC at P 27; compare P's Opp. to D's Mot. to Dismiss the Orig. Compl., at 15 (concluding that allegations in original complaint establish that "the intended goal of defendants' concerted conduct was nevertheless achieved, i.e., block MID from competing with PG&E" regardless of whether the CATSA amendment became effective).

Despite this shift in focus, the only allegations of a "contract, combination, . . . , or conspiracy" in restraint of trade made in connection with MID's section 1 claim as alleged in Count One of the FAC are those raised in paragraphs 29, 30 and 31 of the FAC. MID fails to incorporate by reference [**30] into Count One the paragraphs preceding Count One, including those paragraphs containing specific allegations providing greater detail of the transactions between PG&E, DESTEC and MID, including various agreements, attempted agreements and unilateral acts. Since none of these paragraphs are specifically incorporated or referred to in the first cause of action the court cannot tell whether any of these relate to the section 1 claim. Furthermore, HN16[¹⁴] the court must [*1069] confine its inquiry of whether MID has sufficiently stated a section 1 claim to those allegations contained in paragraphs 29, 30, and 31. In light of the generalized allegations contained in these paragraphs regarding the nature of the contract, combination or conspiracy, it is clear that the agreement alleged in the FAC is no different and no more specific than that found by the court to fail to state a claim upon defendants' earlier motion.

Nonetheless, although MID attempts to distinguish the factual allegations regarding the existence of an agreement in its original complaint from those newly asserted in the FAC, it is clear that MID reasserts the identical claim that PG&E and DESTEC "agreed" that DESTEC would not sell electric [**31] power at wholesale for delivery to substations and in exchange would acquire certain wholesale electric power contracts which permitted DESTEC to resell electricity at a substantial profit. Cf. U.S. v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 182 (3rd Cir. 1970), cert. denied, 401 U.S. 948, 28 L. Ed. 2d 231, 91 S. Ct. 928 (1970) ("no formal agreement is necessary to constitute an unlawful conspiracy; it is sufficient that a concert of action be contemplated and the defendants conform to the arrangement"). As this court held in the February order, the instant action at most involves a unilateral effort by PG&E to deny DESTEC's request that PG&E provide wholesale electric power to the Praxair substation. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984). In reaching its decision, the court again notes that MID has recourse to "other laws, for example, 'unfair competition' laws, business tort laws, or regulatory laws, [which] provide remedies for various 'competitive practices thought to be offensive to proper standards of business morality,'" such as the allegations [**32] of bribery contained in paragraph 30 of the FAC. See NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 119 S. Ct. 493, 498, 142 L. Ed. 2d 510 (1998) (quoting 3 P. Areeda & H. Hovenkamp, ANTITRUST LAW P 651d, at 78 (1996)). MID's allegations are insufficient to state a section 1 claim that PG&E and DESTEC engaged in a "contract, combination, . . . , or conspiracy" in restraint of trade.

In contrast to its section 1 claim, MID in its third cause of action for conspiracy to monopolize under section 2 of the Sherman Act does incorporate by reference all preceding paragraphs and factual allegations. HN17[¹⁵] To state a conspiracy to monopolize claim under section 2, a plaintiff must set forth a specific intent to monopolize and the anticompetitive acts designed to effect that intent, "although in the conspiracy claim the act may be no more than the agreement itself." Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 926 (9th Cir. 1980), cert. denied, 450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981). "No particular level of market power or 'dangerous probability of success' has to be alleged or proved in a conspiracy [to monopolize] [**33] claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken." Id. Whereas MID's first cause of action fails to state a claim for being too generalized, its third cause of action fails for providing an excess of detail without pointing to the specific agreement that constitutes the basis of its conspiracy claim. In its FAC, MID points to a host of allegations specifying a number of agreements and activities but neglects to identify which of these run afoul of the antitrust laws and form the basis for this third claim. However, MID simply concludes that PG&E and DESTEC have "engaged in a continuing conspiracy to monopolize the market for the sale of retail electric power" without providing any direction as to the overt acts or agreements that constitute the conspiracy. See FAC, at P 48.

Furthermore, MID provides only a general allegation of antitrust injury arising from its section 2 conspiracy claim, but fails to point to how any of the overt acts or agreements alleged resulted in the antitrust injury asserted. A plaintiff must establish "the existence of antitrust injury, [*1070] which is to say injury of the type the antitrust laws were [*34] intended to prevent and that flows from that which makes defendants' acts unlawful." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990) (citations and internal quotations omitted). That is, plaintiff must have suffered an injury which bears a causal connection to the alleged antitrust violation. Associated Gen. Contractors of Calif., Inc. v. Calif. Council of State Carpenters, 459 U.S. 519, 535, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). MID alleges in paragraph 45 that "as a direct and proximate result" of the alleged violations it will be "immediately and irreparably injured." FAC, at P 45. However, MID's allegation of antitrust injury is conclusory and does not provide any causal relationship between its section 2 conspiracy claim and an antitrust injury. As such, the court dismisses both Counts One and Three of MID's FAC in their entirety.

C. Noerr-Pennington Doctrine

Defendants further argue that MID's antitrust claims are barred by the Noerr-Pennington doctrine because PG&E's refusal to wheel power to DESTEC was "necessarily incidental" to filing a FERC petition, which it contends [*35] constitutes a valid petitioning activity. Although defendants suggest that Noerr-Pennington immunity should extend to both MID's section 1 and section 2 claims, they direct their Noerr-Pennington argument primarily to MID's section 2 monopolization claim asserted in Count Two of the FAC. In Count Two, MID alleges that PG&E monopolized or attempted to monopolize the Pittsburgh market for the retail distribution of electric power by unilaterally refusing to grant DESTEC's request for transmission services and by improperly invoking various provisions of the CATSA in doing so. See FAC at P 38. As such, the court confines its analysis of Noerr-Pennington immunity to MID's section 2 claim based on PG&E's unilateral refusal to deal. In any event, the court need not consider PG&E's suggestion that Noerr-Pennington immunity attaches to Counts One or Three of the FAC since MID fails to allege a sufficient contract, combination or conspiracy in violation of section 1 of the Sherman Act.

In opposition, MID maintains that the Noerr-Pennington doctrine is of no relevance to this action because it does not claim that defendants run afoul of the antitrust laws through their [*36] efforts to petition FERC, initiate litigation in the federal courts or to petition or solicit any other government agency or court. Rather, MID briefly argues that an alleged anticompetitive agreement between PG&E and DESTEC was not "incidental" to bringing a valid FERC petition because the agreement was solely the result of defendants' private actions, and not the result of any valid governmental action. In doing so, it wrongly asserts that Noerr stands for the proposition that Noerr-Pennington immunity attaches only where a restraint or monopolization is the result of valid government action, as opposed to private action. See Noerr, 365 U.S. at 136; compare Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503-06, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988) (citing Noerr, 365 U.S. at 143) (Noerr immunity extends to situations "where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis of antitrust liability if it is 'incidental' to a valid effort to influence governmental action"). Moreover, MID misconstrues its own complaint [*37] in asserting that its section 2 claim and resultant antitrust injury arises out of an alleged agreement between PG&E and DESTEC not to supply power to the Praxair substation. See FAC at PP 36-43 & 45-6. Finally, in an important concession, MID maintains that because the Noerr-Pennington doctrine does not apply it need not plead facts to establish that defendants' conduct falls within the "sham exception" to the Noerr-Pennington doctrine. Cf. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511, 30 L. Ed. 2d 642, 92 [*1071] S. Ct. 609 (1972) (no Noerr immunity if petitioning activity is "mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor"); Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1529 (9th Cir. 1991) ("the filing of a lawsuit is immune from the antitrust laws unless the suit is a sham"), aff'd, 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993).

HN18 [↑] Under the Noerr-Pennington doctrine, one who files a lawsuit or otherwise petitions the government for redress is generally immune from antitrust liability [*38] unless such litigation or activity is a sham. Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 56, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 669-70, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965).

In California Motor Transp., the Supreme Court adapted the Noerr doctrine to the judicial process in addressing the contention of the respondent out-of-state highway carriers that a group of in-state highway carriers conspired to monopolize the transportation of goods in California by instituting state and federal proceedings to resist and defeat applications by respondents to acquire operating rights within California. Id. at 509. In rejecting antitrust liability, the Court concluded that "it would be destructive . . . to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting [**39] resolution of their business and economic interests vis-a-vis their competitors." Id.

Defendants maintain that PG&E's refusal to grant DESTEC's request to provide transmission service to the Praxair substation should be considered to be "incidental" to its filing of a petition to FERC seeking a declaration that "PG&E is not obligated to interconnect and provide transmission service" in connection with the agreement between DESTEC and MID to provide electric power to Praxair and other retail consumers of Pittsburg. See D's Exh. 3 [PG&E FERC Petition dated Feb. 28, 1996]. According to MID's allegations, DESTEC requested that PG&E provide to the Praxair substation transmission service under the CATSA by letter dated January 30, 1996. FAC at P 24. "Simultaneously," MID requested that PG&E enter into a separate interconnection agreement under which MID could receive interconnection service at the Praxair substation. Id. On February 26, 1996, PG&E denied DESTEC's request. Id. A flurry of activity ensued after PG&E's denial of DESTEC's request: DESTEC initiated private arbitration proceedings under the terms of the CATSA to direct PG&E to provide transmission service; and [**40] PG&E filed a lawsuit in the United States District for the Northern District of California seeking an order enjoining arbitration. FAC at P 25. Importantly, on February 28, 1996, PG&E filed its FERC petition. D's Exh. 3 [PG&E FERC Petition dated Feb. 28, 1996]. In the petition, PG&E alleges, among other things, that the proposed transaction between DESTEC and MID is a "sham wholesale transaction under the Energy Policy Act of 1992 ["EPAct"]," Pub. L. No. 102-486, 106 Stat. 2776 (1992), and that the transaction would undermine a scheme devised by the California Public Utilities Commission ("CPUC") to open up the electric power industry to greater competition at the wholesale and retail levels. Id. at i & 2. On March 26, 1999, MID filed an application with FERC as well in which it sought an order requiring PG&E to interconnect its transmission system with the Praxair substation and to agree to an interconnection agreement. D's Exh. 6 [MID FERC Petition dated March 26, 1999]. In light of the proximity in time of PG&E's rejection of DESTEC's wheeling request and its filing of a FERC petition, defendants maintain that the propriety of DESTEC's [**1072] request for transmission service [**41] to the Praxair substation was in dispute from the outset and that PG&E's refusal to wheel electric power was a "jurisprudential precondition" to PG&E's FERC petition.

In support of its argument, defendants point to Primetime 24 Joint Venture v. National Broadcasting Co., Inc., 21 F. Supp. 2d 350, 358-59 (S.D.N.Y. 1998), in which the court held that a decision by defendants "not to negotiate with or grant to plaintiff a copyright license amounted to the rejection of a settlement offer and could not form the basis of antitrust liability." The plaintiff asserted that defendants engaged in concerted action in violation of federal antitrust laws by encouraging numerous lawsuits against plaintiff alleging copyright infringement and by refusing to deal with plaintiff in its efforts to negotiate a copyright license. In rejecting plaintiff's arguments, the court noted that "conduct or communication which is incident to or attendant upon effective litigation should also receive Noerr immunity." Id. at 356 (citations omitted). It reasoned that "because pre-litigation communications provide useful notice of potential liability and facilitate the settlement [**42] of controversies, it would be foolish to adopt antitrust rules encouraging suit before communication by penalizing the communication but not the suit." Id. at 357 (internal citations and quotations omitted). Importantly, the court also held that defendants' refusals to negotiate a licensing agreement should "receive Noerr immunity because if the defendants had accepted [plaintiff's] offer and agreed to license it, any infringement dispute would be moot." Id. at 359.

HN19 [↑] The Ninth Circuit likewise has held that "[a] decision to accept or reject an offer of settlement is conduct incidental to the prosecution of [a lawsuit] and not a separate and distinct activity which might form the basis for antitrust liability." Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1528 (9th Cir. 1991), aff'd, 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993). In Columbia Pictures, the counterclaimants alleged that several movie studio counterdefendants had engaged in anticompetitive conduct by filing a copyright infringement action against the counterclaimants and by subsequently [**43] concertedly refusing

to grant copyright licenses. *Id. at 1528*. In rejecting the counterclaimants antitrust claims, the court noted that the counterclaimants request for copyright licensing "amounted to an offer to settle the lawsuit" and that the lawsuit would have been mooted by any agreement to license the copyrights at issue. *Id.* Similarly, in *Transphase Systems, Inc. v. Southern Calif. Edison Co.*, 839 F. Supp. 711, 716 (C.D. Cal. 1993), plaintiff alleged that defendants violated section 1 by "appearing together before the CPUC to take positions that would disadvantage [plaintiff]" and by "speaking in unison before the CPUC to demand the fruits of their monopolies." *Id.* (internal quotations omitted). Plaintiff further alleged that defendants "maintained their monopoly power by 'resisting meaningful changes'" through the public positions they took in the CPUC proceedings in violation of section 2. *Id.* The court rejected plaintiff's claims in holding that defendants' petitioning activity before the CPUC was clearly protected by the Noerr-Pennington doctrine. *Id.*

In contrast, the Ninth Circuit has also held that "applying to [**44] an administrative agency for approval of an anticompetitive contract is not lobbying activity within the meaning of the Noerr-Pennington doctrine." *Columbia Steel Casting Co., Inc. v. Portland General Electric Co.*, 111 F.3d 1427, 1445-46 (9th Cir. 1996). In *Columbia Steel*, the plaintiff-consumer of electric power brought an antitrust action against two electric utilities, both of whom were competitors in the Portland-area electric power market, charging them with violations of sections 1 and 2 of the Sherman Act by entering into an agreement to divide the City of Portland into exclusive service territories. *Id. at 1432-33*. After the state public utility commission ("PUC") approved an agreement between the utilities to exchange certain property and customer accounts, but not an allocation [*1073] of exclusive service territories, plaintiff sought to purchase electricity from the lower cost utility. *Id. at 1435-36*. The competitor utility, however, refused to wheel power from the lower cost utility to plaintiff's casting plant, asserting that it had an exclusive right to service plaintiff's plant because the plant fell within its service [**45] territory. *Id. at 1436*. In response to the plaintiff's antitrust claims, the defendant utility company asserted that it was entitled to Noerr-Pennington immunity because it had sought the approval of the state PUC for the anticompetitive agreement. In rejecting defendants' contention, the court noted that "in any event" the defendant utility company was being held liable for entering into an agreement with a competitor to replace competition with area monopolies, and not for the filing of an application with the state PUC. *Id. at 1445-46*.

In essence, MID maintains that defendants' assertion of Noerr-Pennington immunity fails because PG&E's anticompetitive conduct was not "incidental" to bringing a valid FERC petition or other litigation. In doing so, it asserts that PG&E's refusal to wheel electric power to the Praxair substation occurred before it brought its FERC petition against DESTEC. It reasons that therefore PG&E's refusal was not "incidental" to its FERC petition and should not be accorded Noerr protection. However, it is clear that PG&E's refusal is akin to the refusals to negotiate or grant copyright licenses in *Columbia Pictures* [**46] and *Primetime* 24. PG&E's refusal to honor DESTEC's request to wheel power to the Praxair substation was clearly a precondition to its FERC petition seeking a declaration that the proposed transaction between DESTEC and MID was a sham wholesale transaction and any agreement to wheel power to the Praxair substation would have mooted PG&E's FERC petition.

The court thus finds that PG&E's refusal to honor DESTEC's request was "incidental" to its FERC petition and therefore falls within the scope of Noerr-Pennington immunity. As such, the court dismisses in its entirety Count Two of the FAC. Finally, because MID alleges that its state law antitrust claims are bound up in the same conduct as and are ancillary to its federal antitrust claims, see FAC at P 51, the court dismisses MID's Cartwright Act claim on parallel grounds. See *Cal. Bus. & Prof. Code § 16720*. Cf. *Vinci v. Waste Management, Inc.*, 36 Cal. App. 4th 1811, 1814 n.1 (1995); *Cellular Plus, Inc. v. Superior Court (U.S. West Cellular)*, 14 Cal. App. 4th 1224, 1232 n.2 (1993); *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 481-82 & n.3 (9th Cir. 1990). [**47]

CONCLUSION

For the reasons set forth above, the court hereby GRANTS defendants' motion to dismiss MID's federal antitrust and Cartwright Act claims against DESTEC and PG&E. Furthermore, because MID's counsel is an experienced antitrust lawyer who knows how to prepare a well-pleaded complaint and the court has already provided MID with the opportunity to amend its complaint, the court denies MID any further leave to amend its complaint.

61 F. Supp. 2d 1058, *1073 (1999 U.S. Dist. LEXIS 13505, **47

Finally, the court declines to exercise supplemental jurisdiction pursuant to [section 1337\(c\)\(3\)](#) over the remaining state law claims and DISMISSES these claims without prejudice. Under [28 U.S.C. section 1337\(d\)](#), the statute of limitations on plaintiff's state law claims is tolled while claims are pending until thirty (30) days after an order of dismissal, thus allowing the plaintiff time for filing a new action in state court without a lapse of her rights.

This order fully adjudicates the motion reflected at Docket # 37 and the Clerk of the Court shall remove it from the pending motions list.

IT IS SO ORDERED.

Date:

MARILYN HALL PATEL

Chief Judge

United States District Court

Northern District of California **[**48]**

End of Document



Pan Asia Venture Capital Corp. v. Hearst Corp.

Court of Appeal of California, First Appellate District, Division Four

August 20, 1999, Decided

Nos. A077561, A079071.

Reporter

74 Cal. App. 4th 424 *; 88 Cal. Rptr. 2d 118 **; 1999 Cal. App. LEXIS 773 ***; 99 Cal. Daily Op. Service 6844; 99 Daily Journal DAR 8651; 1999-2 Trade Cas. (CCH) P72,624

PAN ASIA VENTURE CAPITAL CORPORATION, Plaintiff and Respondent, v. HEARST CORPORATION et al., Defendants and Appellants.

Notice: [***1] Opinion certified for partial publication. *

Subsequent History: As Modified on Denial of Rehearing of September 20, 1999, Reported at: [1999 Cal. App. LEXIS 851](#).

Review Denied December 15, 1999, Reported at: [1999 Cal. LEXIS 8662](#).

Prior History: San Francisco County Superior Court. Super. Ct. No. 962780. Honorable Donald Mitchell, Judge.

Disposition: The judgment and attorney fee order are reversed. The order denying the motion for judgment notwithstanding the verdict is affirmed. Appellants shall recover their costs.

Core Terms

costs, allocated, advertising, bid, Transportation, products, trial court, overhead, inches, per mile, editorial, issue of fact, trier of fact, irrational, allocation of costs, attorney's fees, matter of law, total cost, newspapers, expenses, purposes, appears, space

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > General Overview

HN1 [down arrow] Antitrust & Trade Law, Consumer Protection

The purpose of the California Unfair Practices Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented. [Cal. Bus. & Prof. Code § 17001](#).

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II., III., and IV.

Antitrust & Trade Law > Consumer Protection > General Overview

HN2 Antitrust & Trade Law, Consumer Protection

The California Unfair Practices Act forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts and deceptive, untrue or misleading advertising. [Cal. Bus. & Prof. Code §§ 17200, 17500, 17040-17041, 17049-10750, 17044, 17043, 17045, 17046.](#)

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN3 Consumer Protection, Deceptive & Unfair Trade Practices

The California Unfair Practices Act prohibits the sale of goods and services below cost. [Cal. Bus. & Prof. Code §§ 17043, 17048.5, 17049.](#)

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN4 Regulated Practices, Trade Practices & Unfair Competition

Proof that a defendant sold or distributed articles or products below cost will be presumptive evidence of the purpose or intent to injure competitors or destroy competition. [Cal. Bus. & Prof. Code § 17071.](#)

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN5 Consumer Protection, Deceptive & Unfair Trade Practices

In a case involving production, the California Unfair Practices Act defines cost to include the cost of raw materials, labor and all overhead expenses. [Cal. Bus. & Prof. Code § 17026.](#)

Antitrust & Trade Law > Consumer Protection > General Overview

HN6 Antitrust & Trade Law, Consumer Protection

The separate definition of overhead expenses is given as labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising. [Cal. Bus. & Prof. Code § 17029.](#)

Antitrust & Trade Law > Consumer Protection > General Overview

HN7 Antitrust & Trade Law, Consumer Protection

California's fully allocated cost standard is a fair allocation of all fixed or variable costs associated with production of the article or product.

Antitrust & Trade Law > Consumer Protection > General Overview

HN8 [] **Antitrust & Trade Law, Consumer Protection**

Fixed costs are those that do not vary with changes in output, while variable costs are those that do vary with changes in output.

Antitrust & Trade Law > Consumer Protection > General Overview

HN9 [] **Antitrust & Trade Law, Consumer Protection**

Fully allocated cost has been equated with average total cost, which 'reflects that portion of the firm's total costs--both fixed and variable--attributable on an average basis to each unit of output.

Antitrust & Trade Law > Consumer Protection > General Overview

HN10 [] **Antitrust & Trade Law, Consumer Protection**

Cost has been described as the initial expense of producing the article together with its share of the load of carrying on the business through which it is sold.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN11 [] **Consumer Protection, Deceptive & Unfair Trade Practices**

Cost has been treated as the burden imposed upon the producer's overall cost of doing business.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN12 [] **Consumer Protection, Deceptive & Unfair Trade Practices**

Cost is to be measured as the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.

Antitrust & Trade Law > Consumer Protection > General Overview

HN13 [] **Antitrust & Trade Law, Consumer Protection**

Determination of the defendant's cost has always been treated as an issue of fact.

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

HN14 [] **Summary Judgment, Entitlement as Matter of Law**

An issue of fact is one where the evidence introduced will support a decision on either side, that is to say, reasonable minds could fairly differ as to the answer to the question posed.

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

HN15 [] **Summary Judgment, Entitlement as Matter of Law**

An issue of fact can become an issue of law when reasonable minds can draw only one conclusion from the evidence.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN16 [] **Standards of Review, Substantial Evidence**

An issue of fact cannot be taken from a jury by the trial court and treated as an issue of law unless only one conclusion is legally deducible and any other conclusion cannot command the support of substantial evidence that will survive appellate review.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A newspaper brought an action against another newspaper, alleging that defendant, in successfully bidding for a contract to publish public notices for a city and county, had bid below the actual cost of publishing ads, in violation of [Bus. & Prof. Code, § 17043](#) (prohibition against selling below cost to injure competitors), of the Unfair Practices Act (UPA). The parties offered conflicting methods for determining defendant's incurred costs. Plaintiff allocated defendant's costs between its news products and its advertising products according to defendant's revenue, while defendant's method allocated its costs according to space devoted to advertising as opposed to news or editorials. The trial court determined that a revenue allocation method was appropriate and did not allow defendant to present its method to the jury. The jury returned a verdict for plaintiff, the trial court trebled the jury's award under the UPA, and the court awarded plaintiff attorney fees. (Superior Court of the City and County of San Francisco, No. 962780, Donald S. Mitchell, Judge.)

The Court of Appeal reversed the judgment and the order awarding attorney fees. The court held that the trial court erred in determining that plaintiff's method for determining defendant's costs was the only appropriate method and in precluding defendant from presenting its method to the jury. Neither of the parties' cost models was irrational or insufficiently allocated to comply with the requirement of the UPA. Neither model was so persuasive that it alone would attract all reasonable minds, allowing the issue to be resolved as a question of law, and thus it remained an issue of fact for the jury. Further, the error was reversible, since it was tantamount to directing a verdict against defendant. (Opinion by Sepulveda, J., with Hanlon, P. J., and Poche, J., concurring.)

Headnotes

CA(1a) [] (1a) **CA(1b)** [] (1b)

Unfair Competition § 3—Unfair Practices Act—Selling Below Cost—Determination of Cost.

--The Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#)), which prohibits the selling of products below cost to injure competitors, embodies California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product. Cost is to be measured as the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion. Fixed costs are those that do not vary with changes in output, while variable costs are those that do vary with changes in output. Fully allocated cost has been equated with average total cost, which reflects that portion of the firm's total costs, both fixed and variable, attributable on an average basis to each unit of output. Thus, cost is the initial expense of producing the article together with its share of the load of carrying on the business through which it is sold. Cost also may be treated as the burden imposed upon the producer's overall cost of doing business. Determination of a defendant's costs has always been treated as an issue of fact, and although there are many feasible methods of determining costs, the determination is best approached on a case-by-case basis.

CA(2) [] (2)

Trial § 61—Province of Court and Jury—Questions of Fact.

--An issue of fact is one where the evidence introduced will support a decision on either side, that is to say, reasonable minds could fairly differ as to the answer to the question posed. An issue of fact can become an issue of law when reasonable minds can draw only one conclusion from the evidence. An issue of fact cannot be taken from a jury by the trial court and treated as an issue of law unless only one conclusion is legally deducible and any other conclusion cannot command the support of substantial evidence that will survive appellate review.

CA(3) [] (3)

Unfair Competition § 9—Unfair Practices Act—Action for Selling Newspaper Notices Below Cost in Violation of Act—Evidence—Determination of Cost—As Question of Law or Fact.

--In a newspaper's action against another newspaper, in which plaintiff alleged that defendant, in successfully bidding for a contract to publish public notices for a city and county, had bid below the actual cost of publishing ads in violation of [Bus. & Prof. Code, § 17043](#) (prohibition against selling below cost to injure competitors), of the Unfair Practices Act (UPA), the trial court erred in determining that plaintiff's method for determining defendant's costs was the only appropriate method and in precluding defendant from presenting its method to the jury. Plaintiff's method allocated defendant's costs between defendant's news products and its advertising products according to revenue, while defendant's method allocated its costs according to space devoted to advertising as opposed to news or editorials. Neither of the parties' cost models was irrational or insufficiently allocated to comply with the requirement of the UPA. Neither model was so persuasive that it alone would attract all reasonable minds, allowing the issue to be resolved as a question of law, and thus it remained an issue of fact for the jury. Further, the error was reversible, since it was tantamount to directing a verdict against defendant. In light of the six days it took the jury to return a nine-to-three verdict in favor of plaintiff, there was more than a reasonable probability of a more favorable result for defendant.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 591 et seq.]

Counsel: Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Jerome B. Falk, Jr., Pauline E. Calande; Sheppard, Mullin, Richter & Hampton, Gary L. Halling and Thomas D. Nevins for Defendants and Appellants.

Steinhart & Falconer, James T. Fousekis, Roger R. Myers and Joshua Koltun for A.H. Belo Corporation, the Copley Press, Inc., Gannett Co., Inc., Knight-Rider, Inc., McClatchy Newspapers, Inc., the New York Times Company, Pulitzer Community Newspapers, [***2](#) Inc., and E.W. Scripps Company as Amici Curiae on behalf of Defendants and Appellants.

Horvitz & Levy, Lisa Perrochet, Jon B. Eisenberg; Commerce Law Group, Darrell J. Salomon; and Bernard Knapp for Plaintiff and Respondent.

Sideman & Bancroft, Donald J. Puttermann and Barry W. Strike for 61 California Newspapers as Amici Curiae on behalf of Plaintiff and Respondent.

Judges: Opinion by Sepulveda, J., with Hanlon, P. J., and Poche, J., concurring.

Opinion by: SEPULVEDA

Opinion

[*426] [**119] SEPULVEDA, J.

One provision of California's Unfair Practices Act specifies that "It is unlawful for any person engaged in business within [**120] this State to sell any article or product at less than the cost thereof . . . for the purpose of injuring competitors or destroying competition." (*Bus. & Prof. Code, § 17043*.¹) The fundamental issue here is how to compute the cost of news paper advertising space in a major metropolitan market. A [*427] complicating factor is that, for all practical purposes, there are only two actors in that market.

[***3] An unbroken line of decisional authority holds that just what constitutes an economic actor's "cost" is an issue of fact to be decided by the trier of fact. In this case, however, the trial court decided the cost issue as a matter of law in circumstances that virtually ensured a verdict for the plaintiff. We therefore shall reverse the judgment for plaintiff together with an ensuing order awarding attorney fees.

BACKGROUND

The dispute between the parties, and the extensive record generated by that dispute, reveal a mountain of detail, not all of which warrants recapitulation here. For present purposes, the following abbreviated narrative will suffice:

For a number of years the City and County of San Francisco let an annual contract for its "official newspaper" publishing public notice of matters as required by state and municipal law. (See *Gov. Code, § 6000 et seq.*; S.F. Admin. Code, § 2.81.) The contract became an issue of bitter contention between two competitors for the contract, the San Francisco Examiner and the San Francisco Independent.²

[***4] By 1993, the Examiner had lost out in the bidding process for this contract to the Independent for three years' running. The last time out prior to the year in controversy here, the Independent's winning bid was approximately 35 cents per line less than the Examiner's.³ This time, the Examiner dropped its bid from \$ 2.28 per

¹ Statutory references are to this code unless otherwise indicated.

² The Examiner is an evening paper owned by the Hearst Corporation. The Examiner and the San Francisco Chronicle, a non-Hearst morning paper, produce a joint Sunday edition; they share facilities and noneditorial business functions pursuant to a joint operating agreement authorized by the Newspaper Preservation Act (15 U.S.C. § 1801-1804; 28 C.F.R. § 48.1-48.16 (1998)). The overlap between the two papers is the responsibility of the San Francisco Newspaper Printing Company, Inc. That entity and the Hearst Corporation were named as defendants and answered the complaint at issue here. For purposes of simplicity, however, these defendants will be collectively referred to as "the Examiner."

The Independent is owned by Pan Asia Venture Capital Corporation, the plaintiff in this litigation. In order to maintain the symmetry of this dispute between newspapers, plaintiff will be referred to as "the Independent."

³ The Independent bid \$ 2.35 per line, while the Examiner bid \$ 2.28. The Examiner concedes, however, that technical factors such as differing type size and line count means that "the dollar amounts of the respective bids . . . are not directly comparable. To derive directly comparable bids, the dollar amount of the *Independent's* bid must be reduced by approximately 15 . . . which reduces the *Independent's* bid of \$ 2.35 per line to approximately \$ 2.00 per line for purposes of comparison."

line to \$ 1.40 per line. The Independent's final bid increased from \$ 2.35 to \$ 2.67 per line. After the Examiner won the contract, the Independent brought suit for compensatory and punitive damages, attorney fees, and a permanent injunction. Although various causes of action were alleged in the Independent's complaint, its case against the Examiner [*428] came to trial on a single theory--that the Examiner's winning bid was less than the costs incurred and thus in violation of the statutory prohibition against "below cost" sales.

[***5] From the outset, both sides recognized that the issue of cost was crucial. No sooner had the case been called for trial than both sides submitted *in limine* motions attacking and requesting exclusion of the other party's "cost study evidence" or "cost allocation model." Because the Examiner and the Independent agreed that "the fundamental legal dispute . . . on the proper cost method should be resolved by the Court 'before the presentation of any argument or evidence to the trier of fact,' " the court conducted an extensive [**121] evidentiary hearing pursuant to [Evidence Code section 402](#). (See fn. 11, *post.*) Based on the evidence it had heard, the court ruled that the Examiner "produces two relevant products"--the actual "physical newspapers" and advertising space--for purposes of this action.⁴ The Independent's "cost [*429] allocation method" recognized the existence of the two

⁴ In its opening brief, the Examiner states: "Although Defendants continue to believe that the Examiner can be viewed as constituting a single 'product' with multiple revenue streams--a newspaper containing both editorial material and paid advertisements--the distinction is academic in the circumstances of this case. Whether the Examiner is viewed as a single, integrated product, or as two distinct products--a newspaper and advertising, Defendants did not engage in below-cost pricing. Nor would Defendants be found to have engaged in below-cost pricing if one separately calculated the costs of classified advertisements. For that reason, Defendants' arguments in this brief are addressed to other rulings of the trial court, and assume--solely for purposes of this appeal, and *arguendo*--that there are indeed two 'products': a daily 'newspaper product' which consumers purchase from a newsstand or by subscription, and an 'advertising product.' Defendants reserve the right to contend in the future, should the occasion arise, that their 'product' or 'products' should be defined differently. [P] It should be noted, however, that Plaintiff's two-product theory--which is a fundamental premise of Plaintiff's claim in this case--is inconsistent with Plaintiff's rationale for the 'revenue allocation' methodology that the trial court approved."

The Independent treated this as a "concession" that the Examiner was not contesting the trial court's ruling that two products were at issue. The Examiner responded in its reply brief that no such concession had been made; it also made the first developed argument attacking the two-product ruling as a grounds for reversal. Three days after the Examiner's reply brief was filed, a number of publishers filed an amicus curiae brief supporting the Examiner, in which they passionately contend that the trial court's ruling on this issue was error. This mutual desire of the Examiner and amici curiae to now litigate the two-product ruling on appeal will not be indulged.

As did the Independent, we too read the language in the Examiner's opening brief as a concession that it will not be contesting the correctness of the trial court's two-product ruling. The operative language of the footnote--"the distinction is academic *in the circumstances of this case*," "Defendants' arguments in this brief are addressed to *other rulings*," "assume--solely for purposes of *this appeal* . . . --that there are indeed two 'products,' " "Defendants *reserve the right to contend in the future, should the occasion arise*" (italics added)--cannot be reasonably read as other than a concession. Nor does the reference to page 32 at the end of the footnote assist the Examiner. Page 32 finds the Examiner stating: "If, as Plaintiff urged and the trial court ruled, the 'newspaper product' and the 'advertising product' are indeed separate products for purposes of the UPA, then the cost of each such 'product' must be measured separately and accurately." A FOOTNOTE AT THIS POINT GOES ON: "Conversely, if Plaintiff persists in arguing that the pricing of advertising and newspapers are inseparably intertwined, it will be necessary for the Court to examine the trial court's ruling that they are, indeed, two separate 'products' for purposes of the UPA's below-cost pricing statute." These 10 lines do not constitute a developed argument with supporting authority and appropriate references to the record. The opening brief will therefore not be regarded as raising the issue of the two-product ruling for review. (See, e.g., [Troensegaard v. Silvercrest Industries, Inc. \(1985\) 175 Cal. App. 3d 218, 228 \[220 Cal. Rptr. 712\]](#).) There being no reason why the issue could not have been developed in the opening brief, the Examiner's attempt to raise it in the reply brief will not be indulged. (See, e.g., [Scott v. CIBA Vision Corp. \(1995\) 38 Cal. App. 4th 307, 322 \[44 Cal. Rptr. 2d 902\]](#); [Neighbours v. Buzz Oates Enterprises \(1990\) 217 Cal. App. 3d 325, 335, fn. 8 \[265 Cal. Rptr. 788\]](#).) The amicus curiae brief cannot remedy this defect because amici curiae are not allowed to expand the issues raised by the parties. (See, e.g., [California Assn. for Safety Education v. Brown \(1994\) 30 Cal. App. 4th 1264, 1274-1275 \[36 Cal. Rptr. 2d 404\]](#) and decisions cited.) Exceptions are allowed on points of jurisdiction or issues that will result in affirmance (see [E. L. White, Inc. v. City of Huntington Beach \(1978\) 21 Cal. 3d 497, 511 \[146 Cal. Rptr. 614, 579 P.2d 505\]](#)), but amici curiae are attempting to argue a nonjurisdictional evidentiary error they view as requiring reversal. The ordinary rule of party issue selection and preclusion therefore applies to this and the other evidentiary error claimed only by amici curiae.

products and allocated costs between them; the Examiner's motion to exclude the Independent's cost determination study was therefore denied. On the other hand, because the Examiner's method did not allocate costs between these two products, the Independent's motion [***6] to exclude evidence of this method was granted.

[***7] In line with this ruling, the Examiner's expert, Dr. Crichfield, prepared a new study that allocated costs between newspapers and advertising. The Independent moved to exclude all evidence of this new [**122] study. Following a second [Evidence Code section 402](#) hearing, the court denied the Independent's motion and ruled that the study could be used at trial. Each side would be permitted, the trial court ruled, to produce its own cost determination study, despite difference in their methodologies. The Independent's method of determining cost was based on a "revenue allocation," the Examiner's on allocation according to the amount of space dedicated to advertising, as opposed to news or editorial coverage.

Trial then commenced. The first witness was Earl Pierson, who testified about the newspaper business in general and the state of that business in San Francisco in the early 1990's. The Independent's next witness was its economic expert, Dr. McLeod. He testified that the Examiner's winning bid of \$ 1.40 was well below its actual per line cost of \$ 1.82. The major purpose of Dr. McLeod's testimony was to attack the validity of the Crichfield model. He accused Dr. Crichfield [***8] of employing "accounting tricks" that "distort" the real picture of the Examiner's costs.

The Independent's next witness was accounting expert Dr. Maher, who had reviewed McLeod's findings and endorsed them. Dr. Maher specifically [*430] agreed with McLeod that the Examiner's costs had to be determined using the "revenue basis of allocation." He also criticized Crichfield's model. Dr. Maher's testimony ended the fourth day of trial.

Prior to the start of the fifth day of the trial, while discussing another matter with counsel in chambers, the court announced that "I have something to talk about." The court then explained that it had reexamined the issue of the cost studies prepared by the parties' experts and concluded that "[T]he only model that's appropriate is a revenue allocation model for allocating costs in this case." The Independent's experts, Drs. McLeod and Maher, endorsed a revenue allocation model. The Examiner, by contrast, relied on Dr. Crichfield's allocation of division between advertising and editorial/newsgathering functions according to the unit of measure of inches of the Examiner devoted to one or the other of these tasks. The court told counsel: "[T]he [***9] only model that's appropriate is a revenue allocation model for allocating costs in this case. You cannot use this physical unit allocation model approach in this context. You can't do it. [P] . . . This is not a fully-allocated cost model, the one that Dr. Crichfield made. It just isn't." The court repeatedly called Dr. Crichfield's approach "irrational." The court denied the Examiner's motion for a mistrial and trial proceeded for approximately six weeks.

The Independent's expert, Dr. McLeod, testified at length about the revenue allocation methodology utilized in his cost study. Dr. McLeod's testimony will be discussed in more detail *post*, but its general import was to allocate cost according to revenue generated by those costs. His bottom line was that the Examiner's genuine cost per line was \$ 1.92, far above the \$ 1.40 bid.

In accordance with the court's most recent ruling, the Examiner's expert, Dr. Crichfield, was not allowed to testify about his cost model, but he did testify as to methodological defects he perceived in Dr. McLeod's model. After both Crichfield and McLeod had testified, and shortly before the case was sent to the jury, the court granted [***10] the Independent's motion to strike portions of Crichfield's testimony that were critical of McLeod's methods and conclusions; the theory was that allowing Crichfield to criticize McLeod's methods and conclusions would permit the Examiner to circumvent the court's ruling excluding substantive affirmative testimony [**123] from Crichfield. During the course of discussing instructions, the court granted the Independent's motion for a directed verdict on the Examiner's "meeting competition" affirmative defense. (See § 17050, subd. (d).)

The court instructed the jury in effect that the only relevant evidence on the issue of cost had come from the Independent, a point the court reiterated [***431**] when expressly asked by the jury.⁵ Three days after the case was sent to them the jury sent a note to the court asking "[W]hat do we do when we have come to an impasse?" The court questioned the jury, determined that there was not a true deadlock, and sent them back to continue the deliberations. Three days later the jury, by a vote of nine to three, returned a "general" (i.e., liability only) verdict in favor of the Independent.

[**11] After a brief damages phase, the jury returned a unanimous "special" verdict for the Independent in the amount of \$ 348,981--the amount requested--together with interest. After this amount was trebled (§ 17082), and prejudgment interest was added, a judgment for \$ 1,149,636 was entered. Almost twice this amount--\$ 2,230,051--was awarded for costs and attorney fees. The Examiner's motions for a new trial and for judgment notwithstanding the verdict were denied. The Examiner appeals from the judgment, the attorney fee order, and the order denying its motion for judgment notwithstanding the verdict.

DISCUSSION

I. *Determination of Cost Under the Unfair Practices Act Is an Issue of Fact to Be Determined by the Jury.*

A. *Applicable Law.*

HN1[[↑]] The purpose of the Unfair Practices Act (UPA) is "to safeguard the public against the creation or perpetuation of monopolies and to foster and [***432**] encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented. [**12] " (§ 17001.) **HN2**[[↑]] It forbids most locality discriminations (§ 17040-17041, 17049-17050), the use of loss leaders (§ 17044), gifts (§ 17043), secret rebates (§ 17045), boycotts (§ 17046), and "deceptive, untrue or misleading advertising" (§ 17200, 17500). **HN3**[[↑]] It also prohibits the sale of goods and services below cost (§ 17043, 17048.5, 17049). This last was the violation the Independent alleged it had suffered at the hands of the Examiner.

HN4[[↑]] Proof that a defendant sold or distributed articles or products below cost will be [**124] "presumptive evidence of the purpose or intent to injure competitors or destroy competition" (§ 17071). The UPA provides definitions for "cost" in various settings (e.g., production and distribution) (§ 17026, 17029). A number of UPA provisions specify what sort of evidence may be used to demonstrate cost (§ 17027, 17071.5-17077).

⁵ The jury was instructed that "the evidence in this case has been that the *only* method for allocating costs to these two products [i.e., the newspaper product and advertising space product] is the so-called 'revenue method' of allocating joint costs. The revenue method of allocating joint costs is a method based on the assumption that the ratio between the amounts of revenue earned by the products involved is the same as the ratio of the costs incurred in producing these products." (Italics added.)

Two days into their deliberations the jury asked the court "Is the revenue method the only legal method to consider in determining if the cost of advertising is below cost in this case?" The court responded that "The answer to that question is yes." Counsel for the Independent had forcefully made the same point during his closing argument.

The court drove the same point home by telling the jury what they could *not* consider: "During the trial of this action, there has been evidence of methods of cost allocation defendants used before [the date of their winning bid] to determine their costs. I instruct you that you are to consider those methods only as they may bear on the defendants' state of mind, and not as methods which you may apply to determine the defendants' advertising costs in this action."

One other point must be mentioned. The Examiner states in its brief that "[D]uring its deliberations the jury inquired as to which portions of Dr. Crichfield's testimony were in evidence . . . but the trial court never clarified the issue." The clear implication of this passage is that the trial court was, to use the mildest term, derelict in its duty. The Examiner's statement is literally true but almost slanderous in its innuendo. What actually happened, and what clearly appears on page 7354 of the reporter's transcript, is that the jury foreman told the court "The jury has decided we no longer need the information that we requested." The court then verified "you are telling me that you no longer need this information; is that right?" The jury foreman answered, "That's right."

HN5[] **[***13]** This case involved production, for which the UPA defines cost to include "the cost of raw materials, labor and all overhead expenses" (§ 17026). **HN6[]** The separate definition of overhead expenses is given as "labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising" (§ 17029).

CA(1a)[] **(1a)** These statutes embody **HN7[]** California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product.⁶ (See *Turnbull & Turnbull v. ARA Transportation, Inc.* (1990) 219 Cal. App. 3d 811, 820 [268 Cal. Rptr. 856]; *G.H.I.I. v. MTS, Inc.* (1983) 147 Cal. App. 3d 256, 275 [195 Cal. Rptr. 211, 41 A.L.R.4th 653].) **HN8[]** Fixed costs are those that do not vary with changes **[***14]** in output, while variable costs are those that do vary with changes in output. **HN9[]** "[F]ully allocated cost has been equated with average total cost, which 'reflects that portion of the firm's total costs--both fixed and variable--attributable on an average basis to each unit of output.' " (*Turnbull & Turnbull v. ARA Transportation, Inc.*, *supra* at p. 820.) **HN10[]** Thus, cost has been described as the initial expense of producing the article together with "its share of the load of carrying on the business through which it is sold." (*People v. Kahn* (1936) 19 Cal. App. 2d Supp. 758, 765 [60 P.2d 596].) **HN11[]** Cost has also been treated as "the burden" imposed upon the producer's "overall cost of doing business." (*Turnbull & Turnbull v. ARA Transportation, Inc.*, *supra*, at p. 822.)

[*15]** **HN13[]** Determination of the defendant's cost has always been treated as an issue of fact. One of the earliest decisions construing the UPA found our Supreme **[*433]** Court stating that ". . . any difficulty in computing cost is a factual one" (*People v. Pay Less Drug Store* (1944) 25 Cal. 2d 108, 118 [153 P.2d 9]; accord, *Turnbull & Turnbull v. ARA Transportation, Inc.*, *supra*, 219 Cal. App. 3d 811, 820; *People v. Kahn*, *supra*, 19 Cal. App. 2d Supp. 758, 765). That principle remains true. (See *Western Union Financial Services, Inc. v. First Data Corp.* (1993) 20 Cal. App. 4th 1530, 1539 [25 Cal. Rptr. 2d 341].)

CA(2)[] **(2)** **HN14[]** An issue of fact is one where the evidence introduced will support a decision on either side, that is to say, reasonable minds could fairly differ as to the answer to the question posed. (E.g., *Hamilton v. Pacific Elec. Ry. Co.* (1939) 12 Cal. 2d 598, 603 [86 P.2d 829]; *Greyhound Lines, Inc. v. Superior Court* (1970) 3 Cal. App. 3d 356, 260 [83 Cal. Rptr. 343].) **HN15[]** An issue of fact can become an issue of law when reasonable minds can draw only one conclusion from the evidence. (E.g., *People v. Wild* (1976) 60 Cal. App. 3d 829, 832 [131 Cal. Rptr. 713]; *Wozniak v. Peninsula Hospital* (1969) 1 Cal. App. 3d 716, 725 [82 Cal. Rptr. 84].) **HN16[]** An issue of fact cannot be taken from a jury by the trial court and treated as an issue of law unless only one conclusion is legally deducible and any other conclusion cannot command the support of substantial evidence that will survive appellate review. (E.g., *Seneris v. Haas* (1955) 45 Cal. 2d 811, 821 [291 P.2d 915, 53 A.L.R.2d 124]; *Serian Brothers, Inc. v. Agri-Sun Nursery* (1994) 25 Cal. App. 4th 306, 311-312 [30 Cal. Rptr. 2d 382].)

Several reported decisions are helpful in demonstrating the minimal quantum of evidence necessary to qualify **[***17]** the issue of cost as one which must be determined by the trier of fact.

Tri-Q, Inc. v. Sta-Hi Corp. (1965) 63 Cal. 2d 199 [45 Cal. Rptr. 878, 404 P.2d 486] involved competing manufacturers of **[**125]** equipment and machinery used in the printing of newspapers. Tri-Q sued Sta-Hi for selling a specific product below cost, in violation of section 17043. During the relevant time period Sta-Hi had no formal cost accounting system in place. Sta-Hi's president testified that he fixed the price of the product using a rough estimate of the labor and materials involved. The opposing evidence was in the form of an accounting report showing that the "range of estimated probable unit costs" was above the prices charged by Sta-Hi. The trial court, acting as the trier of fact, found that Sta-Hi had not sold its products below cost. This determination was upheld by the Supreme Court, which held that "Since there was substantial support in the record for the trial court's resolution

⁶ **HN12[]** Cost is to be measured as "the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion." (*Johnson v. Farmer* (1940) 41 Cal. App. 2d 874, 882 [107 P.2d 959].) This is not a problem in this case, where both sides' cost studies and models were based on annual production costs.

of the issue as to whether the product was sold below cost, the finding of fact with respect thereto cannot be disturbed on appeal." (*Id.* at pp. 203-207.)

At issue in *Western Union Financial* [***18] *Services, Inc. v. First Data Corp., supra*, 20 Cal. App. 4th 1530 was the cost of money orders. Relying on what [*434] is described as "a single document created by a nonmanagement First Data employee," Western Union presented expert testimony that First Data charged \$ 9 for a money order whose cost could range from \$ 20.80 to as much as \$ 26.60. First Data's evidence was that its cost per transaction was \$ 16.26, but it realized revenue of about \$ 17.31 per transaction. The trial court, acting as the trier of fact, found that First Data was making a profit on the transactions and therefore was not selling its products below cost. (*Id.* at pp. 1533-1535.) The Court of Appeal held that ". . . there is a factual dispute about the manner in which costs were computed . . . and what that means is that we will not disturb the trial court's findings." (*Id.* at p. 1539, citations omitted.)

For present purposes, *Turnbull & Turnbull v. ARA Transportation, Inc, supra*, 219 Cal. App. 3d 811, is perhaps most instructive. Turnbull and ARA operated bus transportation services and were competing bidders for annual contracts to bus children within the San Joaquin [***19] County school system. After repeatedly losing out to ARA, Turnbull brought suit, claiming that ARA's bids were below its costs. ARA's routine destruction of documentation meant that Grundig, Turnbull's economic expert, was unable to recreate precise cost figures. "Grundig used four different methods in calculating whether ARA's bid was below its costs. The first method involved comparing the revenue per mile received by ARA on the San Joaquin County contract with the revenue per mile it received on other bus transportation contracts in other counties, after having made adjustments for cost differentials between the counties. The second method compared the revenue per mile ARA received on the San Joaquin County contract with the revenue per mile it received on its Delta College contract in San Joaquin County. In the third method, Grundig calculated ARA's costs based on two national cost surveys regarding operating costs of private passenger vans. Grundig's fourth method entailed an analysis of ARA's operating statements and an allocation of ARA's operating expenses per mile traveled. ARA's total operating costs for the year were divided by the total miles traveled to yield [***20] an average cost per mile. This figure was then multiplied by the contract mileage to determine the contract cost. In each year in question, ARA's bid was below its costs of providing the contract services." (*Id.* at p. 816.)

ARA provided no testimony or documentation concerning projected or actual costs for performing the contracts. One ARA financial officer testified that ". . . ARA was concerned with making a profit on each contract and would not bid under cost. Jack Gottsman, the president of ARA's transportation group, testified . . . ARA was concerned that each contract make a profit and bids were reviewed to make sure ARA was going into a contract on a profitable basis. [P] Robert Griffiths, the area controller who was in charge of the bidding process . . . , testified concerning [**126] ARA's method of [*435] allocating costs. It appears that variable costs were allocated per bus, per day. Fixed or overhead costs were allocated on the basis of bus days and revenue generated by each contract. The overhead would first be allocated among the various divisions based on the number of bus days generated by each division. Then each division would allocate the overhead [***21] per contract in proportion to the percentage of revenue generated by each contract. According to Griffiths, the San Joaquin County bids covered ARA's costs and generated a profit." (219 Cal. App. 3d at pp. 818-819.)

The jury returned a verdict for Turnbull. ARA appealed, contending inter alia that the UPA was unconstitutional "because the method for determining whether a service is sold below cost is arbitrary and irrational." (*Turnbull & Turnbull v. ARA Transportation, Inc, supra*, 219 Cal. App. 3d 811, 819.) In the course of rejecting this claim, the Court of Appeal stated: "ARA claims the fully allocated cost method is arbitrary because there are many ways of allocating costs (for example, in the present case per mile, per bus or per student) each of which may result in significantly different cost profiles. *While we agree there are many ways of fully allocating costs, the possibilities are not without limitation. To be legally acceptable, the allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business.* [Citations [***22] .] Moreover, a defendant is free to demonstrate to the trier of fact that its fully allocated cost, using another reasonable allocation method other than that used by the plaintiff, is actually lower than the plaintiff alleges and lower than defendant's sales or bid price. [Citation.] ARA did not do so. It merely

presented witnesses who testified ARA always bid above cost or always sought to make a profit. In fact, ARA did not even demonstrate it sold its services above its average variable cost or long-run incremental cost, the methods it espouses. As such, defendant failed to demonstrate that the use of the fully allocated cost method was arbitrary or irrational as applied to the facts of this case." (*Id.* at. pp. 822-823, italics added.)

CA(1b) [1b] Several conclusions are obvious. First, the concept of cost may appear simple, but can often prove deceptively hard to grasp in the real world. (See *People v. Kahn, supra*, 19 Cal. App. 2d Supp. 758, 765 ["It must be conceded that in many cases it is going to be extremely difficult to determine what cost of an article is."]; *Transamerica Computer Co., Inc. v. IBM Corp. (9th Cir. 1983) 698 F.2d 1377, 1387* [***23] [noting "the uncertainty and imprecision inherent in determining 'costs' "].) Authorities in the field argue passionately over the many possible models and approaches. (See, e.g., 3 Areeda & Hovenkamp, *Antitrust Law* (1996 rev. ed.) § 722-724d, 739-742, pp. 221-244, 367-426.) Second, and as a corollary, the determination of cost is best approached on a case-by-case basis. The provisions of the UPA and [*436] various judicial glosses reflect an appreciation that no single formulation will ever be broad enough to encompass all possibilities. The principle may be fixed and constant, but the application is prey to the infinite permutations of the question--what did it cost a particular defendant to produce or sell a given article at a specific point in time? Third, California appears to have adopted a very expansive approach to the evidence that may be used to establish cost; no formula has been expressly sustained or denounced.

With this background, we turn to the Examiner's first contention--that the trial court committed reversible error when it precluded the Examiner from presenting its version of how it calculated cost for purposes of bidding for the City's contract.

B. [***24] Application of Law in This Case.

CA(3) [3] The parties continue the intransigence they displayed throughout the trial, each insisting that its economic model is the only acceptable method for determining cost, and that the other side's model is worthless and erroneous as a matter of law. The Examiner insists not only must [**127] the judgment be reversed, there must be no retrial, and it is entitled to judgment notwithstanding the verdict. The Independent is equally adamant that the trial court was correct in excluding evidence of Crichfield's analysis because "revenue allocation the *only* rational way to determine the Examiner's cost." ⁷ (Original italics.)

The revenue allocation adopted by Dr. McLeod, and to a lesser extent by Dr. Maher, appears to be an allocation [***25] approach used if the standard cost allocation (see S 17026 ["cost of raw materials, labor and all overhead expenses"]) either will not work or is inappropriate for some reason. McLeod believed it was inappropriate in this case to use the standard cost allocation (S 17026 ["cost of raw materials, labor, and all overhead expenses"]) because there is not a common physical unit of measurement, and because "you have two products that are intertwined and therefore there is no rational way of simply allocating the costs." (The latter premise obviously ties in to the trial court's "two-product" ruling; see fn. 4 and accompanying text, *ante*.) Using the revenue allocation method, McLeod assigns costs to the two products "[b]ased on an approximation of the value received from the sales of those two products."

Dr. Crichfield's opinion was that revenue allocation was not appropriate because there was a common physical unit of measurement--the inches of space devoted to the advertising and "editorial" (i.e., news gathering and [*437] reporting) functions, which could be used to allocate the cost of production of the Examiner. He allocated 55 percent of the Examiner's total costs [***26] to the editorial side, and 45 percent to advertising.

The difference in result between the two approaches is gaping. Working from the conceded figure of approximately \$ 60.5 million for the Examiner's total costs, McLeod allocated only \$ 11,228,000 to "non-advertising revenues," resulting in \$ 49,250,000 of costs allocated to advertising; that figure was then divided by the number of "advertising inches" to produce a "cost per classified ad line" of \$ 1.85. ⁸ Dr. Crichfield found \$ 23.8 million of advertising costs

⁷ Not even Dr. McLeod made this claim for his method. He candidly admitted that using revenue allocation was "a judgment call to some extent," that it was not a "precise formula," but it was "the best you can come up with under the circumstances."

divided by the same number of advertising inches to produce a per line cost of 89 cents for advertising. Where Crichfield assigned 45 percent of the Examiner's total costs to the "advertising product," McLeod allocated almost 85 percent.

Each side can and does point to flaws in the other's model. This, we believe, illuminates the fundamental point missed by both parties and by the trial court. The [***27] hyperbole obscures the fact that each approach has its relative merits and demerits. Neither is entitled to prevail as a matter of law. Neither is so strong that it can banish the other. In short, both approaches are sufficiently reasonable that both ought to have been put before the jury.

When the Examiner condemns McLeod for using "an irrational 'revenue allocation' methodology that is not sanctioned by California law," it overstates its case. The revenue allocation method may lack an express sanction in California, but so does the Examiner's approach. And while no reported California decision explicitly sanctions or endorses any approach to determining cost, the revenue allocation method was mentioned in *Turnbull & Turnbull* without a hint that it was inappropriate. Moreover, the Examiner never suggested that the revenue allocation approach was new, unscientific, or unaccepted in the fields of economics and cost accounting. (Cf. [In re IBM Peripheral EDP Devices, etc. \(N.D.Cal. 1979\) 481 F. Supp. 965, 998](#) ["Revenue apportionment is a generally accepted and commonly used method of . . . cost allocation."].) Certainly with the record so undeveloped on this point, [***28] we cannot hold as a matter of law that the revenue allocation approach could not be used.

On the other hand, the advantage of measuring the cost of an item backwards from the revenue generated by that item is [**128] not immediately self-obvious and can seem incompatible with common sense. This approach appears to have no connection with the traditional tests of "initial cost," or the item's "share of the load of carrying on the business through which it is sold" (*People v. Kahn, supra*, 19 Cal. App. 2d Supp. 758, 765, 60 P.2d 596), or "the burden [**438] . . . impose[d] on the overall cost of doing business." (*Turnbull & Turnbull v. ARA Transportation, Inc., supra*, 219 Cal. App. 3d 811, 822, 268 Cal. Rptr. 856.) It further appears that there are distinct logical flaws in the approach as developed in this case.

According to Dr. McLeod, the revenue allocation approach should be used only in a joint cost situation where there is no common unit of measurement. In this situation, however, as the Examiner repeatedly urged, there was a common unit of measurement, specifically the literal inches of the Examiner. It is not irrational to divide the Examiner by the inches of space [***29] devoted to the editorial and advertising products.⁹ [***30] On the other hand, as Dr. McLeod testified, one may buy X number of inches of advertising space, but "You can't go to the newsstand and say, 'I'd like to buy 25 inches of news copy today.' " Moreover, as the Examiner points out in its opening brief, McLeod's model treats more than \$ 23 million of the Examiner's total costs, those for "editorial costs" plus ink and newsprint, as joint costs when in fact they are obviously and easily segregated as part of the "editorial product."¹⁰ They would therefore not be subject to the revenue allocation percentages and would almost certainly require a recalculation of those percentages. This suggests that Dr. McLeod's analysis was perhaps too ambitious in its scope and its application of deductive revenue allocation; in effect it made all costs joint costs. These flaws are not, however, of sufficient magnitude to condemn the revenue allocation approach *per se* and make it inadmissible as a matter of law. These and other imperfections would go to the weight the jury ought to give McLeod's testimony, but they do not make it wholly illegitimate.

We conclude that neither of the parties' cost models was irrational or insufficiently allocated to comply with the UPA's requirement. Neither model is so persuasive that it alone would attract all reasonable minds, allowing the

⁸ Dr. McLeod's bottom-line per-line cost figure fluctuated from \$ 1.82 to \$ 1.92.

⁹ As cogently expressed by amici curiae: "A physical-unit method of accounting is appropriate because it directly tracks the requirement that it be 'reasonably related to the burden such product or service imposes on the overall cost of doing business.' [Citation.] Unlike the revenue-allocation method, the physical-unit method actually has a close relationship to the working operations of the newspaper. Public notice advertising takes up physical space in the newspaper, thereby consuming newsprint and ink, is sold in physical units known as column-inches, and is delivered to readers in such physical form."

¹⁰ The difficulty with the revenue approach is perhaps best illustrated with a specific example: Dr. McLeod identified \$ 15,863,613 as "editorial costs," yet his approach allocates almost all of these costs to the "advertising product."

issue to be resolved as a question of law. (See *Seneris v. Haas, supra*, 45 Cal. 2d 811, 821; *Serian Brothers, Inc. v. Agri-Sun Nursery, supra*, 25 Cal. App. 4th 306, 311-312.) The issue of the Examiner's cost remained a question of fact on which the parties could introduce conflicting evidence. It was therefore error to exclude evidence of the Examiner's model from being [*439] presented to the jury.¹¹ (E.g., *Western Union Financial Services, Inc. v. First Data Corp., supra*, 20 Cal. App. 4th 1530, 1539, 25 Cal. Rptr. 2d [**129] 341; *People v. Kahn, supra*, 19 Cal. App. 2d Supp. 758, 765.) [***31]

C. Taking Issue of Determination of Cost From Jury Requires [***32] Reversal.

The error clearly requires reversal because of its importance and its manifold consequences. Cost was the issue of this litigation as it went to trial.¹² Dr. Crichfield's testimony would therefore be crucial for the Examiner. Although both sides in opening statements made reference to Crichfield's anticipated testimony, the comments of counsel for the Independent were far more numerous and pointed.¹³ The preemptive attacks on Crichfield continued virtually from the start of the actual jury trial, with the Independent's second and third witnesses (Drs. McLeod and Maher) spending almost as much time attacking the as-yet-unheard Crichfield conclusions as explaining their own. The court's sua sponte overturning of its ruling could not help but cause confusion and consternation for the jury. The thing they had heard so much about would now not be produced, and they were told to forget all about it. For the Examiner, whose counsel had featured Crichfield prominently in his opening statement, the inability to call that witness was unquestionably damaging. (Cf. *People v. Corona (1978) 80 Cal. App. 3d 684, 725-726 [145 Cal. Rptr. 894]* [defense [***33] counsel dealt "devastating blow" to client when he failed to present evidence promised in opening statement].) The jury did finally get to hear Dr. Crichfield, but he was only allowed to present negative testimony, which is to say, testimony [*440] about the defects in the Independent's case. Even then, a good part of his testimony was stricken. It is hardly surprising that the jury initially had trouble remembering what part of Crichfield's testimony was available to them. (See fn. 5, ante.) Counsel for the Independent told the jury that the only relevant evidence on the dispositive issue of cost favored the Independent, and the trial court twice told the jury that the Independent's cost model was the sole legal method for determining cost. (*Ibid.*) This was tantamount to the court directing a verdict against the Examiner. In light of the six days it took the jury to return a nine-to-three verdict in favor of the Independent, there is more than a reasonable probability of a more favorable result; the error thus compels reversal. (*Cal. Const., art. VI, § 13; People v. Watson (1956) 46 Cal. 2d 818, 836 [299 P.2d 243]; Code Civ. Proc., § 475* [***34] .).)¹⁴¹⁴

¹¹ We reject the Independent's argument that this issue amounts to invited error and was waived by the Examiner's counsel when he asked the court to decide the reasonableness of the respective cost models as a matter of law. First, that request was made in connection with the first model submitted by Dr. Crichfield, which the court found was unallocated, resulting in its order that a new model be prepared. The Examiner's request was not renewed with respect to the second Crichfield model, the one at issue here. The second *Evidence Code section 402* hearing was conducted at the Independent's request, based on its motion to exclude Dr. Crichfield's second cost determination study. Second, the trial court obviously did not deem the Examiner's request applicable to the second model, as evident from its initial decision that neither it nor the McLeod model was "unreasonable" and the choice between them would be left to the jury.

¹² As the Independent's attorney told the jury in his opening statement: "[W]hat this case is all about is the allegation on the part of The Independent that when The Independent competed with The Examiner . . . to get the public notice contract . . . The Examiner bid below cost, below their fully allocated cost."

¹³ E.g., "And so what they chose to do was to hire Dr. Crichfield. They will say that Dr. Crichfield is an independent accountant who gave them independent advice with regard to their costs. [P] But the evidence will show that, in fact, Dr. Crichfield's primary career role is the creation of litigation cost models, and that this cost model is really a cost model designed to defend The Examiner in a lawsuit. . . . There are some other accounting tricks . . . which Dr. McLeod [the Independent's expert] will say makes this allocation study by Dr. Crichfield completely useless."

¹⁴ In its petition for rehearing, the Independent contends that we "mistakenly decided the 'cost' issue under *Evidence Code section 403* instead of *Evidence Code section 405*." We were not mistaken, because we decided no such issue, and the Independent's belated presentation of this claim will not avert reversal.

[***35] [*441] [**130] II.-IV. *

....

V. Conclusion.

The Independent's argument is apparently based on this statement from *Turnbull*: "To be legally acceptable, the allocation of . . . costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business." (*Turnbull & Turnbull v. ARA Transportation, Inc.*, *supra*, 219 Cal. App. 3d 811, 822.) The Independent reasons that whether Dr. Crichfield's model complied with this standard is a preliminary fact, one that [Evidence Code section 405](#) vests with the trial court to decide. [Evidence Code section 403](#), by contrast, allows the jury to decide whether the preliminary fact exists if "the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact" ([Evid. Code, § 403, subd. \(a\)](#)). In fact, the latter statute requires the issue of preliminary fact determination to be submitted to the jury but "[Section 405](#) requires the judge to determine the existence or nonexistence of disputed preliminary facts except in certain situations covered by Section[] 403 [Section 405](#) deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion." (See Assem. Com. on Judiciary, coms. to [Evid. Code, § 403, 405](#), 29B West's Ann. Cal. Evid. Code (1995 ed.) pp. 361, 374; Deering's Ann. Cal. Evid. Code (1986) pp. 142, 150-151.)

Whether the economic models' compatibility with [section 17026](#) and the *Turnbull* standard is properly handled under [Evidence Code section 403](#) or [Evidence Code section 405](#) is an intriguing question, but one we cannot, and need not, decide. There is undoubtedly a case to be made for viewing the admissibility of evidence dependent upon its compliance with an established legal standard as one involving both reliability and public policy, and therefore governed by [Evidence Code section 405](#). On the other hand, it is not fanciful to view the problem as relevance, that is to say, a model that did not comport with *Turnbull* would not be relevant on the issue of cost. This approach would make the problem subject to [Evidence Code section 403, subdivision \(a\)\(1\)](#). Certainly this was the trial court's initial view of the matter: In its written order deciding that the McLeod model could be used but Crichfield's initial model could not (see *ante* at pp. 428-429), the court made these decisions "pursuant to [Evidence Code section 403 \(a\)\(1\)](#)." Although the court did not enter a written order when it ruled that Crichfield's revised model was not "unreasonable in the context of . . . the *Turnbull* case" and not "unreasonable to the extent that it's something that should be precluded from being presented to the Jury altogether," it is difficult to believe the court would have shifted the statutory basis it had been employing up to that point. The blizzard of paper generated by the parties' motions to exclude the other's economic model demonstrates that neither party was entirely consistent in invoking either [section 403](#) or [405 of the Evidence Code](#). Unfortunately, when the trial court reversed course it became impossible to determine if the court would have continued to treat the issue as an [Evidence Code section 403](#) subject. It was because of this uncertainty that we said nothing more specific than that the court had conducted the pretrial hearings "pursuant to [Evidence Code section 402](#)." (See *ante*, at pp. 428-429.) It is therefore inaccurate for the Independent to believe we "decided the 'cost' issue under [Evidence Code section 403](#)." We did no such thing.

The issue is also immaterial because there is little practical consequence to which statute the trial court used. With or without special instructions (see [Evid. Code, § 403, subd. \(c\), 405, subd. \(b\)\(2\)](#)), the essential duty of the jury would have been pretty much the same--judge the evidence against the *Turnbull* standard given in the court's instructions. With *Turnbull* as the benchmark, the jury would decide which party's evidence it found to reflect the Examiner's cost. If the jury had accepted Crichfield's model, it would in effect have decided that his evidence was compatible with the preliminary fact of compliance with the *Turnbull* standard and the McLeod model was not. On the other hand, if the jury had accepted the McLeod/Maher testimony, it would have reached the opposite conclusions.

Such speculation aside, the Independent's contention is ultimately doomed because it does not matter which provision of the Evidence Code the trial court did or ought to have used. Even if (as the Independent assumes) the trial court did use [Evidence Code section 405](#), the court erred when it determined that the Crichfield model was "irrational" and therefore presumably not fully allocated as required by [section 17026](#) and *Turnbull* as a preliminary fact. Alternatively if the trial court did follow through on its initial ruling and continue to apply [Evidence Code section 403](#) when it excluded Crichfield's evidence, the court would also be in error because "there [was] evidence sufficient to sustain a finding of the existence of the preliminary fact" ([Evid. Code, § 403, subd. \(a\)](#)), i.e., that it was fully allocated in compliance with governing legal criteria. Both of these possibilities are encompassed by our analysis and our conclusion that reversible error occurred.

* See footnote, *ante*, page 424.

74 Cal. App. 4th 424, *441A88 Cal. Rptr. 2d 118, **130A1999 Cal. App. LEXIS 773, ***35

The judgment and attorney fee order are reversed. The order denying the motion for judgment notwithstanding the verdict is affirmed. Appellants shall recover their costs.

Hanlon, P. J., and Poche, J., concurred.

A petition for a rehearing was denied September 20, 1999, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied December 15, 1999.

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Concho Residential Servs., Inc. v. MHMR Servs.

Court of Appeals of Texas, Third District, Austin

August 26, 1999, Filed

NO. 03-98-00022-CV

Reporter

1999 Tex. App. LEXIS 6356 *; 1999-2 Trade Cas. (CCH) P72,728

Concho Residential Services, Inc., Appellant v. MHMR Services for the Concho Valley a/k/a Concho Valley Center for Human Advancement, in its Capacity as an Unincorporated Association, its Capacity as a Mental Retardation Authority, and as a Purported Community MHMR Center; James Young; Joe Finn; Karen Sheppard; John Brubaker; The Texas Council of Community Mental Health Mental Retardation Centers, Inc.; Spencer McClure; Texas Council Risk Management Fund; Board of Trustees of the Texas Council Risk Management Fund, as Trustee of the Liability Trust Account, the Property Trust Account, and the Workers' Compensation Trust Account; Brain Crews; JI Specialty Services, Inc.; Central Plains Center for MHMR and Substance Abuse; Richard Hall; Hector Cantu; James Coffey; Ruby Gutierrez; Sheirran Hughes; Brenda Morris; Jacqueline Shannon; Roger Sidener; Hale County; Tom Green County; and City of San Angelo, Appellees

Notice: [*1] PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

Subsequent History: Motion for Rehearing of Petition for Review Overruled April 27, 2000.

Petition for review denied by, 03/09/2000

Motion for rehearing on petition for review overruled by, 04/27/2000

Writ of certiorari denied *Concho Residential Serv. v. MHMR Servs. for the Concho Valley*, 531 U.S. 944, 121 S. Ct. 340, 148 L. Ed. 2d 273, 2000 U.S. LEXIS 6915 (Oct. 16, 2000)

Prior History: FROM THE DISTRICT COURT OF TOM GREEN COUNTY, 119TH JUDICIAL DISTRICT NO. CV92-0444-B, HONORABLE ROYAL HART, JUDGE PRESIDING.

Disposition: Affirmed in Part; Vacated and Dismissed in Part.

Core Terms

community center, trial court, summary judgment, Antitrust, membership, exemption, cause of action, government entity, mentally retarded, state-action, entities, disposing, asserts, sovereign immunity, complains, waived, common-law, centers, argues, default judgment, local government, anti trust law, mental health, Texas Act, interlocutory, residential, injunction, contends, enjoin, grant summary judgment

LexisNexis® Headnotes

HN1 Regulated Practices, Price Fixing & Restraints of Trade

The purpose of the Texas Free Enterprise and Antitrust Act of 1983, [Tex. Bus. & Com. Code Ann. §§15.01-52](#), is to promote economic competition in commerce in Texas. See [Tex. Bus. & Com. Code Ann. §15.04](#). As such, the restraint of trade or commerce is made unlawful. See [Tex. Bus. & Com. Code Ann. § 15.05\(a\)](#).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN2 Regulated Practices, Price Fixing & Restraints of Trade

The Texas Free Enterprise and Antitrust Act of 1983 explicitly states that its provisions shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes. [Tex. Bus. & Com. Code §15.04](#).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN3 Regulated Practices, Price Fixing & Restraints of Trade

Since 1943, the United States Supreme Court, in interpreting federal antitrust statutes, has recognized that antitrust laws do not apply to anti-competitive restraints imposed as an act of government.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN4 Regulated Practices, Price Fixing & Restraints of Trade

[Section 15.05](#) of the Texas Free Enterprise and Antitrust Act of 1983 specifically exempts "actions required or affirmatively approved by any statute of this state or by a regulatory agency of this state acting under statutory authority vesting the agency with such power. See [Tex. Bus. & Com. Code §15.05\(g\)](#).

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Governments > Federal Government > Claims By & Against

HN5 Antitrust & Trade Law, Exemptions & Immunities

The federal Local Government Antitrust Act of 1984 expressly immunizes all local governmental entities from antitrust liability under the Clayton Act. See [15 U.S.C.S. §§ 34-36](#). Counties are included in the definition of "local government." See [15 U.S.C.S. § 34](#).

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

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN6 [down arrow] **Summary Judgment, Entitlement as Matter of Law**

If summary judgment may have been granted on a ground not challenged, failure to address each theory that might support the trial court's rendition of summary judgment requires an affirmance.

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

HN7 [down arrow] **Justiciability, Standing**

The general rule is that standing to bring suit depends upon some interest peculiar to the person individually, and not as a member of the general public. More specifically, a person has standing to sue if: (1) he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; (2) there is a direct relationship between the alleged injury and the claim to be adjudicated; (3) the plaintiff has a personal stake in the controversy; (4) the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental, or otherwise; or (5) the plaintiff is an appropriate party to assert the public interest in the matter as well as his own interest.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN8 [down arrow] **Default & Default Judgments, Default Judgments**

As a prerequisite to presenting an argument for appellate review, the record must show that the complaint was first made to the trial court. See [Tex. R. App. P. 33.1\(a\)](#).

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

Civil Procedure > Judgments > Relief From Judgments > General Overview

[HN9](#)[] Default & Default Judgments, Default Judgments

A trial court has broad, virtually unlimited discretion to vacate an interlocutory order prior to its rendition of a final judgment. See [Tex. R. Civ. P. 329b](#).

Civil Procedure > Pretrial Matters > Continuances

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Continuances

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

[HN10](#)[] Pretrial Matters, Continuances

The granting or denial of a continuance is within the sound discretion of the trial judge. The denial of a motion for continuance will not be disturbed unless the record shows a clear abuse of discretion.

Judges: Before Justices Jones, Kidd and Patterson.

Opinion by: J. WOODFIN JONES

Opinion

Appellant Concho Residential Services, Inc. ("CRS") sued appellees MHMR Services for the Concho Valley (Concho Valley) and 22 others¹ for damages and injunctive relief, alleging multiple statutory and common-law causes of action. The trial court rendered summary judgment that CRS take nothing, disposing of all causes of action against all appellees. CRS perfected this appeal. We will affirm in part and dismiss the cause in part.

FACTUAL AND PROCEDURAL [*2] BACKGROUND

This case involves the expansive legislative scheme for providing mental health and mental retardation services to the citizens of Texas. The Texas Department of Mental Health and Mental Retardation ("TDMHMR") and other governmental entities operating under its direction shoulder the responsibility of providing the administration and delivery of mental health and mental retardation services to the public. See [Tex. Health & Safety Code Ann. §§ 531.001- 615.002](#) (West 1992 & Supp. 1999). A key element in the statutory scheme is the establishment of mental health and mental retardation community centers, which provide the needed services to mentally disabled persons at a local level under the supervision of TDMHMR. These community centers are created by local governmental entities such as counties, municipalities, or hospital districts, or a combination of entities joining together. See *id.* [§ 534.001](#). Community centers are, by statutory definition, "an agency of the state, a governmental unit, and a unit of local government." *Id.*

Also key in the statutory scheme is the creation of Mental Health or Mental Retardation [*3] Authorities ("MRAs"). MRAs are selected by TDMHMR and contract directly with the agency. It is the duty of the MRA to ensure that the statutorily mandated services are provided in its designated service area and to oversee state-funded community-based services. See *id.* §§ 534.052-.070. MRAs, in turn, work with community centers, as well as private entity

¹ There are 23 named appellees in this appeal, generally referred to collectively as appellees. As necessary, we will refer to appellees individually by name.

providers of mental retardation and mental health services. Each MRA acts as the referral center for MHMR services in its service area.

At all times relevant to this suit, CRS was a for-profit provider of residential facilities and services to mentally retarded persons. Concho Valley was both a community center and a designated MRA.

Although CRS asserted numerous claims against the various appellees, the crux of CRS's complaint is that Concho Valley and several of its employees allegedly blocked potential clients' access to CRS's residential facilities. CRS alleges that Concho Valley conspired with the City of San Angelo and Tom Green County--the local governmental creators of Concho Valley--to limit CRS's business; alternatively, CRS argues that the City of San Angelo and Tom Green County are vicariously liable for Concho's [*4] conduct. CRS also sought an injunction prohibiting Concho Valley from being a member of the Texas Council, a nonprofit corporation made up of community centers from all around Texas. The remaining appellees are asserted to be either directly liable for their participation in the conspiracy and other fraudulent acts, or derivatively liable due to their association with Concho Valley or the Texas Council.

DISCUSSION

CRS presents sixteen issues for this Court's review. The first complains generally that the trial court erred in granting summary judgment disposing of all of its causes of action against all appellees.² [*6] Issue two concerns the trial court's denial of CRS's request for injunctive relief. Issues three through six assert error related to the trial court's refusal to grant a default judgment against Tom Green County. Issue seven concerns CRS's antitrust cause of action. The eighth issue asserts generally that the trial court erred in dismissing the claims against Hale County. Issue nine addresses CRS's claims brought under the Deceptive Trade Practices-Consumer Protection Act ("DTPA").³ The tenth and eleventh issues concern federal claims for violation [*5] of the Racketeer Influenced Corrupt Organizations Act ("RICO")⁴ and "[section 1983](#)".⁵ Issue twelve complains of the trial court's disposal of various common-law claims. Issue thirteen asserts error related to the dismissal of CRS's statutory claims grounded in the Persons with Mental Retardation Act of 1977.⁶ Issue fourteen generally contends that the trial court erred in disposing of the vicarious liability claims against Central Plains. The final two issues complain of procedural rulings by the trial court.

Antitrust Liability

CRS asserted claims under the Texas Free Enterprise and Antitrust Act of 1983 ("Antitrust Act" or "Texas Act")⁷ against Concho Valley; Concho Valley employees Finn, Sheppard, and Young; Tom Green County; the Texas Council; McClure (Council director); and Central Plains, a community center and member of the Council. CRS argues that the named appellees violated the Antitrust Act by conspiring to restrict the access of potential clients

² The trial court rendered the following orders: (1) summary judgment for Tom Green County dated May 28, 1996, disposing of all claims against the county; (2) summary judgment for Concho Valley, Young, Finn, Sheppard, Texas Council, McClure, and Central Plains dated October 29, 1996, disposing of all claims arising under the Texas Free Enterprise Antitrust Act; (3) summary judgment for Hale County dated September 15, 1995, disposing of all claims against the County; and (4) final summary judgment dated December 19, 1997, disposing of all claims against all defendants.

³ See [Tex. Bus. & Com. Code Ann. § 17.46](#) (West 1987 & Supp. 1999).

⁴ See [18 U.S.C.A. § 1961](#) (West 1984 & Supp. 1999).

⁵ See [42 U.S.C.A. § 1983](#) (West 1994 & Supp. 1999).

⁶ See [Tex. Health & Safety Code Ann. §§ 591.001-025](#) (West 1992 & Supp. 1999).

⁷ [Tex. Bus. & Com. Code Ann. §§ 15.01-52](#) (West 1987 & Supp. 1999).

from CRS's services. The appellees respond that their conduct is "immunized from antitrust liability by exemptions derived directly from the Texas Antitrust Act and from federal laws incorporated [*7] by the Act." We agree.

HN1[] The purpose of the Antitrust Act is to promote economic competition in commerce in Texas. See [Tex. Bus. & Com. Code Ann. § 15.04](#) (West 1987). As such, the restraint of trade or commerce is made unlawful. See *id.* [§ 15.05\(a\)](#). The 1983 Act was meant to be a major reform and modernization of Texas **antitrust law** and is modeled after the federal Sherman Antitrust Act and Clayton Act. See [Caller-Times Publishing Co. v. Triad Communications, Inc., 826 S.W.2d 576, 579-80 \(Tex. 1992\)](#). **HN2**[] The Texas Act explicitly states that its provisions "shall be construed . . . in harmony with federal judicial interpretations of comparable federal antitrust statutes . . ." [Bus. & Com. Code § 15.04](#). It is to one of these federal judicial interpretations that we now turn.

HN3[] Since 1943, the United States Supreme Court, in interpreting [*8] federal antitrust statutes, has recognized that antitrust laws do not apply to anti-competitive restraints imposed "as an act of government." [Parker v. Brown, 317 U.S. 341, 352, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#). *Parker* involved a marketing program adopted pursuant to the California Agricultural Prorate Act governing the 1940 California raisin crop. Brown, a producer of raisins, complained that the program violated the Sherman Act. The Court rejected this contention, relying on principles of federalism and state sovereignty, holding that the Sherman Act should be interpreted as a prohibition on individual, not "state action." [Id. at 352](#). Because the program was not the product of a private agreement or combination by others in restraint of trade, it did not violate the Sherman Act. [Id. at 351](#). The Court stated: "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." [Id. at 352](#). Because [*9] the Texas Act specifically adopts federal judicial interpretation of federal **antitrust law**, we are bound to apply the *Parker* state action exemption to the Texas Act. See [Bus. & Com. Code § 15.04](#).

Texas has chosen to regulate the health and welfare of its mentally challenged citizens through a comprehensive statutory scheme, rather than leaving the availability of services to the marketplace. We believe this regulation fits squarely within the *Parker* exemption for an "act of government by the State as sovereign." See [City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413, 55 L. Ed. 2d 364, 98 S. Ct. 1123 \(1978\)](#) (discussing the *Parker* exemption); see also [City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 370, 113 L. Ed. 2d 382, 111 S. Ct. 1344 \(1991\)](#) (confirming Sherman Act does not apply to anti-competitive restraints imposed by states as an act of government). As in *Parker*, Texas has not entered into a contract or agreement with an individual to establish a monopoly and is not engaged in a conspiracy to restrain for-profit entities from providing services to mentally challenged [*10] persons. Rather, the state has decided to pursue a policy of replacing competition with regulation.

The statutory scheme charges TDMHMR with governing the state policies concerning mentally disabled persons. In turn, local community centers are created to carry out the state's policies, with extensive oversight by TDMHMR. By definition, community centers are agencies of the state. See [Health & Safety Code § 534.001](#). As state agencies engaging in acts of government by the state, these centers enjoy antitrust immunity under the state-action exemption. See [Bates v. State Bar of Arizona, 433 U.S. 350, 360-62, 53 L. Ed. 2d 810, 97 S. Ct. 2691 \(1977\)](#); [Benton, Benton & Benton v. Louisiana Pub. Facilities Auth., 897 F.2d 198, 199, 203 \(5th Cir. 1990\)](#).⁸ We conclude that the *Parker* state-action exception is applicable to statutorily created state agency community centers such as Concho Valley and Central Plains.

[*11] In addition, the Texas Act includes its own state-action exemption. **HN4**[] [Section 15.05](#) of the Antitrust Act specifically exempts "actions required or affirmatively approved by any statute of this state . . . or by a regulatory agency of this state . . . acting under . . . statutory authority vesting the agency with such power." See [Bus. & Com.](#)

⁸ This is to be contrasted with municipalities, which are not themselves sovereign, and therefore carry a higher burden to demonstrate that their anti-competitive actions are authorized by the state pursuant to the state's policy to replace competition with regulation. See [Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40-42, 85 L. Ed. 2d 24, 105 S. Ct. 1713 \(1985\)](#).

Code § 15.05(g). Accordingly, we hold that the trial court properly granted a take-nothing summary judgment against CRS on its antitrust claims against Concho Valley and Central Plains.

Furthermore, the individuals Finn, Sheppard, and Young, as employees of Concho Valley, also enjoy the benefits of the *Parker* state-action exemption. The state-action doctrine applies equally to the officers and agents of the governmental body who participate in the challenged conduct. See *Foley v. Alabama State Bar*, 648 F.2d 355, 359 (5th Cir. 1981) (citing *City of Lafayette*, 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123). We hold the trial court did not err in disposing of CRS's antitrust claims against these individuals.

Similarly, the Texas Council and its director McClure enjoy the benefits [*12] of the *Parker* state-action doctrine. State-action immunity extends to private persons and entities taking a role in implementing state policy. See *Benton*, 897 F.2d at 204. The controversy in *Benton* involved a state agency's policy of always using the same law firm as bond counsel. Attorneys from a law firm not selected sued both the agency and the chosen private attorneys, alleging antitrust violations. The court found that not only was the agency protected by the state-action exemption, the private attorneys selected to perform services for the public agency were also shielded by the doctrine. See *id.*

In the instant case, the summary judgment evidence shows that the Texas Council is created and governed by its community center membership for the sole purpose of performing services for the centers in their endeavors to provide services to mentally challenged Texans. Accordingly, the Texas Council and its agent McClure are entitled to the state-action exemption. We hold that the trial court did not err in disposing of CRS's antitrust claims against Texas Council and McClure.

Finally, CRS asserted antitrust claims against Tom Green County. Because the County [*13] is also exempt from antitrust liability, this claim fails. HNS↑ The federal Local Government Antitrust Act of 1984 expressly immunizes all local governmental entities from antitrust liability under the Clayton Act. See *15 U.S.C.A. §§ 34-36 (West 1997)*. Counties are included in the definition of "local government." *Id. § 34*. As noted previously, the purpose of the Texas Act was to drastically reform Texas antitrust law to mirror federal antitrust law. See *Caller-Times*, 826 S.W.2d at 579-80. The legislature explicitly adopted federal judicial interpretations of comparable federal antitrust statutes, and further provided that nothing in the Antitrust Act should be "construed to prohibit activities that are exempt from the operation of the federal antitrust laws." See *Bus. & Com. Code §§ 15.04, 15.05(g)*. We believe these expressions of the legislature incorporate the local government exemption for counties contained in the Local Government Antitrust Act. Further, as previously noted, the Texas Act also includes its own state-action exemption, which we conclude is expansive enough to cover the County's participation [*14] in the anti-competitive scheme. See *id. § 15.05(g)*. Accordingly, we hold that the trial court did not err in dismissing CRS's antitrust claims against Tom Green County.

Lawfully Formed Community Centers

As will be made clear later in this opinion, CRS's causes of action for DTPA violations, RICO violations, and common-law torts are premised on its assertion that Concho Valley and Central Plains are not legally constituted community centers and thus are not governmental entities entitled to sovereign immunity. Accordingly, we turn to the threshold issue of the community centers' legitimacy.

1. Failure for Lack of Contract

Concho Valley and Central Plains were established in June 1966 and July 1967, respectively, pursuant to article 3 of the Mental Health and Mental Retardation Act ("MHMRA") as enacted in 1965. See Act of April 5, 1965, 59th Leg., R.S., ch. 67, § 1, 1965 Tex. Gen. Laws 165, 171 (since repealed and codified as amended at Health & Safety Code Title VII). Section 3.01 of the MHMRA, as it existed at the community centers' creation, provided:

One or more cities, counties, hospital districts, school districts, rehabilitation districts, [*15] state-supported institutions of higher education, and state-supported medical schools, or any combination of these, may cooperate,

negotiate, and contract with each other through their governing bodies to establish and operate a community center.

Id.

It is undisputed that the creating entities of Concho Valley and Central Plains did not enter into written contracts to establish the two community centers. CRS urges this Court to read the above-quoted language to *require* a written contract as a prerequisite to the valid establishment of the community centers. We decline to do so.

We read section 3.01, as written in 1965, to allow the joint creation and operation of a community center by cooperation, negotiation, or contract between local governmental entities. Clearly, the legislature meant to *authorize* the creation of community centers by means of contract. It appears that the legislature may have anticipated these local entities were likely to enter into contracts when forming joint community centers. However, there is nothing to indicate that the entities were *required* to form a written contract, or that the failure to do so would *invalidate* the legal existence [***16**] of a jointly formed community center.⁹

Even assuming, however, that the version of section 3.01 applicable in 1967 could somehow be construed to require a contract in the formation of a community center, the record shows that in 1967 the creating entities of Central Plains did enter into a written agreement governing the selection of trustees for the center. In November 1989, the sponsoring local government creators of Concho Valley adopted written procedures setting forth, among other things, the selection of trustees, as required by the version [***17**] of section 3.01 applicable in 1989. See Act of June 20, 1987, 70th Leg., R.S., ch. 956, § 3.01, 1987 Tex. Gen. Laws 3194, 3211 (since repealed and codified as amended at Health & Safety Code Title VII). Therefore, at the time the present lawsuit was filed, and only months following the date CRS alleges Concho Valley's offending conduct began, both centers had written contracts in place.

We decline to invalidate Concho Valley and Central Plains' 30-year history as legally created community centers for lack of written contracts at their inception.

2. Failure as Incorporated Entity

CRS next argues that because Central Plains was incorporated from 1969 to 1996 as a nonprofit corporation, it cannot be a valid community center. Basically, CRS contends that because governmental entities may not legally fund a corporation, and because the sponsoring governmental entities provide Central Plains with funding, Central Plains must not be a community center.

We are unpersuaded by this argument. Central Plains was incorporated pursuant to the Texas Non-Profit Corporation Act.¹⁰ The summary-judgment evidence shows that Central Plains exercises only public functions for public [***18**] purposes under the control of the State. Contrary to CRS's assertions, Central Plains is governed by a board of trustees appointed by the participating local governmental entities creating the community center. Nothing in the statute authorizing the creation of community centers indicates that a center may not be a nonprofit corporation properly formed under the Texas Non-Profit Corporation Act. We fail to see how Central Plains' nonprofit corporate status strips it of its identity as a governmental entity.

We reject CRS's contention that Concho Valley and Central Plains are not valid community centers. Having so held, we turn to those causes of action asserted by CRS turning on the premise that the centers are invalid, and thus not governmental entities entitled to sovereign immunity.

⁹ We note that section 3.01 was amended in 1969 to *require* the governing bodies creating a community center to enter into a contract. See Act of June 12, 1969, 61st Leg., R.S., ch. 688, § 3, 1969 Tex. Gen. Laws 2010, 2012 (since repealed and codified as amended at Health & Safety Code Title VII). We believe this supports our conclusion that prior to the amendment, when Concho Valley and Central Plains were created, no contract was required.

¹⁰ [Tex. Rev. Civ. Stat. Ann. art. 1396--1.01-11.01](#) (West 1997 & Supp. 1999).

RICO Claims

CRS contends in its tenth issue that the trial court erred in disposing of [*19] its cause of action asserting RICO violations. As conceded by CRS in its brief to this Court, however, its RICO claims fail if this Court finds Concho Valley and Central Plains are legitimate community centers entitled to sovereign immunity from these claims. Moreover, CRS's RICO claims against appellees other than Concho Valley and Central Plains are premised on their alleged improper holding out of the community centers as legitimate. Because we reject CRS's contention that the centers are illegitimate, the RICO claims against all appellees fail accordingly. We hold that the trial court did not err in rendering judgment that CRS take nothing by its RICO cause of action.

Common-law Tort Claims

CRS next challenges the trial court's rejection of its common-law tort claims against all appellees, including claims of fraud, negligence, and tortious interference with contract. CRS's challenge fails for two reasons.

First, CRS provides no authority or argument to this Court that sovereign immunity has been waived; accordingly, CRS has failed to present anything for us to review, and the judgment should be affirmed on this ground alone. See [Rodriguez v. Morgan, 584 S.W.2d 558, 559](#) [*20] (Tex. Civ. App.--Austin 1979, writ ref'd n.r.e.). To the extent CRS asserts that sovereign immunity has been waived due to Concho Valley's and Central Plains' not being valid community centers, and therefore not governmental units, we have rejected this argument, as discussed above.

Second, appellees asserted grounds for summary judgment before the trial court that are not addressed by CRS on appeal. In granting summary judgment against CRS on this claim, the trial court did not specify the basis for its ruling; thus, the summary judgment may be affirmed on any ground presented in appellees' motion. See [Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 625](#) (Tex. 1996). [HN6](#) ↑ If summary judgment may have been granted on a ground not challenged, failure to address each theory that might support the trial court's rendition of summary judgment requires an affirmance. See, e.g., [Holloway v. Starnes, 840 S.W.2d 14, 23](#) (Tex. App.--Dallas 1992, writ denied), cert. denied, 510 U.S. 828, 114 S. Ct. 93, 126 L. Ed. 2d 60 (1993). Because CRS failed to assign error to all bases upon which the appellees moved for summary judgment on its common-law tort claims, complaint on appeal [*21] has been waived.

We hold that the trial court did not err in granting appellees a take-nothing judgment on CRS's common-law tort causes of action.

DTPA Claims

In its ninth issue presented, CRS asserts that the trial court erred in dismissing its DTPA claims against all appellees because they are not shielded by sovereign immunity. We disagree. To the extent CRS contends that the appellees do not enjoy sovereign immunity because Central Plains and Concho Valley are "impostor" community centers, we have previously rejected this contention. Although CRS presents additional creative arguments as to why the DTPA waives sovereign immunity, none are viable. We hold there was no error.

Section 1983

In its eleventh issue, CRS complains that the trial court erred in dismissing its "[section 1983](#)" cause of action. See [42 U.S.C.A § 1983](#) (West 1994 & Supp. 1999). In granting summary judgment against CRS on this claim, the trial court did not specify the basis for its ruling; thus, the summary judgment may be affirmed on any ground presented in appellees' motion. See [Cincinnati Life, 927 S.W.2d at 625](#). Because CRS [*22] failed to assign error to all bases upon which the appellees moved for summary judgment on its [section 1983](#) claims, complaint on appeal has been waived.

Injunction

CRS sought to enjoin Concho Valley from membership in the Texas Council, a nonprofit corporation created by community centers from throughout the state in a joint effort to effectuate the centers' responsibilities to mentally

challenged Texans. CRS claims that Concho Valley lacks statutory authority to be a dues-paying member of a corporation such as the Council, and that Concho Valley's membership violates that portion of [article 3, section 52 of the Texas Constitution](#) prohibiting public entities from holding stock in a corporation. See [Tex. Const. art. III, § 52](#).

Concho Valley counters that CRS lacks standing to seek an injunction to void its membership in the Council. CRS argues it has standing because it pays ad valorem taxes on five residential properties to Tom Green County and the City of San Angelo, which, in turn, fund Concho Valley. Alternatively, CRS argues it has standing as a citizen with a peculiar interest adversely affected by the actions of Concho Valley.

We agree with CRS that, generally [*23] speaking, a taxpaying citizen has standing to seek an injunction to enjoin public officials from the illegal expenditure of public funds. See, e.g., [Lara v. Williams, 986 S.W.2d 310, 314-15](#) (Tex. App.--Fort Worth 1999, pet. filed) (citing [Osborne v. Keith, 142 Tex. 262, 177 S.W.2d 198, 200](#) (Tex. 1944); [Hoffman v. Davis, 128 Tex. 503, 100 S.W.2d 94, 95](#) (Tex. 1937)). However, CRS does not seek to enjoin an expenditure by Tom Green County or the City of San Angelo to Concho Valley, or Concho Valley's expenditure to the Council in the form of membership dues. Rather, CRS seeks to enjoin Concho Valley from remaining a member of the Council. Because CRS has not properly placed itself within the parameters of taxpayer standing, CRS's taxpayer status cannot in itself provide it with the necessary standing to maintain its request for injunction.

CRS argues alternatively that it has standing to seek injunctive relief as a citizen with a special interest adversely affected by Concho's membership in the Texas Council. [HNT](#)[¹] The general rule is that standing to bring suit depends upon some interest peculiar to the person individually, and not as [*24] a member of the general public. See, e.g., [Hunt v. Bass, 664 S.W.2d 323, 324](#) (Tex. 1984). More specifically, a person has standing to sue if:

- (1) he has sustained, or is immediately in danger of sustaining, some *direct* injury as a result of the wrongful act of which he complains; (2) there is a *direct* relationship between the alleged injury and the claim to be adjudicated; (3) the plaintiff has a *personal* stake in the controversy; (4) the challenged action has caused the plaintiff some *injury in fact*, either economic, recreational, environmental, or otherwise; or (5) the plaintiff is an appropriate party to assert the public interest in the matter as well as his own interest.

[Lake Medina Conservation Soc'y, Inc./Bexar-Medina-Atascosa Counties WCID No. 1 v. Texas Natural Resource Conservation Comm'n, 980 S.W.2d 511, 515](#) (Tex. App.--Austin 1998, pet. denied) (emphasis added); see also [Amerada Hess Corp. v. Garza, 973 S.W.2d 667, 680](#) (Tex. App.--Corpus Christi 1996, no writ); [Billy B., Inc. v. Board of Trustees, 717 S.W.2d 156, 158](#) (Tex. App.--Houston [1st Dist.] 1986, no writ).

[*25] CRS concedes that following the rendition of the final summary judgment in this case, it sold its licenses by which it had been authorized to provide residential services to mentally retarded persons. CRS asserts that it nevertheless maintains standing to seek an injunction because it leases real property to a company that currently operates residential service centers on that property. In effect, CRS contends that, because it has a financial stake in the profitability of its lessee, who in turn is allegedly affected by Concho Valley's membership in the Council, it maintains an interest adversely affected by Concho Valley's actions.

We conclude that the lessor/lessee relationship between CRS and its tenant does not create the special interest needed to support standing. Assuming Concho Valley's membership in the Council is improper, CRS, as landlord, has not sustained, and is not in danger of sustaining, a *direct* injury as a result of the membership. Further, the relationship between the possible injury to CRS and the allegedly improper membership of Concho Valley in Council is attenuated, at best. We certainly cannot say the relationship is *direct*. Finally, CRS has no [*26] *personal* stake in Concho Valley's membership, and CRS can point to no *injury in fact* resulting from the membership.

Accordingly, we hold that CRS lacks standing to enjoin Concho Valley's membership in the Texas Council. Because lack of standing is a ground for dismissal rather than a take-nothing judgment on the merits, see [Alexander v. City of Greenville, 585 S.W.2d 333, 334](#) (Tex. Civ. App.--Dallas 1979, writ ref'd n.r.e.), the proper course for this Court is

to vacate the portion of the summary judgment ordering that CRS take nothing by its request for injunctive relief, and to render judgment dismissing that portion of the cause in its entirety.

Persons with Mental Retardation Act

In its thirteenth issue presented, CRS urges this Court to find error in the trial court's disposal of its claims under the Persons with Mental Retardation Act ("PMRA"). See [Health & Safety Code §§ 591.001-025](#) (West 1992 & Supp. 1999). We decline.

The PMRA creates a statutory cause of action to redress violations of the rights of mentally retarded persons. See *id.* § 591.022. However, the right to sue is expressly [*27] limited to the person injured, the injured party's parent or guardian, or next friend. *Id.* § 591.022(d). CRS argues that it is a "person injured" and is therefore entitled to maintain suit. This precise contention has been advanced and rejected previously in [Develo-Cepts, Inc. v. City of Galveston, 668 S.W.2d 790, 794](#) (Tex. App.--Houston [14th Dist.] 1984, no writ) (PMRA "clearly restricts recovery to mentally retarded persons and to those entitled to bring suit in their behalf"). CRS's conclusory statement that *Develo-Cepts* is erroneous is not persuasive.

Because CRS had no right to sue under the PMRA, the trial court properly granted summary judgment disposing of this claim.

Claims Against Hale County

All of CRS's claims against Hale County are derivative in nature. CRS asserts that because Hale County participated in the creation, controlling, and funding of Central Plains, it is vicariously liable for the wrongdoings and liabilities of Central Plains. Because we have concluded that Central Plains is not liable under any theory advanced by CRS, there can be no vicarious liability imputed to Hale County. We hold that the trial court [*28] properly granted summary judgment for Hale County.

Interlocutory Default Judgment

CRS complains in issues three through six that the trial court erred in: (1) refusing to sign an interlocutory default judgment against Tom Green County after such judgment was rendered on the record in open court; (2) holding a "show cause" hearing on whether the court should sign an interlocutory default judgment against Tom Green County; (3) applying an improper legal test at the "show cause" hearing; and (4) making findings of fact at the "show cause" hearing.

[HN8](#) As a prerequisite to presenting an argument for appellate review, the record must show that the complaint was first made to the trial court. See [Tex. R. App. P. 33.1\(a\)](#). CRS failed to complain to the trial court regarding the default judgment issues presented, and failed to obtain a ruling on any complaint; therefore, CRS has not preserved error for appellate review. See *id.*

Even if CRS had preserved error, and assuming CRS is correct that the trial court orally rendered an interlocutory default judgment, CRS's complaints are still without merit. **[HNG](#)** The trial court had broad, virtually unlimited discretion to vacate an [*29] interlocutory order prior to its rendition of a final judgment. See [Tex. R. Civ. P. 329b; Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 \(Tex. 1993\)](#) (trial court has continuing power over interlocutory orders and may set them aside at any time before final judgment is entered). We find no error.

Procedural Rulings

In its final two issues presented, CRS complains of procedural rulings made in connection with the granting of summary judgment. By a scheduling order dated June 6, 1997, the trial court set deadlines after which the parties would not be permitted to file summary judgment argument or evidence. That order gave CRS until July 11, 1997, to complete summary judgment filings, and gave appellees until July 18, 1997. Appellees filed additional summary

judgment argument and evidence on July 18. CRS filed an omnibus motion requesting the trial court to grant it leave to reply to the newly filed argument and evidence. The motion was denied. CRS asserts that the June 6 order improperly allowed appellees (as movants) the "last word" and that the trial court erred in denying its omnibus motion.

The record does not show that CRS complained to the trial [*30] court about the June 6 order or secured a ruling on any complaint; therefore, the point is waived. See [Tex. R. App. P. 33.1](#). Furthermore, CRS provides no authority to this Court to support its assertion that it was error to allow movants the "last word." Error was therefore waived. See, e.g., [Marsh v. Wallace, 924 S.W.2d 423, 425](#) (Tex. App.--Austin 1996, no writ). Even if CRS's contention had not been waived, we would still find it to be without merit. The order did not preclude CRS from responding to any additional summary judgment argument or evidence presented by appellees; rather, it required CRS to seek leave of court before doing so. We do not find an abuse of discretion in the filing of the scheduling order.

As to the denial of the omnibus motion, while the trial court did deny the motion's *general* request for additional time to respond, the court granted CRS leave to file the only evidence specifically identified by CRS as necessary to respond to appellee's July 18 filing. The remainder of the omnibus motion, in essence, was simply a request for a continuance for more time to gather potentially responsive evidence. [HN10](#)[] The granting or denial of a continuance [*31] is within the sound discretion of the trial judge. See [State v. Crank, 666 S.W.2d 91, 94 \(Tex. 1984\)](#). The denial of a motion for continuance will not be disturbed unless the record shows a clear abuse of discretion. See *id.* Given the extended time frame within which the parties filed and responded to motions for summary judgment; the numerous motions for continuance that had previously been granted in this case; and the fact that CRS was granted leave to file the evidence it contends was responsive to appellee's July 18 filing, we conclude that the trial court did not abuse its discretion by generally denying CRS's omnibus motion.

CONCLUSION

We hold that CRS lacks standing to seek to enjoin Concho Valley from future membership in the Texas Council; accordingly, we vacate that portion of the trial court's final summary judgment that CRS take nothing by its request for injunctive relief and render judgment dismissing that claim. Having found all remaining issues presented by CRS to be without merit, we affirm the summary judgment in all other respects.

J. Woodfin Jones, Justice

Before Justices Jones, Kidd and Patterson

Affirmed in Part; [*32] Vacated and Dismissed in Part

Filed: August 26, 1999



7-UP Bottling Co. v. Archer Daniels Midland Co. (In re Citric Acid Litig.)

United States Court of Appeals for the Ninth Circuit

May 19, 1999, Argued and Submitted, San Francisco, California ; September 1, 1999, Filed

No. 98-15344

Reporter

191 F.3d 1090 *; 1999 U.S. App. LEXIS 20892 **; 1999-2 Trade Cas. (CCH) P72,641; 99 Cal. Daily Op. Service 7223; 99 Daily Journal DAR 9233

In re: CITRIC ACID LITIGATION 7-UP BOTTLING CO. OF JASPER INC., et al., Plaintiffs, and VARNI BROTHERS CORP., on its own behalf and all others similarly situated dba Seven-Up Bottling of Modesto; 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC. Plaintiffs-Appellants, v. ARCHER DANIELS MIDLAND CO., INC., a Delaware corporation, et al., Defendants, and CARGILL, INC., Defendant-Appellee.

Subsequent History: Certiorari Denied March 27, 2000, Reported at: [2000 U.S. LEXIS 2213](#).

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Northern District of California. D.C. No. MDL-01092-FMS. Fern M. Smith, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

conspiracy, conspirators, citric acid, documents, joining, prices, market share, summary judgment, circumstantial evidence, competitors, meetings, district court, fix prices, price-fixing, figures, argues, firms, act independently, antitrust, direct evidence, aggregate, distributed, infer, production and sale, legal control, statistics, producers, oil, reasonable inference, judicial notice

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN1](#) [down arrow] Sherman Act, Scope

Price fixing is illegal per se under [section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

[HN2](#) [down arrow] Antitrust & Trade Law, Sherman Act

On a claim of concerted price fixing under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement.

Civil Procedure > ... > Discovery > Methods of Discovery > 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

[HN3](#) **Discovery, Methods of Discovery**

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\(c\)](#).

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

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

[HN4](#) **Summary Judgment, Entitlement as Matter of Law**

[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.

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

[HN5](#) **Summary Judgment, Entitlement as Matter of Law**

A court is obligated to construe the evidence in the light most favorable to the non-moving party in summary judgment context, to give the non-moving party the benefit of all reasonable inferences, and to refrain from making credibility determinations.

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

[HN6](#) **Summary Judgment, Entitlement as Matter of Law**

Although the non-moving parties in summary judgment setting are to be given the benefit of the doubt, they must do more than simply show that there is some metaphysical doubt as to the material facts.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN7**](#) [blue download icon] Antitrust & Trade Law, Sherman Act

Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

[**HN8**](#) [blue download icon] Remedies, Damages

An inference of conspiracy is sustainable only if reasonable in light of the competing inferences of independent action, and to survive a motion for summary judgment, a plaintiff seeking damages for a violation of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN9**](#) [blue download icon] Antitrust & Trade Law, Sherman Act

Courts reviewing anti-trust complaints have developed a two-part test to be applied whenever a plaintiff rests its case entirely on circumstantial evidence. First, the defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. The burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN10**](#) [blue download icon] Antitrust & Trade Law, Sherman Act

A plaintiff who relies solely on circumstantial evidence of conspiracy in an anti-trust case must produce evidence tending to exclude the possibility that defendants acted independently.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN11**](#) [blue download icon] Antitrust & Trade Law, Sherman Act

It is not reasonable to infer that a firm is engaging in illegal activities merely from the fact that it fails to continue to increase market share.

Evidence > ... > Testimony > Expert Witnesses > General Overview

[**HN12**](#) [blue speech bubble icon] **Testimony, Expert Witnesses**

An expert report cannot be used to prove the existence of facts set forth therein. Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.

Evidence > ... > Testimony > Expert Witnesses > General Overview

[**HN13**](#) [blue speech bubble icon] **Testimony, Expert Witnesses**

When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

[**HN14**](#) [blue speech bubble icon] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Communications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN15**](#) [blue speech bubble icon] **Antitrust & Trade Law, Sherman Act**

Although the possession of competitor price lists is consistent with conspiracy, it does not, at least in itself, tend to exclude legitimate competitive behavior. There are many legal ways in which an anti-trust defendant could have obtained pricing information on competitors. To allow an inference of agreement from such evidence, standing alone, would have the effect of deterring competitors from obtaining information about other companies' actual retail prices, even through legitimate means.

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

[**HN16**](#) [blue speech bubble icon] **Disclosure, Mandatory Disclosures**

Fed. R. Civ. P. 45 (a) requires a party served with a subpoena for records to produce those records that are in its possession, custody or control.

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

[**HN17**](#) [blue speech bubble icon] **Disclosure, Mandatory Disclosures**

For purposes of discovery, control of documents is defined as the legal right to obtain documents upon demand.

Business & Corporate Law > Foreign Corporations > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Foreign Discovery

HN18[] Business & Corporate Law, Foreign Corporations

In a case where documents are in the possession of a foreign entity and discovery is requested from a domestic entity, the proof of theoretical control of the domestic over the foreign is insufficient; a showing of actual control is required.

Counsel: Jerome B. Falk, Jr. (argued), Therese M. Stewart, Sue A. Krenek, Howard, Rice, Nemerovski, Canady, Falk & Rabkin, San Francisco, California; Leonard Barrack, Steven A. Asher, Barrack, Rodos & Bacine, Philadelphia, Pennsylvania; Joseph W. Cotchett, Bruce L. Simon, Marie S. Weiner, Steven C. Keller, Cotchett, Pitre & Simon, Burlingame, California; Guido Saveri, Richard Saveri, R. Alexander Saveri, Saveri & Saveri, San Francisco, California, for plaintiffs-appellants Varni Brothers Corp., on its own behalf and on behalf of all others similarly situated, dba Seven-Up Bottling of Modesto; 7-Up Bottling Company of Philadelphia, Inc.

Robert E. Bloch, Robert L. Bronston, Richard J. Favretto (argued), Lawrence S. Robbins, Mark W. Ryan, Mayer, Brown & Platt, Washington, D.C.; Charles F. Preuss, Vernon I. Zvoleff, Michael J. Stortz, Preuss, Walker & Shanagher, San Francisco, California, for defendant-appellee Cargill, Incorporated.

Frederick S. Fields, Steven H. Winick, Bronson, Bronson & McKinnon, San Francisco, California; **[**2]** Christian M. Hoffman, Peter M. Casey, Daniel H. Haines, Foley, Hoag & Eliot, Boston, Massachusetts, for non-party appellee Coopers & Lybrand L.L.P.

Judges: Before: Diarmuid F. O'Scannlain, M. Margaret McKeown, and Kim McLane Wardlaw, Circuit Judges. Opinion by Judge O'Scannlain.

Opinion by: Diarmuid F. O'Scannlain

Opinion

[*1092] OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether purchasers were able to establish that a citric acid manufacturer conspired with competitors to fix prices and to allocate market share in violation of the federal antitrust laws.

I

Citric acid is a corn derivative with a wide variety of uses in the manufacture of food, soft drinks, detergents, and pharmaceuticals. Varni Brothers Corp. and 7-Up Bottling Company of Philadelphia, Inc. (collectively "Varni") filed civil antitrust class actions against Cargill, Incorporated ("Cargill"), Archer Daniels Midland ("ADM"), Haarman & Reimer ("H&R"), Hoffmann LaRoche ("HLR"), and Jungbunzlauer ("JBL"), alleging that these firms conspired to fix citric acid prices and to allocate market share. These cases were consolidated and transferred to the Northern District of California. The district court certified a class consisting **[**3]** of all people **[*1093]** and entities (other than government purchasers and the defendants themselves and affiliated companies) who had purchased citric acid directly from the defendants.

Conceding the existence of a conspiracy in the citric acid market but denying its participation therein, Cargill moved for summary judgment. ADM, H&R, HLR, and JBL (collectively the "admitted conspirators") each admitted to

conspiring to fix citric acid prices and reached settlements with Varni. Thus, the only question before the district court was whether Cargill was a member of this conspiracy or, more precisely, whether Varni had produced sufficient evidence such that a reasonable factfinder could so infer. The district court concluded that Varni failed to satisfy this test because its evidence did not "tend[] to exclude the possibility that [Cargill] acted independently." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#) (internal quotation marks and citation omitted). Accordingly, the court granted summary judgment in favor of Cargill and commented that "apparently hoping that quantity will substitute for quality, plaintiffs [\[**4\]](#) have submitted voluminous but weak circumstantial evidence that they argue indicates that Cargill was a member of the conspiracy."

On appeal, Varni argues that Cargill's participation in the conspiracy can be reasonably inferred from the circumstantial evidence in the record. Varni also appeals the district court's denial of a discovery motion, an issue we consider in Part IV.

II

To avoid extensive repetition of the facts, we will first consider the legal standard by which we decide whether Varni has produced sufficient evidence to survive summary judgment. By understanding the proper legal framework applicable at the summary judgment stage, we can better analyze the evidence.

A

[HN1](#) Price fixing is illegal *per se* under [section 1](#) of the Sherman Act. See [15 U.S.C. § 1](#); [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 84 L. Ed. 1129, 60 S. Ct. 811 \(1940\)](#). [HN2](#) "On a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement." [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#). [\[**5\]](#) [HN3](#) 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\(c\)](#); see also [Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#) [HN4](#) ("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.").)

Varni can establish a genuine issue of material fact by producing either direct evidence that Cargill conspired to fix citric acid prices or circumstantial evidence from which a reasonable factfinder could conclude that Cargill so conspired. Although Varni argues halfheartedly that it has produced direct evidence that Cargill entered into illegal price-fixing agreements with the admitted conspirators - in which case summary judgment would, of course, be inappropriate, [\[**6\]](#) see [McLaughlin v. Liu, 849 F.2d 1205, 1208 \(9th Cir. 1988\)](#); [T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631-32 \(9th Cir. 1987\)](#) - Varni concedes that such evidence is, at best, weak. Having reviewed the proffered evidence, we can find nothing in the record that establishes, without requiring any inferences, that Cargill participated in the citric acid price-fixing conspiracy. See [In re Baby Food Antitrust Litig., 166 F.3d 112, 118](#) [\[*1094\]](#) [\(3d Cir. 1999\)](#) ("Baby Food") ("Direct evidence in a [Section 1](#) conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted."). We thus agree with both parties that the essential question in this case is whether Varni's circumstantial evidence is sufficient to permit a reasonable factfinder to conclude that Cargill was a participant in the citric acid conspiracy.¹

[\[**7\]](#) *Matsushita* is the Supreme Court's foremost explanation of how summary judgment works in the antitrust context. See [Matsushita, 475 U.S. at 585-97](#). The *Matsushita* Court began by reaffirming hornbook law that [HN5](#)

¹ In its briefs, Varni argued that it need show only a "slight connection" between Cargill and the conspiracy to survive summary judgment. See, e.g., [United States v. Dunn, 564 F.2d 348, 357 \(9th Cir. 1977\)](#). At oral argument, however, Varni expressly disclaimed any reliance upon this theory.

courts are obligated to construe the evidence in the light most favorable to the non-moving party, to give the non-moving party the benefit of all reasonable inferences, and to refrain from making credibility determinations. See *id.* [HN6](#)¹ The Court cautioned, however, that, although plaintiffs are to be given the benefit of the doubt, they "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id. at 588*. Importantly, [HN7](#)¹ "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id. at 586*. Instead, [HN8](#)¹ an inference of conspiracy is sustainable only if "reasonable in light of the competing inferences of independent action," and "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 [**8] alleged conspirators acted independently." *Id. at 588* (quoting *Monsanto, 465 U.S. at 764*); accord *City of Long Beach v. Standard Oil Co. of California, 872 F.2d 1401, 1404 (9th Cir. 1989)*). The Court warned that permitting the inference of conspiratorial behavior from evidence consistent with both lawful and unlawful conduct would deter pro-competitive conduct - an especially pernicious danger in light of the fact that the very purpose of the antitrust laws is to promote competition. See [475 U.S. at 593](#) ("Courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.").

Based on *Matsushita*, this circuit has outlined [HN9](#)¹ a two-part test to be applied whenever a plaintiff rests its case entirely on circumstantial evidence. First, the defendant can "rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." *Richards v. Neilson Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)*; accord *City of Long Beach, 872 F.2d at 1406*; [\[**9\]](#) *Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522, 526-28 (9th Cir. 1987)*; *T.W. Elec. Serv., 809 F.2d at 632, 635*. The burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior. See *Long Beach, 872 F.2d at 1406*; *Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1159 (9th Cir. 1988)*; *Wilcox, 815 F.2d at 525*; *Richards, 810 F.2d at 902, 904*; *T.W. Elec. Serv., 809 F.2d at 632*.²

[\[**10\]](#) [\[*1095\]](#) B

We have repeatedly applied this summary judgment framework, which, to repeat, we must apply whenever the plaintiff cannot establish every element of its case without asking the court to draw an inference in his favor. In *Richards*, a local trucking carrier, Foothills Express, accused major trucking companies of engaging in a concerted group boycott against Foothills Express. The defendant corporations used Foothills Express as an interliner for shipments to the Sacramento area: the defendants carried freight from areas nationwide to Sacramento using their own trucks and Foothills Express made the deliveries from Sacramento to surrounding areas. Foothills Express, however, began soliciting the business of defendants' customers using information gained from carrier freight bills, a practice known as "back solicitation." In response to Foothill Express's back solicitation, each of the defendants cut off or substantially reduced its business with Foothills. See *Richards, 810 F.2d at 900-01*.

Foothills Express alleged that the defendants had violated the antitrust laws by *agreeing* not to employ the services of any local carrier who engaged in back solicitation. [\[**11\]](#) In support of its claims, Foothills Express cited the fact that each defendant stopped using its services around the same time. The defendants, however, responded that it was in each defendant's *independent self-interest* to refrain from doing business with local carriers who competed with them. Considering the defendants' explanation, we held that the defendants had "met their burden of proffering a plausible justification for their conduct consistent with proper business practice." *Id. at 902*. Thus, the burden

² This second requirement flows directly from *Matsushita*. As then-Judge Kennedy explained in *Richards*:

Were the case to go to trial, [the antitrust plaintiff] would bear the burden of proving the existence of the alleged conspiracy . . . To discharge its burden, it would have to introduce evidence that would permit a jury to conclude that a conspiracy . . . [is] more likely than not. If the evidence produced in opposition to a defendant's motion for summary judgment does not give reasonable support to a finding of conspiratorial, as opposed to unilateral, behavior, summary judgment is appropriate.

Richards, 810 F.2d at 903 (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; 6 P. Areeda, *Antitrust Law* Par. 1405, at 21 (1986)).

shifted to Foothills to demonstrate that the trucking companies acted pursuant to some sort of *conspiracy*, since the legality of their conduct depended crucially, as is often the case, on whether they had acted independently or pursuant to an agreement.

Foothills Express asserted that the existence of a conspiracy could be inferred from the concession by one of the defendant corporations' presidents that there was "a gentlemen's agreement" with the other major trucking companies against back solicitation. [Richards, 810 F.2d at 903](#). We acknowledged that it was possible to interpret this deposition testimony as evidence of an agreement [**12](#) amongst competitors, but noted that this evidence was not necessarily inconsistent with lawful behavior. The evidence could also plausibly be interpreted either as a "reference to industrywide acceptance of the competitive reality that back solicitation was an abuse of the interlining relation" or as "meaning there were discrete, bilateral understandings between each defendant on one hand, and its interlining company on the other" (rather than a horizontal agreement amongst the defendants). *Id.* Under both of these latter interpretations, defendants would have engaged only in lawful conduct. Because the circumstantial evidence was as consistent with permissible competitive behavior as with illegal conspiracy - and thus did not tend to exclude the possibility of legitimate behavior - we concluded that the supposed smoking gun was not sufficient for Foothills to overcome defendants' summary judgment motion. See [*id. at 903-04*](#).

We reached a similar conclusion in *T.W. Electrical Service*, in which electrical contractors accused the Pacific Electrical Contractors Association ("PECA") of conspiring with unions to require all contractors to make certain contributions. [**13](#) Because PECA offered a legitimate, non-conspiratorial interpretation of its conduct, we emphasized that, to withstand PECA's summary judgment motion, "the contractors must not only come forward with 'specific facts' showing the existence of a genuine issue of material fact, but also must set forth 'specific facts' that tend to *exclude* the possibility that PECA acted independently." [T.W. Elec. Serv., 809 F.2d at 635](#). [*1096](#) In light of the fact that the contractors failed to produce evidence showing that the contribution requirement was the product of an agreement between PECA and others, rather than a requirement unilaterally imposed by PECA, we affirmed the grant of summary judgment in favor of PECA. See *id.*

In *Wilcox*, commercial borrowers of the First Interstate Bank of Oregon ("FIOR") sued FIOR alleging that it had conspired with other banks to fix interest rates. After the borrowers successfully convinced a jury to infer conspiracy from evidence of price parallelism, exchanges of pricing information, and opportunities to conspire, the district court granted judgment notwithstanding the verdict in favor of FIOR. Agreeing that there was no direct evidence of [**14](#) any agreement to set interest rates, that the circumstantial evidence of price fixing did not tend to exclude the possibility that FIOR set rates independently, and that FIOR did not act against its own independent self-interest, we affirmed. See [Wilcox, 815 F.2d at 524-28](#).

In another case, the City of Long Beach, which sold oil to various major oil companies at a price based on posted prices for Wilmington crude oil, alleged that the oil companies conspired to maintain uniformly low, noncompetitive posted prices. Although it lacked direct evidence of conspiracy, the City produced evidence that the defendants exchanged crude oil amongst themselves using a complicated "three-cut exchange system" rather than simply valuing oil based upon the posted prices. The City asserted that the companies used the three-cut exchange system because the posted prices were rigged: the oil corporations were making an "unusual effort" to maintain the elaborate three-cut exchange system, and the defendants did not demonstrate any advantage of this "cumbersome and inconvenient" system over valuing oil using posted prices. [Long Beach, 872 F.2d at 1403, 1406](#). Applying the [**15](#) legal framework outlined above, we concluded that evidence of such behavior, inexplicable absent a conspiracy, *did* tend to exclude the possibility that defendants acted independently and thus reversed the grant of summary judgment in the defendants' favor. See [*id. at 1406-07*](#).

C

Notwithstanding our many cases applying this legal framework for analyzing circumstantial evidence cases, Varni asks us to apply a very different summary judgment standard whereby it need *not* produce evidence tending to exclude the possibility that defendants acted independently even though it relies entirely on circumstantial evidence. Varni cites only a single case, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, [906](#)

F.2d 432 (9th Cir. 1990), in support of its proposed legal standard. The plaintiffs in that case, however, presented direct evidence of conspiracy, see id. at 456-57, 459-60 & n.22, thus making dicta any discussion therein of the standard applicable when plaintiffs rely exclusively on circumstantial evidence. See United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 463 n.11, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993) [**16] (recognizing the "need to distinguish an opinion's holding from its dicta"); Delta & Pine Land Co. v. Sinkers Corp., 177 F.3d 1343, 1349-50 (Fed. Cir. 1999) (declining to follow dicta).

The requirement that a HN10[[↑]] plaintiff who relies solely on circumstantial evidence of conspiracy - as Varni does - must produce evidence tending to exclude the possibility that defendants acted independently follows directly from the Supreme Court's opinion in *Matsushita* and is, as we have explained, well-established in both this circuit, see Long Beach, 872 F.2d at 1406; Jeanery, 849 F.2d at 1159; Wilcox, 815 F.2d at 525; Richards, 810 F.2d at 902, 904; T.W. Elec. Serv., 809 F.2d at 632, as well as in our sister circuits. See Mitchael v. Intracorp, 179 F.3d 847, 858 (10th Cir. 1999); Baby Food, 166 F.3d at 123; City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 569-70 (11th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3773 [*1097] (U.S. June 9, 1999) (No. 98-1997); Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs., Inc., 123 F.3d 1107, 1112 (8th Cir. 1997), [**17] cert. denied, 118 S. Ct. 1054 (1998); Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 55 (2d Cir. 1997); Thompson Everett, Inc. v. National Cable Adver., L.P., 57 F.3d 1317, 1323 (4th Cir. 1995); Wallace v. Bank of Bartlett, 55 F.3d 1166, 1170 (6th Cir. 1995); Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 49 (7th Cir. 1992); In re Beef Indus. Antitrust Litig., 907 F.2d 510, 514 (5th Cir. 1990).

With the appropriate legal standard in mind, we now analyze the evidence in the record.

III

Varni offers a plethora of evidence which it claims shows that Cargill was a member of the citric acid conspiracy. As Varni emphasizes, the crucial question is whether all the evidence considered as a whole can reasonably support the inference that Cargill conspired with the admitted conspirators to fix prices. See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962). Thus, we consider the evidence offered by Varni, and then ask whether, in light of all the evidence considered together, a reasonable [**18] factfinder could have concluded that Cargill conspired to fix prices.

A

Varni contends that the admitted conspirators and Cargill used the industry's trade association, the European Citric Acid Manufacturers Association ("ECAMA"), as a vehicle for conducting illegal conspiratorial activities. The claim, in a nutshell, is that ECAMA functioned as a front organization for conspiratorial activities.

ECAMA held semi-annual meetings that were attended, on a regular basis, by "masters" (the term used by the conspirators to describe high-level executives involved in the conspiracy who negotiated the broad terms of the conspiracy) and "sherpas" (lower-level corporate executives responsible for implementing the details of the conspiracy), among others. Varni argues that these meetings provided an opportunity for competitors to reach illegal agreements and that it is unlikely that these meetings were legitimate in light of the fact that many of those attending ECAMA meetings were active players in the conspiracy.

Having reviewed the record independently, however, we agree with the district court that there is no evidence to support Varni's theory that these meetings were used to pursue illegal [**19] ends. Although the evidence makes clear that representatives of the admitted conspirators gathered in "unofficial" meetings to fix prices and to allocate market shares - often in the same city as, and within a few days of, officially scheduled ECAMA meetings - there is no evidence that illegal activities took place during ECAMA meetings attended by Cargill representatives. Nor is there evidence that Cargill participated in any of the "unofficial" meetings. Instead, the apparently uncontested testimony of Hans Hartmann, president of H&R and a master in the conspiracy, was to the contrary: that official ECAMA meetings were legitimate and that the illegal activities took place in separate, non-ECAMA meetings. According to Hartmann, the ECAMA gatherings merely provided a convenient excuse for the conspirators to be in the same city at the same time.

Lacking evidence that the admitted conspirators and Cargill negotiated or reached price-fixing agreements during ECAMA meetings, Varni alleges that the citric acid manufacturers used ECAMA as a mechanism for negotiating illegal agreements with Chinese citric acid producers, whose expanding market share had caused increasing concern among [**20] ECAMA members. Varni cites the following evidence: (1) that ECAMA gathered information about Chinese citric acid producers; (2) that ECAMA commissioned a study of [*1098] "the Chinese situation as to location, production, distribution, prices"; (3) that ECAMA held a meeting to discuss a report on Chinese citric acid producers; (4) that an executive of Gadot Petrochemical Industries, Ltd. ("Gadot") circulated a memorandum advising ECAMA to correspond with Chinese citric acid producers to "stabilize and regulate Chinese production and exports"; and (5) that handwritten notes of an ADM employee at a March 1994 ECAMA working group meeting contained the following statement - "Undertaking is a confidential agreement to maintain price. Producers must police."³

[**21] We have little trouble concluding that the first three pieces of evidence do not tend to exclude the possibility of legitimate behavior. Gathering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action. As the Supreme Court has recognized, however, trade associations often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services. See, e.g., *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 567, 69 L. Ed. 1093, 45 S. Ct. 578 (1925).

At first glance, the last two pieces of evidence appear more ominous. The Gadot memorandum suggests an illegal course of conduct - that ECAMA contact the Chinese producers and agree to stabilize prices. However, minutes of an ECAMA meeting indicate that the suggestion "was quickly overviewed and it was decided not to pay attention to that message for most of the information contained in it [**22] [was] against the spirit of the anti-trust law." It would not be reasonable to infer that Cargill engaged in illegal activities merely from evidence that an illegal course of action was suggested but immediately rejected.⁴ Finally, the handwritten notes that constitute the fifth piece of evidence were taken at a meeting at which Cargill was not present. Thus, even if we interpret the notes as Varni asks us to, it would nevertheless not be reasonable to infer from such notes that *Cargill* conspired to fix prices.

B

Varni argues that, even if ECAMA was not directly used as a mechanism for fixing prices, it served as a front organization for the illegal distribution [**23] of detailed, firm-specific information on citric acid production and sales, information which facilitated the policing of agreed-upon market share allocations.

ECAMA collected figures on production and sales from each of its members, audited this information on an annual basis, and produced statistics aggregated by country on citric acid production and sales. ECAMA members reported production and sales information to an independent agent of ECAMA, who distributed information aggregated by country to members. The reason that only aggregate statistics were distributed was to preserve the confidentiality of individual members' sales and production figures. It is uncontested that these activities served the legitimate purpose of informing members of worldwide citric acid conditions and were, in themselves, wholly legal. Cargill vigorously [*1099] maintains that ECAMA distributed only *aggregate* information.

Varni contends, however, that ECAMA engaged in the additional illegal step of distributing *firm-specific* data to each member firm so that they could verify that all conspirators were adhering to agreed-upon market shares. The only evidence produced by Varni in support of its allegation [**24] that members received firm-specific information is a

³ Varni also attempts to rely on a search warrant affidavit by FBI Agent Brian Shepard, which reports what a witness had told the FBI agent that a master had told the witness. The district court did not abuse its discretion in deciding not to consider this evidence because it was hearsay. See *Quevedo v. Trans-Pacific Shipping, Inc.*, 143 F.3d 1255, 1258 (9th Cir. 1998).

⁴ Importantly, we note that Varni's theory of the case is that Cargill conspired with the admitted conspirators to fix prices and to allocate market shares amongst themselves. Varni has not articulated a conspiracy theory wherein Cargill or the admitted conspirators actually conspired with Chinese producers to fix prices or to allocate market shares.

table with detailed, firm-specific market share information found in Cargill's business records. Although Varni asserts that this information could have come only from ECAMA, Cargill maintains that these figures were generated from its own internal market research, and Varni has offered no evidence to the contrary. Moreover, the only other evidence in the record relating to this issue is Hartmann's testimony that the admitted conspirators policed their conspiracy by exchanging sales and production figures on a monthly basis by telephone, which clearly supports Cargill's position.

Lacking solid evidence that ECAMA ever disclosed firm-specific information to members, Varni falls back upon its argument that such an inference is reasonable in light of the fact that ECAMA hired auditors to verify the information submitted by members. According to Varni, the only conceivable reason ECAMA would have had to hire an independent firm to audit production and sales data is to allow conspirators to police their price-fixing conspiracy.

Cargill, however, offers a legitimate explanation - that the auditing process served the perfectly legal purpose [**25] of guaranteeing the reliability of the aggregate statistics on worldwide market conditions that ECAMA distributed to members. Cargill joined ECAMA to get "a more accurate picture of world supply/demand conditions." Cargill, like the other firms, valued having *accurate* information on market conditions throughout the world, because such information was being used to make strategic business decisions. If any ECAMA member submitted inaccurate data (whether intentionally or not), the resulting aggregate statistics would be inaccurate. Decisions made on the basis of inaccurate data are, of course, likely to be sub-optimal. If firms had to worry about whether their competitors were submitting accurate information, they would likely have been less willing to rely on the information distributed by ECAMA in making strategic business decisions. Auditing eliminated this worry.

Applying the legal framework outlined in Part II, we conclude that (1) Cargill's participation in an organization that collected and audited members' production and sales figures to calculate and distribute aggregate market statistics is as consistent with legitimate behavior as with conspiratorial behavior, and (2) [**26] Varni has failed to produce evidence tending to exclude the possibility that Cargill acted independently.

C

Lacking evidence that ECAMA itself served illegal ends, Varni falls back upon the argument that Cargill's decision to join ECAMA in the first place constitutes indirect evidence that Cargill was a participant in the citric acid conspiracy. Its theory is the same here as with much of the other evidence - that Cargill's behavior was inconsistent with its own self-interest and that, since no non-conspiring rational actor would have decided to do what Cargill did, Cargill must have been conspiring.

Cargill asserts that it joined ECAMA to obtain accurate information on worldwide market conditions in the citric acid industry, which it valued because it was considering expanding into foreign markets. In joining, Cargill believed that information on worldwide supply and demand in the citric acid industry would assist it in deciding which markets to enter, when to enter them, and how best to do so.

Varni, however, maintains that the costs of joining ECAMA far outweighed any [*1100] benefits, such that Cargill must have received some other (*i.e.*, conspiracy-related) benefit from joining. [**27] The costs relate to Cargill's obligation, as an ECAMA member, to disclose sales and production information to an independent agent of ECAMA who would calculate the aggregate statistics distributed to members. Cargill itself concedes that it considered the danger that its production and sales figures would fall into the hands of competitors to be a drawback of joining ECAMA. Varni argues that, on the benefits side, Cargill gained little from joining ECAMA because ECAMA's focus was on the European citric acid market and Cargill did not compete in that market.

In response, Cargill points to the uncontested evidence in the record that it *did* explicitly weigh the costs and benefits of joining ECAMA and did take steps to assure that its data would be kept as confidential as possible. When ECAMA and Cargill representatives met in February 1993 to negotiate and discuss terms of membership, Robert Simpson, a Cargill executive, conveyed Cargill's concerns about joining ECAMA. Simpson stated that he recognized that, as an ECAMA member, Cargill would have to disclose production and sales information to ECAMA so that ECAMA could compute aggregate statistics, but wanted to be absolutely [**28] sure that Cargill-specific

figures would not fall into the hands of competitors. In a letter of March 12, 1999, ECAMA's Secretary responded, explaining that Cargill's data would be kept confidential and that only aggregate market data would be provided to other firms. The Secretary did, however, acknowledge that when Cargill joined ECAMA, ECAMA members would be able to derive a one-time estimate of Cargill's sales and production figures by comparing the pre-Cargill figures with the new figures after Cargill's joinder, with the difference roughly equaling Cargill's sales and production figures.

Simpson evaluated the costs and benefits of joining ECAMA in an internal memorandum. By joining ECAMA, Cargill would get a better picture of world supply and demand conditions, which would be of increasing importance as Cargill expanded worldwide. In addition, Cargill stood to benefit from ECAMA's work on product development and other industry-related matters. Simpson noted that "the only drawback to ECAMA membership [was] disclosure of Cargill's sales volume and production capacity," but concluded that this drawback was minimal because, "after several detailed discussions with ECAMA, I feel **[**29]** comfortable with the confidentiality of Cargill trade data and ECAMA's position on national competition laws (antitrust)." Weighing the costs against the benefits, Simpson recommended that Cargill join ECAMA, and Cargill subsequently did so in May 1993.

To the extent that Cargill's decision is consistent with conspiratorial behavior, the evidence is equally well, if not better, interpreted as a decision in Cargill's own independent self-interest. Cargill offered a sound reason for joining ECAMA, and, importantly, Varni's evidence does not tend to exclude the possibility that Cargill, acting independently, reasonably concluded that the benefits of membership outweighed the costs. Varni's theory might be validated if information on worldwide market conditions were truly useless to Cargill, but this information was valuable because Cargill was considering expanding abroad. Finally, we note that Varni's argument that information on worldwide market conditions was worthless to Cargill is inconsistent with its attacks on Cargill for not expanding operations rapidly enough outside of the United States. See *infra* Part III.D.

D

Varni argues that Cargill's failure to expand its production **[**30]** capacity more rapidly than it did constitutes circumstantial evidence that it was conspiring to fix prices. When it entered the citric acid market, Cargill's production facility had an annual production capacity of 56 million pounds. In 1992, Cargill expanded capacity **[*1101]** to 80 million pounds. In March 1992, Cargill issued a press release announcing that it would double capacity to 160 million pounds per year. Sometime in or before October 1992, however, Cargill decided to increase capacity from 80 million to only 120 million pounds.⁵ Varni contends that Cargill's decision to expand capacity by 50 percent rather than by 100 percent is circumstantial evidence that Cargill was conspiring to fix prices and allocate market share.

The timing of this decision, however, does not fit with Varni's theory of the conspiracy. Varni **[**31]** contends that Cargill was a vigorous competitor until it turned conspirator in 1993, but the decision to expand capacity to 120 million rather than 160 million pounds was made by late 1992. Because "the factual context renders [appellants'] claim implausible," no reasonable factfinder could conclude from this evidence that Cargill was part of the conspiracy. [Matsushita, 475 U.S. at 587.](#)

Moreover, Cargill *did* expand rapidly. It increased its annual production capacity from 56 million to 80 million and then to 120 million - in only a matter of years. Faulting a company for expanding too slowly where it doubled capacity in a few years would subject countless strategic business decisions to second-guessing by courts. Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute. See [Reserve Supply, 971 F.2d at 49-53; Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 662 \(7th Cir. 1987\).](#) **[**32]**⁶ Cargill has explained

⁵ This expansion was completed by 1994. Cargill also implemented improvements such as installing a liquid extraction recovery process, which increased the efficiency of the manufacturing process.

why it did not expand even more rapidly: it was concerned that an excessively rapid expansion in citric acid supply would undermine prices and wanted to avoid precipitating a costly price war as it had done when it first entered the citric acid market (incurring substantial losses as a result).

E

Varni contends that Cargill "decided" to stop increasing its market share in 1993, which only a conspirator would have done. We note, as an initial matter, [HN11](#)⁶ that it is not reasonable to infer that a firm is engaging in illegal activities merely from the fact that it failed to continue to increase market share. If a conspiracy could be inferred so easily, then no firm against whom an antitrust claim is levied would ever be entitled to summary judgment unless it continually increased its market share. In light of the fact that firms enjoy discretion in [**33](#) exercising business judgment, see *supra* Part III.D, such a rule of law would be untenable.

In any case, there is no evidence in the record supporting Varni's claim that Cargill's market share flattened after 1993. Varni attempts to rely on market share statistics contained in an internal Cargill document cited in the report of its economic expert. See *infra* n.9. That document, however, was not included as part of the summary judgment record. To be considered in a motion for summary judgment, "documents must be authenticated by and attached to an affidavit that meets the requirements of [\[Federal Rule of Civil Procedure\] 56\(e\)](#) and the affiant must be a person through whom the exhibits could be admitted into evidence." [Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550-51 \(9th Cir. 1989\)](#) (internal quotation marks omitted). The document on which Varni relies for its market share figures was not submitted as part of the [\[*1102\]](#) summary judgment record, and thus we do not consider it.

Varni attempts to get this document in through the back door. First, it argues that this data is admissible because it is discussed in an expert report which was part [**34](#) of the record. The law is clear, however, that [HN12](#)⁷ an expert report cannot be used to prove the existence of facts set forth therein. See [Paddock v. Dave Christensen, Inc., 745 F.2d 1254, 1261-62 \(9th Cir. 1984\)](#); see also [Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 125 L. Ed. 2d 168, 113 S. Ct. 2578 \(1993\)](#) ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."); [Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1436 \(9th Cir. 1995\)](#) (same). Varni makes the alternative argument that the expert report can be used to show the truth of facts stated therein because it is a summary of the data admissible under [Federal Rule of Evidence 1006](#). Varni, however, has failed to show that the underlying document that it neglected to attach as evidence to its opposition motion qualifies as a voluminous writing that cannot be conveniently examined. See [Fed. R. Evid. 1006](#) ("The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.").

Because there [**35](#) is no evidence in the record establishing that Cargill's market share was constant between 1993 and 1995,⁷ any inference founded upon that factual assertion - even one drawn by an economic expert - is necessarily unreasonable. See [Brooke Group, 509 U.S. at 242 HN13](#)⁸ ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

F

Varni argues that the fact that Cargill's list prices mirrored those of its competitors is evidence of conspiracy. A [section 1](#) violation cannot, however, be inferred from parallel pricing alone, see [Wallace, 55 F.3d at 1168](#); [Wilcox, 815 F.2d at 526](#); [Reserve Supply, 971 F.2d at 50](#), [**36](#) nor from an industry's follow-the-leader pricing strategy, see [United States v. International Harvester Co., 274 U.S. 693, 708-09, 71 L. Ed. 1302, 47 S. Ct. 748 \(1927\)](#).

⁶ For the same reason, we reject Varni's assertion that illegal conduct can be inferred from Cargill's failure to expand more rapidly in Europe.

⁷ In fact, the only market share data actually in the record - and thus the only data properly before this court - indicates that Cargill's market share continued to increase even after 1993.

Wilcox, 815 F.2d at 526. Parallel pricing is a relevant factor to be considered along with the evidence as a whole; if there are sufficient other "plus" factors, an inference of conspiracy can be reasonable. See Petroleum Prods., 906 F.2d at 441-60.

It is true that Cargill's list prices have generally been nearly identical to those of ADM and H&R. Between 1990 and 1997, ADM, H&R, and Cargill always changed list prices within a month of one another and generally did so in the same month. We must, however, consider the evidence in the record as a whole. See Continental Ore, 370 U.S. at 699. Although there appears to have been little competition in citric acid *list prices*, Cargill did price aggressively in actual contracts. An internal Cargill document stated its strategy of generally "support[ing] industry price increases" but "selectively competing at strategic accounts." As part of this strategy, Cargill reached agreements to supply most of the [**37] citric acid needs of Coca-Cola, Pepsi, Kraft General Foods, Procter & Gamble Beverage, and Quaker Oats, and these five accounts constituted the majority of Cargill's sales.

Also relevant is Cargill's success in gaining 22 percent of the United States market share by 1995, which came largely at the expense of ADM and H&R. A May 1993 H&R internal monthly report expressed exasperation with Cargill's success, reporting [*1103] as follows: "We as a company can no longer take a position of 'maintaining our share of the business'. [sic] Why? Because we are losing! Cargill has new capacity coming on stream and they will continue to go after anyone they can get. Each time we play it conservative in our negotiations and price offerings Cargill beats us by half to one cent. Most of the time its [sic] a price issue." A second H&R internal report from 1994 on the domestic citric acid market concluded that Cargill had gained market share from ADM and H&R by consistently underpricing them. A third H&R document, dated 1995, similarly reported that "Cargill has been quite aggressive with citric price offers."

Considering the foregoing evidence together, we conclude that the evidence does not tend to [**38] exclude the possibility that Cargill acted legally in its pricing decisions.

G

Varni asks the court to infer Cargill's role in the conspiracy from the fact that representatives of Cargill attended meetings and had telephone conversations with individuals who have been identified as masters and sherpas. Varni does not offer any specific details with regard to illegal discussions, but instead merely asks us to infer participation in the conspiracy from the opportunity to do so. Such meetings, at least in and of themselves, do not tend to exclude the possibility of legitimate activity. See Baby Food, 166 F.3d at 126 HN14 [+] ("Communications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'") (quoting Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1013 (3d Cir. 1994)).

H

Varni argues that the fact that Cargill's files contained copies of competitors' price lists is circumstantial evidence that Cargill was conspiring with competitors to fix prices. Varni relies upon United States v. Container Corp. of America, 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969), [**39] in which the Supreme Court held that the reciprocal exchange of price information pursuant to an agreement by the defendants was concerted action sufficient to establish a price-fixing conspiracy. There is, however, a crucial difference between that case and the case before us. Unlike the plaintiffs in *Container* who presented evidence of an agreement to exchange pricing information, see Container, 393 U.S. at 340; accord Baby Food, 166 F.3d at 125-26, Varni has made no showing - or even any claim - that there was an agreement to exchange pricing information.

HN15 [+] Although the possession of competitor price lists is consistent with conspiracy, it does not, at least in itself, tend to exclude legitimate competitive behavior. See Baby Food, 166 F.3d at 125; Wallace, 55 F.3d at 1169; Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 996 (4th Cir. 1990). There are many legal ways in which Cargill could have obtained pricing information on competitors. See United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978); Petroleum Prods., 906 F.2d at 455 [**40] ("To allow an inference of agreement from such evidence, standing alone, would have the effect of deterring

competitors from obtaining information about other companies' actual retail prices, even through legitimate means. We can think of few inferences that would have a more undesirable distorting effect on market conduct."). Varni has not, for example, produced evidence tending to exclude the possibility that Cargill received these price lists legitimately from customers after they were distributed by competitors as Cargill claims.

I

Varni contends that a 1994 H&R document recommending that H&R "gain share at accounts where no significant effect on ADM, Cargill, JBL share" is circumstantial **[*1104]** evidence of Cargill's role in the conspiracy because H&R would have been concerned about taking market share from Cargill only if they were conspiring with one another. Cargill responds with an innocent explanation - that H&R avoided competing directly with Cargill because H&R had consistently lost when it tried to do so due to Cargill's lower prices, and that H&R apparently found it easier simply to compete with other firms instead.⁸

[41]** In a similar case, plaintiffs produced what they characterized as direct evidence of a horizontal conspiracy. Upon close analysis, however, this court concluded that such evidence could be interpreted as evidence of a horizontal conspiracy but also could be construed in a benign light. We held that, in such a situation, the purported "smoking gun" was not sufficient in itself to preclude summary judgment because evidence as consistent with legitimate behavior as illegal behavior cannot independently support an inference of conspiracy. See *Richards*, 810 F.2d at 903-04.

The Third Circuit recently reached a similar conclusion when it was confronted with purported smoking gun evidence in an antitrust price-fixing case involving the baby food industry. In *Baby Food*, an internal Heinz memorandum contained the following statement:

I was told by [a prospective Heinz customer] that they wanted to stock only two brands of baby food - Gerber and someone else. Their main objective was to stock the lines that were preferred by the retailers. I advised them that we would make every effort to secure a majority base of distribution. However, with our "truce" in effect, **[**42]** our hands were tied.

Baby Food, 166 F.3d at 120. The *Baby Food* plaintiffs contended that the "truce" was evidence of a price-fixing conspiracy - namely, that Heinz's hands were "tied" because they had agreed not to lower prices. The Third Circuit rejected this argument and concluded instead that "the single use of the term ['truce'] in a highly competitive business environment and in the face of continuing fierce competition is as consistent with independent behavior as it is with price-fixing." *Id. at 127*.

Considering Varni's interpretation of this evidence in light of Cargill's explanation, we conclude that the district court did not err in ruling that this evidence did not tend to exclude the possibility that Cargill was acting lawfully.

J

Varni also cites scattered evidence from 1991 and 1992 which purportedly supports an inference that Cargill was a conspirator. In its briefs, however, Varni conceded that "until mid-1993, Cargill competed with the Admitted Conspirators." At oral argument, Varni argued that Cargill joined the conspiracy in October 1992 - when Cargill indicated its receptiveness to joining ECAMA - rather than **[**43]** in May 1993 - when Cargill actually joined ECAMA. Even under this revised theory, all circumstantial evidence pre-dating October 1992 is irrelevant because it does not comport with Varni's theory that Cargill joined the conspiracy in October 1992.

K

⁸This document is not direct evidence of conspiracy because there remains a gap between the document and the conclusion that Cargill was a conspirator, a gap that can be bridged only by making some sort of inference. See *Baby Food*, 166 F.3d at 120-21.

Varni points to the trial testimony of ADM employee Barrie Cox in a criminal proceeding involving a price-fixing conspiracy in the lysine industry, in which Cox stated that he had discussions regarding the "bidding price for certain [citric acid] accounts" with someone from Cargill, and maintains that Cox's testimony constitutes direct evidence of price-fixing by Cargill. Cox's testimony at the lysine trial does not constitute *direct* evidence, however, because it still requires an inference that the price discussions were conspiratorial in nature. Furthermore, Cox's trial testimony, [*1105] not subjected to cross-examination, does not possess the requisite specificity to withstand summary judgment. See *Baby Food*, 166 F.3d at 125 ("Evidence of sporadic exchanges of shop talk among field representatives who lack pricing authority is insufficient to survive summary judgment.") (citing *Krehl v. Baskin Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982)). [**44]

Subsequent to oral argument in this case, Varni filed a request for judicial notice of and motion to supplement the record with the government's sentencing memorandum in the lysine conspiracy case. Varni relies in particular on an FBI investigative report attached to the sentencing memorandum, which summarizes statements allegedly made by ADM employee Cox in an FBI interview. According to the report, Cox claimed that he had discussions with Cargill employee William Gruber regarding the bidding price for specific citric acid accounts. Varni argues that Cox's statements, as described in the FBI report, constitute specific, direct evidence of price-fixing by Cargill in the citric acid industry.

Cargill has vigorously opposed Varni's request for judicial notice, offering several arguments as to why the substance of Cox's FBI interview statements is not a proper subject for judicial notice. Cargill makes the following arguments: (1) Cox's statements in the FBI report are inadmissible "triple hearsay"; (2) the statements are inadmissible under *Federal Rule of Evidence 403* because they lack probative value; (3) as a general rule, the summary judgment record cannot be supplemented on appeal [**45] and is limited to material before the district court; and (4) under *Federal Rule of Evidence 201*, only facts "not subject to reasonable dispute" can be proper subjects of judicial notice, and Cox's statements fail to satisfy this requirement. The arguments offered by Cargill against Varni's request for judicial notice possess considerable force.

We need not resolve the dispute over whether judicial notice of this evidence would be proper, however, because the documents Varni seeks to add to the record would not change the result in this case, for several reasons. First, the documents support Cargill's theory that Cargill was not part of the "Group of Four" or the "Group of Five" (the terms used by the citric acid conspirators in referring to themselves). Second, Cox's statements in the FBI report show, at best, that Cox engaged in sporadic price discussions with one individual at Cargill, which evidence is neither sufficient to survive summary judgment under *Baby Food* nor probative of the industry-wide conspiracy alleged by Varni. Third, the documents upon which Varni seeks to rely do not comport with Varni's theory that Cargill joined the conspiracy when it joined ECAMA in May [**46] 1993, since the FBI report on which Varni relies makes clear that the conspirators considered asking Cargill to join the conspiracy in 1995 - some two years after Cargill joined ECAMA. In sum, even if we were to grant Varni's request for judicial notice, the new evidence would not alter the outcome because it appears to be inconsistent with Varni's theory of the case.

L

Applying the legal framework set forth in *Matsushita* and developed through several subsequent cases in this circuit, we have concluded that none of the various pieces of evidence offered by Varni supports a reasonable inference that Cargill conspired to fix prices because none of the evidence, when considered individually, tends to exclude the possibility that Cargill acted independently.⁹ The crucial question, [*1106] however, is whether the

⁹ Varni argues that the reports of its expert economist, Robert G. Harris, mandate the denial of Cargill's summary judgment motion. Harris concluded that a company acting independently would not have done many of the things that Cargill did. Purported to be irrational absent conspiratorial behavior on the part of Cargill were Cargill's decision to join ECAMA (the strongest piece of evidence in Harris's view), the virtual identity in list prices among citric acid producers, Cargill's failure to increase its market share between 1993 and 1995, its failure to expand its annual production capacity by more than it did, its decision not to enter the European citric acid market sooner, and the fact that, "given the number and type of known contacts - to say nothing of other possible communications - between Cargill and personnel of the admitted conspirators, it is inconceivable

evidence considered as a whole can support an inference of conspiracy on Cargill's part. As we stated at the outset of this analysis, such an inference may still be plausible when looking, as we must, at the big picture. Summing the iota up, of course, makes it more difficult to say whether a reasonable factfinder could conclude that Cargill was more likely than not a conspirator, **[**47]** especially in light of the fact that this case is unique in that several citric acid manufacturers have already admitted to conspiring about prices.

[48]** Considered as a whole, the evidence in the record, though it clearly shows that several citric acid producers conspired to fix prices and to allocate market shares, does not tend to exclude the possibility that Cargill acted independently - and thus does not support a reasonable inference that *Cargill* was involved in the citric acid price-fixing conspiracy. Cargill has offered reasonable legitimate explanations for joining ECAMA, for its strategic decisions relating to expansion, for its citric acid pricing, and for the various other pieces of evidence offered by Varni purportedly showing that Cargill engaged in price fixing. We note that all four major citric acid manufacturers admitted to conspiring to fix prices but none identified Cargill as a co-conspirator. All in all, there is no more than a scintilla of evidence that Cargill was a participant in the citric acid conspiracy, and the existence of "a scintilla of evidence of concerted, collusive conduct" is not sufficient for Varni to overcome Cargill's summary judgment motion. *Baby Food*, 166 F.3d at 137.¹⁰ Thus, the district court did not err in granting summary judgment in favor of Cargill.

[49] IV**

Finally, we address whether the district court abused its discretion in denying Varni's motion to compel Coopers & Lybrand L.L.P. ("C&L-US") to produce various documents in its possession and in the possession of Societe Fiduciare Suisse Coopers & Lybrand ("C&L-Switzerland"), which had performed certain accounting and auditing work for ECAMA.

A

C&L-Switzerland and C&L-US are both members of Coopers & Lybrand International ("C&L International"), an association (organized under the laws of Switzerland) consisting of member accounting firms around the world (including C&L-US and C&L-Switzerland). By virtue of membership in C&L-International, member firms are allowed to utilize the Coopers & Lybrand name. Although members use the "Coopers & Lybrand" name, each firm is autonomous. Firms do not share profits or losses, nor do they have any management, authority, or control over other member firms. In addition, C&L-International does not exercise management, authority, or control over member firms. Of particular relevance to the case at hand, C&L-US does not have any economic or legal interest in C&L-Switzerland, and C&L-Switzerland has no such interest in C&L-US.

[*1107] Varni served C&L-US **[**50]** with a subpoena to produce various documents in its possession and in the possession of C&L-Switzerland. C&L-US produced all the relevant documents in its possession and wrote a letter to C&L-Switzerland asking if it would voluntarily turn over the documents sought by Varni. C&L-Switzerland declined. Varni then filed a motion to compel C&L-US to produce C&L-Switzerland's documents. The magistrate judge ruled that, under *Federal Rule of Civil Procedure 45(a)*, Varni could compel only C&L-US to produce those records in its legal control. Finding that C&L-US lacked legal control over documents held by C&L-Switzerland, the magistrate denied the motion to compel in an order subsequently adopted by the district court. Varni argues that the district court abused its discretion by denying its motion to compel.

B

that Cargill remained ignorant of the existence of the conspiracy." We have already considered all the evidence discussed by Harris, see *supra* Part III.A-III.L, and our conclusion that no piece of evidence tends to exclude the possibility that Cargill acted independently is not affected by the conclusory statements in the expert report to the contrary. See *Brooke Group*, 509 U.S. at 242.

¹⁰ Because the evidence must, on summary judgment, be construed to the greatest extent reasonably possible in favor of finding an antitrust violation, rare is the antitrust case in which there is absolutely no evidence which could support some inference of an antitrust violation.

[HN16](#)[] The Federal Rules of Civil Procedure require a party served with a subpoena for records to produce those records that are in its "possession, custody or control." [Fed. R. Civ. P. 45\(a\)](#). The documents in question are neither in the possession nor custody of C&L-US. Thus, the only question before us is whether C&L-US has "control" over documents in the possession of C&L-Switzerland.[HN17](#)[]

[**51] "Control is defined as the legal right to obtain documents upon demand." [United States v. International Union of Petroleum & Indus. Workers, 870 F.2d 1450, 1452 \(9th Cir. 1989\)](#) ("International Union"). In *International Union*, the Department of Labor had served a subpoena on the International Union of Petroleum and Industrial Workers ("IUPIW"), seeking records from local unions affiliated with IUPIW. The court concluded that IUPIW lacked legal control over documents in the possession of local unions because IUPIW and each local union were separate entities under the law and because the contract governing the union relationship did not expressly give IUPIW the right to obtain the records of local unions upon demand. See [id. at 1452-53](#). Although there was a theoretical possibility that IUPIW could dissolve a local union and thereby gain access to the documents of the dissolved union, the court deemed this remote possibility insufficient to give IUPIW "control" for purposes of Federal [Rule 45\(a\)](#). The court emphasized that [HN18](#)[] proof of theoretical control is insufficient; a showing of actual control is required. See [id. at 1453-54](#). [**52]

Varni concedes - as it must - that the district court's ruling was correct under an application of the legal control test, because there is no dispute that C&L-US lacks the legal ability to obtain documents from C&L-Switzerland. Just as IUPIW and the local unions were separate entities under the law, so are C&L-US and C&L-Switzerland. Also as in *International Union*, there is no contract giving C&L-US the right to compel C&L-Switzerland to furnish it with documents in C&L-Switzerland's possession.

Recognizing that the district court's ruling is entirely consistent with *International Union*, Varni urges this court to reject the legal control test used in *International Union*. It asks us instead to define "control" in a manner that focuses on the party's practical ability to obtain the requested documents and argues that *International Union* does not foreclose the application of this practical-ability-to-obtain-documents test, because *International Union*'s decision to apply the legal control test rather than the practical-ability-to-obtain-documents test is purportedly "an unexamined assumption," which *stare decisis* does not compel the present court to follow.

[**53] Even if *International Union* does not conclusively settle the question, we conclude - consistently with all of our sister circuits who have addressed the issue - that the legal control test is the proper standard under [Rule 45](#). See [Cochran Consulting, Inc. v. Uwatec USA, Inc., 102 F.3d 1224, 1229-30 \(Fed. Cir. 1996\)](#); [In re Bankers Trust Co., 61 F.3d 465, 469 \[*1108\] \(6th Cir. 1995\)](#); [Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1426 \(7th Cir. 1993\)](#); [Gerling Int'l Ins. Co. v. Commissioner, 839 F.2d 131, 140-41 \(3d Cir. 1988\)](#); [Searock v. Stripling, 736 F.2d 650, 653 \(11th Cir. 1984\)](#). Ordering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents. Varni claims that C&L-US has the practical ability to obtain documents from C&L-Switzerland because C&L-Switzerland has voluntarily furnished C&L-US with documents and information in the past. With respect to the ECAMA documents, however, C&L-US asked C&L-Switzerland to produce those documents, but C&L-Switzerland refused. There is no [**54] mechanism for C&L-US to compel C&L-Switzerland to produce those documents, and it is not clear how Varni wants C&L-US to go about getting the ECAMA documents, since C&L-Switzerland could legally - and without breaching any contract - continue to refuse to turn over such documents. Because C&L-US does not have legal control over C&L-Switzerland's documents, Varni could not compel C&L-US to produce those documents.

V

For the foregoing reasons, we conclude that the district court did not err either by granting summary judgment in favor of Cargill or by denying Varni's motion to compel.

AFFIRMED.



Found. for Interior Design Educ. Research v. Savannah College of Art & Design

United States District Court for the Western District of Michigan, Southern Division

September 3, 1999, Decided ; September 3, 1999, Filed

Case No. 1:98-CV-346

Reporter

73 F. Supp. 2d 829 *; 1999 U.S. Dist. LEXIS 14194 **

FOUNDATION FOR INTERIOR DESIGN EDUCATION RESEARCH, Plaintiff, v. SAVANNAH COLLEGE OF ART AND DESIGN, Defendant.

Disposition: [\[**1\]](#) Plaintiff's Motion to Dismiss Counterclaims (docket no. 51) and Plaintiff's Motion to Dismiss [First Amendment](#) to Count V of Defendant's Counterclaims (docket no. 67) GRANTED. Defendant's counterclaims DISMISSED WITH PREJUDICE.

Core Terms

accreditation, Sherman Act, relevant market, market power, antitrust, counterclaims, interior design, decisions, common law, fraud claim, allegations, cases, common law claim, motion to dismiss, anticompetitive, discovery, commerce, education program, due process, deferential, faculty, motive, breach of fiduciary duty, substantial evidence, anti trust law, certification, capricious, consumers, prestige, products

LexisNexis® Headnotes

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

[**HN1**](#) **Motions to Dismiss, Failure to State Claim**

An action may be dismissed if the complaint fails to state a claim upon which relief can be granted. [Fed. R. Civ. P. 12\(b\)\(6\)](#).

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

[**HN2**](#) **Motions to Dismiss, Failure to State Claim**

The moving party for a dismissal on the ground that the pleading did not state a claim or cause of action has the burden of proving that no claim exists.

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

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HN3 Pleadings, Rule Application & Interpretation

Although a complaint is to be liberally construed, the complaint must contain more than bare assertions of legal conclusions.

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

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

HN4 Motions to Dismiss, Failure to State Claim

In considering a motion to dismiss for failure to state a claim, the court must presume all factual allegations in the complaint to be true and draw all reasonable inferences in favor of the non-moving party.

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

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

HN5 Motions to Dismiss, Failure to State Claim

In considering a motion to dismiss for failure to state a claim, the court need not accept unwarranted factual inferences.

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

HN6 Motions to Dismiss, Failure to State Claim

Dismissal is proper only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

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

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > Immunity

HN7 Motions to Dismiss, Failure to State Claim

Dismissal is proper if the complaint fails to allege an element necessary for relief or when a successful affirmative defense or other bar to relief appears on the face of the complaint, such as the absolute immunity of a defendant.

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

HN8 Pleadings, Rule Application & Interpretation

A complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.

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

HN9[**Motions to Dismiss, Failure to State Claim**

The governing precept is that while the plaintiff's facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, and legal conclusions. The factual allegations must be specific enough to justify dragging a defendant past the pleading threshold.

Governments > Courts > Common Law

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Administrative Law > Agency Adjudication > Informal Agency Action

Education Law > Administration & Operation > Career & Technical Schools

Governments > Fiduciaries

HN10[**Courts, Common Law**

Courts that have considered common law claims as part of a dispute over denial of accreditation have uniformly held that decisions by accrediting bodies should be analyzed as administrative decisions rather than as traditional common law claims.

Administrative Law > Agency Adjudication > Informal Agency Action

HN11[**Agency Adjudication, Informal Agency Action**

Accrediting bodies are not engaged in commercial transactions for which state-law contract principles are natural matches.

Administrative Law > Agency Adjudication > Informal Agency Action

HN12[**Agency Adjudication, Informal Agency Action**

Principles of federal administrative law supply the right perspective for review of accrediting agencies' decisions.

Governments > Courts > Common Law

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

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

Governments > Fiduciaries

HN13[**Courts, Common Law**

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A plaintiff could only maintain a claim under breach of fiduciary duty and violation of an association's constitution and bylaws if the decision by the association was arbitrary, capricious, or discriminatory.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN14 [] **Antitrust & Trade Law, Sherman Act**

The proscriptions of the Sherman Act are tailored for the business world, not for the noncommercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

HN15 [] **Antitrust & Trade Law, Sherman Act**

It is possible to conceive of restrictions on eligibility for accreditation that could have little other than a commercial motive; and as such, antitrust policy would presumably be applicable.

Antitrust & Trade Law > Sherman Act > General Overview

HN16 [] **Antitrust & Trade Law, Sherman Act**

Absent commercial motives, the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > 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

HN17 [] **Regulated Industries, Higher Education & Professional Associations**

Anticompetitive effect on the market is necessary unless the action at issue is found to be a per se violation of the Sherman Act.

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

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

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HN18 [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A per se analysis applies only to agreements or actions which, because of their pernicious effect on competition and lack of any redeeming value, are conclusively presumed to be unreasonable and therefore illegal.

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 > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN19 [blue icon] Higher Education & Professional Associations, Colleges & Universities

Because the rule of reason applies, in order to state a claim under [§ 1](#) of the Sherman Act, plaintiff must allege an injury to competition in the marketplace.

Antitrust & Trade Law > Sherman Act > General Overview

HN20 [blue icon] Antitrust & Trade Law, Sherman Act

A defendant must have market power before its conduct can be shown to have an adverse effect on competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

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

HN21 [blue icon] Regulated Practices, Market Definition

Unless an antitrust plaintiff alleges the existence of market power, the complaint may be dismissed for failure to state a claim upon which relief can be granted.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN22 [blue icon] Regulated Practices, Market Definition

Market power must be alleged in more than vague and conclusory terms to prevent the dismissal of the complaint on a defendant's [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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[**HN23**](#) **Regulated Practices, Market Definition**

Dismissal is appropriate if the definition of the relevant market in the complaint is implausible or not tenable.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN24**](#) **Regulated Practices, Market Definition**

The relevant market, for antitrust purposes, is composed of products or services that have reasonable interchangeability for the purposes for which they are produced -- price, use, and qualities considered.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN25**](#) **Regulated Practices, Market Definition**

Courts have repeatedly rejected efforts to define markets by price variances or product quality variances. Such distinctions are meaningless where the differences are actually a spectrum of price and quality differences.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN26**](#) **Antitrust & Trade Law, Sherman Act**

Stigma or loss of prestige to an entity that is denied accreditation or certification of its service or product does not constitute an injury to competition under the Sherman Act.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Discharge of Secondary Obligors

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Negotiable Instruments > Enforcement > Joint & Several Instruments

[**HN27**](#) **Higher Education & Professional Associations, Professional Associations**

When a trade association provides information, or gives a seal of approval, but does not constrain others to follow its recommendations, it does not violate the antitrust laws.

Counsel: For FOUNDATION FOR INTERIOR DESIGN EDUCATION RESEARCH, plaintiff: Douglas W. Van Essen, Bruce Anthony Courtade, Law, Weathers & Richardson, Grand Rapids, MI.

For SAVANNAH COLLEGE OF ART AND DESIGN, defendant: David L. Harrison, Tolley, VandenBosch, Walton, Korolewicz, et al, Grand Rapids, MI.

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For SAVANNAH COLLEGE OF ART AND DESIGN, counter-claimant: David L. Harrison, Tolley, VandenBosch, Walton, Korolewicz, et al, Grand Rapids, MI.

For FOUNDATION FOR INTERIOR DESIGN EDUCATION RESEARCH, counter defendant: Bruce Anthony Courtade, Law, Weathers & Richardson, Grand Rapids, MI.

Judges: GORDON J. QUIST, UNITED STATES DISTRICT JUDGE.

Opinion by: GORDON J. QUIST

Opinion

[*831] OPINION

Plaintiff, Foundation for Interior Design Education Research ("FIDER"), has sued Defendant, Savannah College of Art and Design ("Savannah College"), pursuant to the Declaratory Judgment Act, [28 U.S.C. §§ 2201](#) and [2202](#), for a declaratory judgment that FIDER's [*2] decision to deny accreditation to Savannah College was in accordance with FIDER's own procedures, supported by substantial evidence, and not arbitrary or capricious. In an Opinion and Order dated December 21, 1998, this Court entered a declaratory judgment in favor of FIDER. [See Foundation for Interior Design Educ. Research v. Savannah College of Art and Design, 39 F. Supp. 2d 889, 890-91 \(W.D. Mich. 1998\)](#)(hereinafter "FIDER").

Savannah College has brought counterclaims against FIDER, alleging breach of contract, violation of common law due process, breach of fiduciary duty, antitrust violations under Michigan and federal law, and fraud arising out of FIDER's denial of accreditation. This matter is before the Court on FIDER's Motion to Dismiss Counterclaims.

Facts

The Court adopts the statement of facts from its previous opinion. [See FIDER, 39 F. Supp. 2d at 891-93](#). The Court also reiterates that it has held that:

In acting to deny accreditation to the interior design program at Savannah College of Art and Design, Plaintiff FIDER followed its own procedures; those procedures were fair and impartial; FIDER's decision was supported [*3] by substantial evidence in the record upon which the FIDER Board of Trustees acted; and FIDER did not otherwise act in an arbitrary, capricious, or wrongful manner.

[Id. at 890-91.](#)

Standard

[HN1](#) An action may be dismissed if the complaint fails to state a claim upon which relief can be granted. [See Fed. R. Civ. P. HN2](#) 12(b)(6). The moving party has the burden of proving that no claim exists. [HN3](#) Although a complaint is to be liberally construed, the complaint must contain more than bare assertions of legal conclusions. [See Allard v. Weitzman \(In re DeLorean Motor Co.\), 991 F.2d 1236, 1240 \(6th Cir. 1993\).](#) [HN4](#) The court must presume all factual allegations in the complaint to be true and draw all reasonable inferences in favor of the non-moving party. [See 2 James Wm. Moore et al., Moore's Federal Practice P 12.34\[1\]\[b\] \(3d ed. 1997\).](#) [HN5](#) The court need not, however, accept unwarranted factual inferences. [See Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 \(6th Cir. 1987\).](#) [HN6](#) Dismissal is proper "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, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 \(1984\).](#) [*4]

HN7 Dismissal is also proper if the complaint fails to allege an element necessary for relief or "when a successful affirmative defense or other bar to relief appears on the face of the complaint, such as the absolute immunity of a defendant . . ." 2 James Wm. Moore et al., Moore's Federal Practice PP 12.34[4][a],[b] (3d ed. 1997).

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In practice, **HN8** "a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory."

Allard, 991 F.2d at 1240 (quoting Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988)).

The standard for dismissal was summarized recently in DM Research, Inc. v. College of American Pathologists, 170 F.3d 53 (1st Cir. 1999), an antitrust case, which states:

HN9 The governing precept . . . is that while the plaintiff's "facts" must be accepted as alleged, this does not automatically extend to "bald assertions, subjective characterizations, and legal conclusions . . . The factual allegations must be specific enough to justify 'dragging a defendant past the pleading threshold.'"

[**5] DM Research, 170 F.3d at 55 (quoting Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1998)(citation omitted)(alterations in original)).

Analysis

I. Common law counterclaims

Savannah College alleges five common law counterclaims: (1) breach of contract; (2) violation of common law procedural due process; (3) violation of common law substantive due process; (4) breach of fiduciary duty; and (5) fraud. **HN10** Courts that have considered common law claims as part of a dispute over denial of accreditation have uniformly held that decisions by accrediting bodies should be analyzed as administrative decisions rather than as traditional common law claims. For example, in Chicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools and Colleges, 44 F.3d 447 (7th Cir. 1994), a case cited in this Court's Opinion of December 21, 1998, the plaintiff, Chicago School of Automatic Transmissions, argued that the denial of accreditation by defendant was a breach of contract under Illinois law. However, the Seventh Circuit rejected the application of state law, noting that **HN11** "accrediting bodies are not [**6] engaged in commercial transactions for which state-law contract principles are natural matches." Chicago School, 44 F.3d at 449. The Seventh Circuit instead concluded, after citing many of the decisions cited by this Court in its Opinion of December 21, 1998, "that **HN12** principles of federal administrative law supply the right perspective for review of accrediting agencies' decisions." Id. at 450 (noting that "administrative law entails deferential review, while courts applying contract law do not defer to either of the contracting parties' views").

A similar conclusion was reached in Dietz v. American Dental Association, 479 F. Supp. 554 (E.D. Mich. 1979), another case cited in this Court's opinion of December 21, 1998. In Dietz, the plaintiff sued for breach of fiduciary duty and violation of the American Dental Association's constitution and by-laws. The court concluded that **HN13** plaintiff could only maintain a claim under these common law causes of action if the decision by the association was "arbitrary, capricious, or discriminatory." Dietz, 479 F. Supp. 554 at 557.

A third case cited in this Court's prior Opinion, [Transport Careers, Inc. v. National Home Study Council, 646 F. Supp. 1474 \(N.D. Ind. 1986\)](#), [\[**7\]](#) also supports this conclusion. The plaintiff in [Transport Careers](#) alleged violations of common law procedural due process, common law substantive due process, disparate treatment, and breach of fiduciary duty. The court applied the deferential standard for review of the decisions of accrediting bodies to each of plaintiff's common law claims, concluding that summary judgment in favor of defendant was appropriate because the accrediting body followed its own rules and its decision to terminate plaintiff's accreditation was supported by substantial evidence. [See Transport Careers, 646 F. Supp. at 1486.](#)

Savannah College's counsel essentially admitted at oral argument that each of the college's common law counterclaims, except [\[*833\]](#) for its fraud claim, is precluded by this Court's prior determination that FIDER followed its own procedures in denying Savannah College accreditation, that those procedures were fair and impartial, that FIDER's decision was supported by substantial evidence in the record, and that FIDER did not otherwise act in an arbitrary, capricious, or wrongful manner. The Court concludes that allowing Savannah College to proceed with these counterclaims [\[**8\]](#) would sanction form over substance, allowing artful pleading to avoid the deferential standard of review uniformly applied to the review of accreditation decisions. Accordingly, Savannah College's breach of contract, breach of fiduciary duty, violation of common law procedural due process, and violation of common law substantive due process claims will be dismissed.

Savannah College argues that its fraud claim must be treated differently from these other common law counterclaims for two reasons: (1) in order to state a fraud claim, Savannah College must meet the heightened pleading requirements of [Fed. R. Civ. P. 9\(b\)](#), which provides adequate protection for FIDER and distinguishes the fraud claim from the other common law claims; and (2) none of the cases applying the deferential standard of review to common law claims arising out of a denial of accreditation have involved a fraud claim. The Court is not persuaded that the enhanced pleading requirement for a fraud claim offers any basis for treating the fraud claim differently from Savannah College's other common law claims, considering that the cases are clear "that principles of federal administrative law supply the right perspective [\[**9\]](#) for review of accrediting agencies' decisions." [Chicago School, 44 F.3d at 450](#) (applying arbitrary or unreasonable test to all common law claims complaining of denial of accreditation).

The fact that the cases dealing with common law claims arising out of a denial of accreditation have not involved an allegation of fraud by the school denied accreditation does not lead to a different result in light of this Court's prior ruling. Savannah College's fraud claim essentially alleges that: (1) it was the victim of disparate treatment by FIDER, in that it was denied accreditation while other schools were granted accreditation despite non-compliance with several of the Student Achievement Standards; and (2) it did not receive a meaningful appeal when it filed its appeal with the FIDER Board of Appeals because the FIDER Board of Trustees made the final decision regarding Savannah College's accreditation. ([See 1st Am. Countercl. PP 137-145.](#)) However, the Court already concluded in its December 21, 1998, Opinion that FIDER cannot maintain a disparate treatment claim. [See FIDER, 39 F. Supp. 2d at 898-99.](#) The Court also concluded that FIDER followed its own [\[**10\]](#) procedures in denying Savannah College accreditation, and that FIDER's procedures clearly indicate that the Board of Trustees, not the Board of Appeals, makes the final decision about accreditation. [See id. at 892, 896-97.](#) Accordingly, the Court concludes that Savannah College's fraud claim merely repackages its previous claim that accreditation was wrongfully denied in an attempt to avoid the deferential standard of review uniformly applied to the review of accreditation decisions. Therefore, Savannah College's fraud claim will also be dismissed.

II. Antitrust counterclaim

Savannah College also alleges that FIDER has unreasonably restrained trade in violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#)¹ [\[**11\]](#), and the Michigan Antitrust Reform Act, [M.C.L. § 445.772](#).² FIDER's [\[*834\]](#) arguments in support of dismissal of these claims are addressed below.

¹ Savannah College was granted leave to file an Amended Counterclaim on June 15, 1999, after FIDER filed its motion to dismiss counterclaims, in order to correct any deficiencies in the pleading of its antitrust counterclaim.

A. Accreditation as "trade or commerce"

FIDER's initial argument is that the denial of accreditation in this case is not "trade or commerce" governed by the Sherman Act. FIDER relies heavily on [Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools, Inc., 139 U.S. App. D.C. 217, 432 F.2d 650 \(D.C. Cir. 1969\)](#), in support of its argument. The court in Marjorie Webster began by noting that "despite the broad wording of the Sherman Act, it has long been settled that not every form of combination or conspiracy that restrains trade falls within its ambit." [Marjorie Webster, 432 F.2d at 653.](#)³ The court then explained that:

[HN14](#)[] the proscriptions of the Sherman Act were "tailored ... for the [**12] business world," not for the noncommercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.

[Id. at 654](#) (footnotes omitted).

However, the court stopped short of granting accreditation decisions in the education field complete immunity under the Sherman Act, holding that [HN15](#)[] "it is possible to conceive of restrictions on eligibility for accreditation that could have little other than a commercial motive; and as such, antitrust policy would presumably be applicable." [Id. at 654-55.](#)⁴ The court concluded that:

[HN16](#)[] Absent such motives, however, the process of accreditation is an activity distinct from the sphere [**13] of commerce; it goes rather to the heart of the concept of education itself. We do not believe that Congress intended this concept to be molded by the policies underlying the Sherman Act.

[Id. at 655.](#)

Other courts have cited Marjorie Webster with approval, prompting the authors of a recent article to conclude that "decisions involving Sherman Act challenges against accrediting associations have been consistent with this deferential view of favoring the accrediting associations." Jeffrey C. Sun & Philip T.K. Daniel, [The Sherman Act Antitrust Provisions and Collegiate Action: Should There be a Continued Exception for the Business of the University?](#), 25 J.C. & U.L. 451, 469 (1999)(citing Marjorie Webster, [**14] Brandt v. American Bar Ass'n, No. CIV. A 3:96-cv-2606 D, 1997 WL 279762 (N.D. Tex. May 15, 1997)(mem. op.), and [Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n, 107 F.3d 1026 \(3d Cir. 1997\)](#)). In fact, Sun and Daniel suggested that this deference is similar to the "arbitrary or unreasonable" standard of review applied to direct review of accrediting decisions. [See id.](#) (citing two cases cited in this Court's previous opinion of December 21, 1998, [Wilfred Academy of Hair & Beauty Culture v. Southern Ass'n of Colleges & Schs., 957 F.2d 210, 214 \(5th Cir. 1992\)](#) and [Parsons College v. North Central Ass'n of Colleges & Secondary Schs., 271 F. Supp. 65, 72 \(N.D. Ill. 1967\)](#)).

Savannah College does not dispute the applicability of Marjorie Webster, but rather argues that it has met the exception in Marjorie Webster allowing antitrust scrutiny of accreditation decisions with "little other than a

² The parties agree that claims of unreasonable restraint of trade under the Michigan Antitrust Reform Act are analyzed exactly the same as claims of unreasonable restraint of trade under [Section 1](#) of the Sherman Act. [See, e.g., Blair v. Checker Cab Co., 219 Mich. App. 667, 674, 558 N.W.2d 439, 442 \(1996\).](#)

³ The Sherman Act provides that "every contract, combination ..., or conspiracy, in restraint of trade or commerce ... is hereby declared to be illegal." [15 U.S.C. § 1.](#)

⁴ For example, the court noted that the Sherman Act would apply if accreditation was denied to an institution simply because it did not buy textbooks from an agreed-upon supplier who provided special discounts for association members. [See Marjorie Webster, 432 F.2d at 655 n.21.](#)

commercial motive" by alleging that FIDER applied its accreditation [*835] standards in this case with a commercial motive, namely the commercial desire to insulate FIDER's members from competing with Savannah College [**15] in the recruitment of students and faculty and in obtaining grants, scholarships, endowments, and links to professional organizations that would arise from accreditation. (See 1st Am. Countercl. PP 80, 113, 115, 118.) Savannah College argues that resolution of FIDER's purpose, motive, and intent in applying its accreditation standards in this case is a question of fact that can only be considered after allowing discovery. See *Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 572, 581 (6th Cir. 1986)*(noting that "motive and intent play leading roles" when evaluating antitrust claims and that "discovery should proceed for further development of the facts").

Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, 128 F.3d 59 (2d Cir. 1997), is helpful in resolving this issue. The plaintiffs alleged that Hamilton College violated the Sherman Act by changing its residential policy to require all of its students to live in college-owned facilities and to purchase college-sponsored meal plans. The plaintiffs alleged that this policy was adopted for the commercial purpose of raising revenues and forcing the fraternity houses out of business, [**16] allowing the college to purchase the fraternity houses at below-market prices. See *Hamilton College, 128 F.3d at 66*. The college moved to dismiss, arguing that its residential policy was not "trade or commerce" under the Sherman Act, but was adopted in response to evidence that fraternities were dominating social life at the college, which was leading the most talented of Hamilton's prospective female students to enroll elsewhere. See id. The plaintiffs alleged that the college's stated purpose for the new policy was a mere pretext designed to obscure the college's purely commercial purpose. See id.

The Second Circuit cited *Marjorie Webster* with approval in considering whether the college's residential policy was "trade or commerce" governed by the Sherman Act. However, the court also emphasized that *Marjorie Webster* held that an incidental restraint of trade resulting from an accreditation decision was not "trade or commerce" under the Sherman Act "absent an intent or purpose to affect the commercial aspects of the profession...." *128 F.3d at 64* (quoting *Marjorie Webster, 432 F.2d at 654*); see also *United States v. Brown Univ., 5 F.3d 658, 667 (3d Cir. 1993)* [**17] (holding that the Sherman Act applies to the commercial aspects of higher education). The Second Circuit reversed the district court's dismissal of the complaint, concluding that "in the procedural posture of this case, [plaintiffs'] allegations must be accepted as true." *Hamilton College, 128 F.3d at 66*. Accordingly, because the plaintiffs alleged that the policy was adopted for a commercial purpose, it was reversible error to dismiss the complaint on the basis that the conduct did not involve "trade or commerce" under the Sherman Act. See id.

The Court finds that Savannah College has made a sufficient allegation of commercial intent to avoid dismissal for failure to state a claim on this ground. Savannah College has alleged that it was denied accreditation by FIDER because FIDER members sought to diminish competition that FIDER members and their institutions face for recruiting students and faculty and acquiring grants. (See 1st Am. Countercl. P 113). This is similar to the allegation of commercial purpose made by plaintiffs in *Hamilton College* and is sufficient to avoid dismissal. Accordingly, Plaintiff's motion to dismiss on this issue will be denied.

[**18] B. Anticompetitive effect

FIDER's second argument is that Savannah College has failed to properly allege an anticompetitive effect on the market from FIDER's decision to deny accreditation to Savannah College. *HN17* [+] Anticompetitive effect on the market is necessary unless the action at issue is found to be a *per se* violation of the Sherman Act. [*836] See, e.g., *Stratmore v. Goodbody, 866 F.2d 189, 194 (6th Cir. 1989)*.

HN18 [+] A *per se* analysis applies only to "agreements or actions which, because of their pernicious effect on competition and lack of any redeeming value, are conclusively presumed to be unreasonable and therefore illegal" *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing, Inc., 472 U.S. 284, 289, 105 S. Ct. 2613, 2617, 86 L. Ed. 2d 202 (1985)*(quoting *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*). FIDER's denial of accreditation to Savannah College does not fall in the category of an action that categorically has a "pernicious effect on competition and lack of any redeeming value" such that a conclusive presumption that the actions violated [**19] the Sherman Act should apply. No case of which this Court

is aware has ever held that denial of accreditation by any type of accrediting body is a *per se* violation of the Sherman Act. Accreditation has pro competitive effects ("redeeming value") in that it "enhance[s] competition and promotes efficiency by clarifying and informing choices that market actors must make. Clark C. Havighurst, *Accrediting and The Sherman Act*, 57-AUT L. & Contemp. Probs. 199, 200 (1994). "Cases demonstrate the existence of a general presumption that 'the public interest is served by the promotion of enhanced education and training requirements.'" Sun & Daniel, supra, at 476 (quoting *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n, Inc.*, 654 F. Supp. 716, 722 (N.D. Ga. 1986)).

In this case, Savannah College has not alleged any refusal to deal nor any joint action of any kind against FIDER other than the refusal to grant accreditation. The parties agree that FIDER accreditation has substantial redeeming value. (See 8/12/99 Hr'g Tr. at 26-27.) The Court has already concluded that in this case "FIDER followed its own procedures; those procedures were [**20] fair and impartial; FIDER's decision was supported by substantial evidence in the record upon which the FIDER Board of Trustees acted; and FIDER did not otherwise act in an arbitrary, capricious, or wrongful manner." FIDER, 39 F. Supp. 2d at 890-91.

The denial of accreditation by FIDER is not the type of naked restraint on the market to which a *per se* analysis applies. Accordingly, the Court concludes that a rule of reason analysis is appropriate in this case.

1. Market power in a relevant market

HN19[] Because the rule of reason applies, in order to state a claim under section 1 of the Sherman Act, Savannah College must allege an injury to competition in the marketplace. See, e.g., *Valley Prods. Co. v. Landmark*, 128 F.3d 398, 406 (6th Cir. 1997); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1422 (6th Cir. 1990). This requires Savannah College to allege that FIDER has substantial market power in a particular market, as **HN20**[] "[a] defendant must have market power before its conduct can be shown to have an adverse effect on competition." *Hand v. Central Transp., Inc.*, 779 F.2d 8, 11 (6th Cir. 1985) [**21] (per curiam); see also *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12, 26-29, 104 S. Ct. 1551, 1558, 1565-67, 80 L. Ed. 2d 2 (1984)(requiring proof of market power and holding that proof of a 30 percent share of the market, standing alone, is an insufficient basis from which to infer market power); *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 818 (6th Cir. 1997)(stating that "the market power requirement is important because, without market power, a seller cannot engage in the forcing necessary to establish a § 1 violation"); *Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1995)(stating that "substantial market power is an essential ingredient of every antitrust case under the Rule of Reason"). [*837]

HN21[] "Unless an antitrust plaintiff alleges the existence of market power, the complaint may be dismissed for failure to state a claim upon which relief can be granted." *Health First, Inc. v. Bronson Methodist Hosp.*, 1990 U.S. Dist. LEXIS 11007, No. 1:89-CV-1191, 1990 WL 157372, at *2 (W.D. Mich. Aug. 20, 1990)(citing Hand). **HN22**[] Market power "must be alleged in more than vague and conclusory terms" [**22] to prevent the dismissal of the complaint on a defendant's Rule 12(b)(6) motion." Id. (citing *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988)). As part of its allegation that FIDER has market power, Savannah College must plead "the existence of relevant product and geographic markets in order to establish a Section 1 claim." Id. (citing *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195 (6th Cir. 1982)); see also *Hand*, 779 F.2d at 11 (holding that "determining whether the defendants have market power ... can only be accomplished by first defining the relevant market"). **HN23**[] Dismissal is appropriate if the definition of the relevant market in the complaint is "implausible" or "not tenable." See *B.V. Optische v. Hologic, Inc.*, 909 F. Supp. 162, 172 (S.D.N.Y. 1995)(rejecting plaintiff's definition of the relevant market and dismissing the complaint because plaintiff failed to "offer an explanation" as to why the product market was defined "in such narrow terms"); *Staudinger v. Educational Comm'n for Foreign Med. Graduates*, 1994 U.S. Dist. LEXIS 10580, No. 92 Civ. 8071, 1994 WL 410875, [**23] at *3 (S.D.N.Y. Aug. 3, 1994)(dismissing complaint because relevant market was "not tenable")); *E. & G. Gabriel v. Gabriel Bros., Inc.*, 1994 U.S. Dist. LEXIS 9455, No. 93 CIV. 0894, 1994 WL 369147, at *3 (S.D.N.Y. July 13, 1994)(dismissing plaintiff's complaint because alleged market was "implausible").

Savannah College has failed to plead that FIDER has substantial market power in a relevant market. Savannah College's counterclaim defines the market as "accredited interior design education programs in the United States." (1st Am. Countercl. P 74.) If the relevant market is **accredited** interior design education programs, as opposed to interior design education programs generally, whether accredited or not, there is little question that FIDER had substantial market power, as it is the only organization that specifically accredits interior design education programs in the United States. (See *id.* P 81.)

However, the Court concludes that the relevant market is not **accredited** interior design education programs and that the relevant market is interior design education programs generally. Savannah College's own pleadings and arguments are inconsistent with Savannah College's [**24] narrow definition of the relevant market and are consistent with the Court's conclusion.

The Supreme Court has indicated that [HN24](#) the relevant market, for antitrust purposes, "is composed of products [or services] that have reasonable interchangeability for the purposes for which they are produced -- price, use, and qualities considered." [*United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S. Ct. 994, 1012, 100 L. Ed. 1264 \(1956\)](#); see also [*American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 1999 U.S. App. LEXIS 16861, 1999 WL 51 6283](#), at *12 (6th Cir. July 22, 1999)(noting that "the relevant market includes those products or services that are reasonably interchangeable with, as well as identical to, defendant's product"). The question facing the Court in *duPont* was whether the relevant market was cellophane, of which duPont had a 75 percent share, or all flexible packaging material, of which duPont's share was less than twenty percent. The Court concluded that the relevant market was all flexible packaging materials, finding that "despite cellophane's advantages it has [**25] to meet competition from other materials in every one of its uses" and that "a very considerable degree of functional interchangeability exists between these products." [*Id. at 399, 76 S. Ct. at 1009*](#). While not identical, the Court concluded that cellophane and other flexible packaging materials were "reasonably interchangeable by consumers for the same purposes" and were therefore [*838] part of the same relevant market under the Sherman Act. [*Id.* at 395, 76 S. Ct. at 1007](#).

Savannah College admitted at oral argument that it was competing with accredited schools for the same pool of students, faculty, and staff. (See 8/12/99 Hr'g Tr. at 29.) Savannah College suggested that it was "severely crippled" in its ability to compete because of perceived differences by students, faculty, and staff in the quality of accredited versus non-accredited interior design programs. (*Id.*) However, [HN25](#) "courts have repeatedly rejected efforts to define markets by price variances or **product quality variances**. Such distinctions are meaningless where the differences are actually a spectrum of price and quality differences." [*Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc. \(In re Super Premium Ice Cream Distribution Antitrust Litig.\)*, 691 F. Supp. 1262, 1268 \(N.D. Cal. 1988\)](#) [**26] (emphasis added)(rejecting attempt by plaintiff to define the relevant market as "premium ice creams," because "all grades of ice creams compete with one another for customer preference" and "the relevant market is ice cream generally"); see also [*Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 528 \(4th Cir. 1989\)](#)(holding that "better branded" furniture is not a relevant market distinct from the furniture market generally). Thus while students, faculty, and staff may consider whether a school is FIDER-accredited in deciding whether to attend or work at that school, the contention that accredited interior design programs actually constitute a legally separate market from non-accredited interior design programs is "implausible" and "not tenable" in light of Savannah College's admission that it has been and is continuing to compete for the same pool of students, faculty, and staff.

Because Savannah College has not alleged that FIDER has substantial market power in the relevant market of interior design programs generally, its antitrust counterclaim must be dismissed.

2. Injury to competition

Savannah College has also failed [**27] to allege an injury to competition. Savannah College alleges that the denial of accreditation by FIDER has injured the marketplace by artificially reducing the number of educational choices for students, the number of teaching opportunities for professors, and the amount of competition for grants

and scholarships, all resulting in a smaller output of qualified design school graduates. (See 1st Am. Countercl. PP 114-18.)

During oral argument, this Court opined that [*Sanjuan v. American Board of Psychiatry and Neurology, Inc., 40 F.3d 247 \(7th Cir. 1995\)*](#) seemed to be the case most analogous to the instant case. In an opinion written by a former professor of **antitrust law**, Frank H. Easterbrook, the Seventh Circuit held that the American Board of Psychiatry and Neurology's decision to deny certification to two doctors could not, as a matter of law, "amount to an exercise of market power, which entails cutting back output in the market and thus driving up prices to consumers." [*Sanjuan, 40 F.3d at 251*](#). The Seventh Circuit noted that the doctors "already are sellers in the market for psychiatric services; turning down their applications for certification [**28] does not remove their output from the market and therefore does not raise prices to consumers." *Id.* Similarly, Savannah College or any other school is free to offer an interior design program without FIDER accreditation. In fact, Savannah College had a growing interior design program for many years prior to its voluntary decision to apply for FIDER accreditation. With refreshing candor, Savannah College's lawyer acknowledged during oral argument that if this District Court were to follow the Seventh Circuit's decision in [*Sanjuan*](#), this Court would have to grant FIDER's motion to dismiss. (See 8/12/99 Hrg Tr. at 32.)

In essence, the injuries alleged by Savannah College are all injuries that result from the stigma and loss of prestige allegedly [*839] suffered by Savannah College because of the denial of accreditation by FIDER. According to Savannah College, some students, teachers, and business organizations choose not to attend, work for, or donate money to Savannah College because of the denial of accreditation by FIDER.

It is well settled that [**HN26**](#) stigma or loss of prestige to an entity that is denied accreditation or certification of its service or product does not constitute [**29] an injury to competition under the Sherman Act. For example, in [*Massachusetts School of Law at Andover, Inc. v. American Bar Association, 107 F.3d 1026 \(3d Cir. 1997\)*](#), the plaintiff law school was denied accreditation as an approved law school by the ABA. In granting summary judgment in favor of the defendant, the Third Circuit held that "[a] loss of prestige resulting from a refusal to approve a product or service does not alone make out an antitrust claim." [*Massachusetts School of Law, 107 F.3d at 1037-38*](#).

In [*Consolidated Metal Products, Inc. v. American Petroleum Institute, 846 F.2d 284 \(5th Cir. 1988\)*](#), the defendant trade association delayed its decision whether or not to certify plaintiff's product for almost three years. Plaintiff alleged a conspiracy under the Sherman Act by the members of the trade association, several of whom were competitors of plaintiff. The Fifth Circuit held that even if product certification "is very important to buyer acceptance," denial of certification by a trade association does not constitute an injury to competition unless there is proof that "customers were coerced ... or otherwise constrained [**30] to buy only [certified] products." [*Consolidated Metal Prods., 846 F.2d at 295-96*](#).

[*Zavaletta v. American Bar Association, 721 F. Supp. 96 \(E.D. Va. 1989\)*](#)(mem. op.) held that the ABA's denial of accreditation to certain schools did not have any anticompetitive effect under the Sherman Act. The Court held that, other than stigma and loss of prestige suffered by an individual law school resulting from a denial of accreditation, the only effects in the market were caused by the independent decisions by many states to adopt the ABA accreditation list as their own. The stigma and loss of prestige suffered by the law school was insufficient as a matter of law to constitute injury to competition. See [*Zavaletta, 721 F. Supp. at 98*](#).

In [*Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 \(7th Cir. 1989\)*](#), another case authored by Judge Easterbrook, the plaintiffs alleged that an American Academy of Ophthalmology press release characterizing radial keratotomy surgery for myopia as "experimental" violated [section 1](#) of the Sherman Act. The plaintiffs argued that the press release was issued to restrain the ability [**31] of ophthalmologists to perform this surgery. In holding that there was no injury to competition under the Sherman Act, Judge Easterbrook cited [Consolidated Metal Products](#) with approval for the proposition that [**HN27**](#) "when a trade association provides information ([or] gives a seal of approval) but does not constrain others to follow its recommendations, it does not violate the antitrust laws." [*Schachar, 870 F.2d at 399*](#). The court went on to note that although the press release almost certainly had some effect on the demand for this surgery, the press release merely "appealed to consumers' (and third-party

payors') better judgment" and that "the plaintiffs had no entitlement to consumers' favor." *Id. at 400*. The court explained that "if such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech -- the marketplace of ideas." *Id.*

These cases are analogous to the instant case. In this case, the effects on the market alleged by Savannah College would be caused by the voluntary decision of students, teachers, or business organizations not to do business with Savannah College [**32] because it was denied FIDER accreditation. Even without FIDER accreditation, Savannah College is free to continue to offer an interior design program, and has [*840] done so. There has been no restriction of output.

Savannah College relies on two cases, *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 1999 WL 435807 (10th Cir. 1999), and *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), for the proposition that an injury to a particular competitor can constitute injury to competition for the purpose of stating a claim under Section 1 of the Sherman Act. However, to the extent these cases arguably stand for the proposition asserted by Savannah College, both cases are distinguishable. *Full Draw* involved a *per se* violation for which proof of adverse effect on competition and substantial market power are not required, and is therefore not applicable to this case, which involves rule of reason analysis. See *Full Draw*, 1999 WL 435807, at *4. *Feeser* involved a price discrimination claim under section 2 of the Clayton Act and is therefore wholly inapplicable to Savannah [**33] College's claim under section 1 of the Sherman Act. See *Feeser*, 909 F.2d at 1532-33.

"It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors'" and that an injury suffered only by the antitrust plaintiff is insufficient as a matter of law to prove anticompetitive effect in the market. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224, 113 S. Ct. 2578, 2588-89, 125 L. Ed. 2d 168 (1993)(quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962)); see also *Langenderfer*, 917 F.2d at 1422, 1431 (same); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 812 (9th Cir. 1988)(holding that an injury to an antitrust plaintiff alone is not sufficient to prove injury to competition).

Savannah College has failed to allege injury to anyone or anything other than itself. Therefore, Savannah College has failed to allege an anticompetitive effect of the denial of accreditation necessary to avoid dismissal.

3. Further Discovery and Amendment of Complaint

This Court seriously considered allowing Savannah [**34] College some discovery to establish a relevant market and anticompetitive effect. When this Court asked the College's lawyer what discovery the College would need in order have to show a relevant market and injury to competition, counsel's answer had nothing to do with showing the market or injury to competition. Rather, the College's lawyer requested, once again, discovery to show that the College was not treated fairly in comparison with other schools that had applied for accreditation. In counsel's words, although the standards are not challenged on their face, "the fix was in." (8/12/99 Hrg Tr. at 27.) The "fix was in" argument was disposed of by this Court in its prior decision. Furthermore, as Judge Easterbrook said in *Schachar*, even if FIDER was wrong in denying Savannah College accreditation, "the remedy is not antitrust litigation but more speech -- the marketplace of ideas." *Schachar at 400*.

This Court does not believe that further discovery or further amendment of Savannah College's Counterclaim will enable Savannah College to submit a legitimate claim under the antitrust laws. Accordingly, the Court will dismiss Savannah College's antitrust counterclaim with prejudice. [**35] ⁵

Conclusion

⁵ The Court, therefore, does not reach FIDER's third argument that Savannah College has not alleged concerted action by the member schools that are part of FIDER.

73 F. Supp. 2d 829, *840 (1999 U.S. Dist. LEXIS 14194, **35

For the foregoing reasons, Plaintiff's motion to dismiss counterclaims will be granted.

An Order consistent with this Opinion will be entered.

Dated: SEP - 3 1999

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons stated in the Opinion entered on this date,

IT IS HEREBY ORDERED that Plaintiff's Motion to Dismiss Counterclaims (docket no. 51) and Plaintiff's Motion to Dismiss First Amendment to Count V of Defendant's Counterclaims (docket no. 67) are **GRANTED**. Defendant's counterclaims are hereby **DISMISSED WITH PREJUDICE**.

This case is concluded.

Dated: SEP - 3 1999

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

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Merck-Medco Managed Care, LLC v. Rite Aid Corp.

United States Court of Appeals for the Fourth Circuit

June 8, 1999, Argued ; September 7, 1999, Decided

No. 98-2847

Reporter

1999 U.S. App. LEXIS 21487 *; 1999-2 Trade Cas. (CCH) P72,640

MERCK-MEDCO MANAGED CARE, LLC, Plaintiff-Appellant, v. RITE AID CORPORATION; EAGLE MANAGED CARE CORPORATION, a Subsidiary of Rite Aid Corporation; GIANT FOOD, INC.; EPIC PHARMACY NETWORK, INCORPORATED; NEIGHBORCARE PHARMACIES, INCORPORATED, Defendants-Appellees, NATIONAL PRESCRIPTION ADMINISTRATORS, INCORPORATED, Movant.

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: [1999 U.S. App. LEXIS 36612](#).

Prior History: Appeal from the United States District Court for the District of Maryland, at Baltimore. Benson E. Legg, District Judge. (CA-96-499-L).

Disposition: AFFIRMED.

Core Terms

pharmacies, conspiracy, network, antitrust, summary judgment, join, conspire, tends, independent action, prescription, forecast, reimbursement rate, present evidence, district court, factors, summary judgment motion, conversations, conscious, reasonable inference, antitrust case, negotiations, restraint of trade, act independently, advertisement, manufacturers, participated, practices, discount, asserts, quantum

LexisNexis® Headnotes

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

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

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

HN1 [blue icon] Summary Judgment, Entitlement as Matter of Law

The court of appeals reviews a summary judgment determination by a district court de novo. Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). Movants bear the burden of initially coming forward and demonstrating the absence of a genuine issue of material fact. When making a summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. Movants can bear their burden either by presenting affirmative evidence, or by demonstrating that the non-movant's evidence is insufficient to establish its claim.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2 [blue icon] Summary Judgment, Evidentiary Considerations

Once movants have met their burden of demonstrating the absence of a genuine issue of material fact regarding a summary judgment motion, the non-movants must then affirmatively demonstrate that there is a genuine issue of material fact which requires trial. There is no issue for trial unless there is sufficient evidence favoring non-movants for a jury to return a verdict for them. The standard for summary judgment therefore mirrors the standard for judgment as a matter of law under [Fed. R. Civ. P. 50\(a\)](#), viz. a trial court must grant a judgment if, under the governing law, there can be but one reasonable conclusion as to the verdict. A trial judge faced with a summary judgment motion must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.

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

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

HN3 [blue icon] Summary Judgment, Supporting Materials

In opposing summary judgment, the non-moving party must set forth such facts as would be admissible in evidence. [Fed. R. Civ. P. 56\(e\)](#). Inadmissible hearsay cannot be used to oppose summary judgment.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

[**HN4**](#) Regulated Practices, Price Fixing & Restraints of Trade

While the summary judgment standard of [*Fed. R. Civ. P. 56*](#) for an antitrust suit is the same as that for any other action, the application of [*Fed. R. Civ. P. 56*](#) to antitrust cases is somewhat unique. The inferences to be drawn from underlying facts on summary judgment must be viewed in a light most favorable to the non-movant. But [**antitrust law**](#) limits the range of permissible inferences from ambiguous evidence in a [§ 1](#) case under the Sherman Antitrust Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[**HN5**](#) Regulated Practices, Price Fixing & Restraints of Trade

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[**HN6**](#) Sherman Act, Claims

To prove a violation of [§ 1](#) of the Sherman Antitrust Act, plaintiff must establish: first, that there are at least two persons acting in concert and, second, that the restraint complained of constitutes an unreasonable restraint on trade or commerce.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > 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

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 > Per Se Violations

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

[**HN7**](#) Regulated Practices, Price Fixing & Restraints of Trade

Certain restraints on trade are per se violations of [§ 1](#) of the Sherman Antitrust Act, which presume that the questionable conduct has anticompetitive effects without comprehensive inquiry into whether the concerted action produced adverse, anticompetitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

[**HN8**](#) Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A plaintiff alleging conspiracy in restraint of trade must demonstrate a conscious commitment to a common scheme designed to achieve an unlawful objective. Monsanto requires "something more" than independent action, and must rise to the level of a unity of purpose or a common design and understanding, or a meeting of minds.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

HN9 [down arrow] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A party may demonstrate an agreement in restraint of trade by direct evidence or circumstantial evidence. When relying upon circumstantial evidence, the range of permissible inferences that the court may draw from the evidence is limited by the plausibility of the plaintiff's theory and the danger associated with such inferences. A plaintiff may have a plausible theory, but the danger to the market or innocent participants in the market may be so great as to warrant a limitation of the inferences available to the plaintiff. Consequently, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN10 [down arrow] **Remedies, Damages**

To withstand a motion for summary judgment, a plaintiff seeking damages for a violation of [§ 1](#) of the Sherman Antitrust Act must present evidence that tends to exclude the possibility that the alleged competitors acted independently.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence

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

HN11 [down arrow] **Regulated Practices, Price Fixing & Restraints of Trade**

On summary judgment motions in antitrust cases, when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[**HN12**](#) [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

When there is no direct evidence of antitrust activity, an agreement to restrain trade may be inferred from other conduct.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > Defenses > Illegal Bargains

[**HN13**](#) [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

There are two possible judicial interpretations when conduct to restrain trade is ambiguous. The first interpretation is that the suspected agreement may be found consistent with the independent conduct or a legitimate business purpose. The second interpretation is that the agreement may be consistent with an illegal agreement. To prove a violation through ambiguous conduct, proof must be offered that tends to exclude the first interpretation.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[**HN14**](#) [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

Given the Monsanto/Matsushita standard, a plaintiff must discharge a twofold evidentiary burden to prove conduct in restraint of trade. First, they must establish that defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective. Second, plaintiff must bring forward evidence that excludes the possibility that the alleged coconspirators acted independently or based upon legitimate business purpose.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[**HN15**](#) [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

Regarding a case alleging a conspiracy in restraint of trade, the quantum of evidence required to exclude the possibility of independent action or legitimate business purposes is directly related to the plausibility of the plaintiff's theory. If the plaintiff advances a strong, plausible theory then the quantum of evidence tending to exclude independent action is not as great as if the plaintiff advances a weak or implausible theory. Likewise, when there is a risk that the threat of antitrust liability will chill legitimate, procompetitive conduct by market participants, the quantum of evidence is also high.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

[**HN16**](#) [blue icon] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

An agreement to boycott may be inferred from the business conduct of the parties. This pattern of uniform business practices is commonly referred to as "conscious parallelism. Courts may find consciously parallel behavior where a plaintiff shows: (1) that the defendants' behavior was parallel; and (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making process.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN17 [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

Parallel behavior alone is not enough to prove a conspiracy.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN18 [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

In order to infer a conspiracy, conscious parallelism must be accompanied by "plus factors."

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN19 [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

If a party establishes the existence of plus factors, a rebuttable presumption of conspiracy arises. Viewing all the evidence and taking the plus factors into consideration, the court must then determine if the evidence tends to exclude the possibility that the alleged coconspirators acted independently or based upon legitimate business purposes.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Inferences & Presumptions > Inferences

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

HN20 [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

A court should not tightly compartmentalize the evidence put forward by the nonmovant regarding a motion for summary judgment in a case alleging the existence of an agreement in restraint of trade, but instead should analyze it as a whole to see if together it supports an inference of concerted action.

Counsel: ARGUED: James Patrick Tallon, SHEARMAN & STERLING, New York, New York, for Appellant.

Lewis A. Noonberg, PIPER & MARBURY, L.L.P., Washington, D.C.; Glenn Alfredo Mitchell, STEIN, MITCHELL & MEZINES, Washington, D.C., for Appellees.

ON BRIEF: Kenneth M. Kramer, Daniel D. Edelman, SHEARMAN & STERLING, New York, New York; Thomas M. Wilson, III, John B. Isbister, Scott Patrick Burns, TYDINGS & ROSENBERG, L.L.P., Baltimore, Maryland, for Appellant.

Leonard L. Gordon, Kenneth G. Starling, Susan H. Pope, PIPER & MARBURY, L.L.P., Washington, D.C., for Appellees Rite Aid and Eagle; David U. Fierst, Andrew Beato, STEIN, MITCHELL & MEZINES, Washington, D.C., for Appellee Giant Food; Michael F. Brockmeyer, Jay I. Morstein, PIPER & MARBURY, L.L.P., Baltimore, Maryland,

for Appellee Epic; Ward B. Coe, III, Pamela M. Conover, WHITEFORD, TAYLOR & PRESTON, L.L. [*2] P., Baltimore, Maryland, for Appellee NeighborCare.

Judges: Before MICHAEL, Circuit Judge, HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation, and FRIEDMAN, United States District Judge for the Eastern District of Virginia, sitting by designation.

Opinion

OPINION

PER CURIAM:

The managed health care industry has drastically changed the way medical and pharmaceutical services are dispensed in this country. Where individuals once stopped at their local drug store to fill a prescription, people now shop almost exclusively in those stores which service the health benefit plans provided by their employers. Competition is keen over what company will administer an employer's health plan.

In September 1995, the State of Maryland awarded to the appellant, Merck-Medco Managed Care, Inc. ("Medco"), a contract to manage the prescription drug benefits program for State employees and retirees (the "Maryland Plan" or the "Plan"). Under the terms of the award, Medco was required to assemble an extensive statewide network of pharmacies which would agree to fill prescriptions at a steeply discounted rate.

The Maryland Plan was scheduled to go [*3] "live" on January 1, 1996. By mid-December 1995, the State had grown concerned about Medco's ability to put together a satisfactory network in time. On December 20, 1995, the State issued an ultimatum to Medco, requiring Medco to submit a certified list of participating pharmacies within three days. Because Medco failed to assemble a network satisfactory to the State, the State terminated Medco's contract on December 27, 1995. Ultimately, the State rebid the contract and awarded it to one of Medco's competitors.

The appellees own or represent approximately one-half of the retail pharmacies in Maryland. Four of the appellees were engaged in the retail pharmacy business in 1995. Rite Aid operated 180 pharmacies in Maryland. Giant, a supermarket, had 76 stores in Maryland and each included a pharmacy. NeighborCare operated 20 pharmacies in Maryland, all of which were located in hospitals or medical centers. EPIC is an umbrella organization that represented the interests of over 200 independently owned pharmacies. The fifth appellee, Eagle, is a wholly owned subsidiary of Rite Aid and a direct competitor of Medco. In partnership with EPIC, Eagle was an unsuccessful bidder for the Maryland [*4] contract.

Both Eagle and Medco are Pharmacy Benefits Managers ("PBM"). PBMs were created in response to the rising costs of pharmaceutical products. They seek to keep prices down by pooling claims. A PBM will contract with a plan sponsor, such as the State of Maryland, and for a fee, will manage the drug benefits program for the sponsor's employees. The PBMs put together a network of participating pharmacies. To be included in the network, the pharmacies must agree to dispense drugs at a discount. For each prescription filled, the PBM reimburses the pharmacy under a formula based on the drug's average wholesale price ("AWP") less a percentage, plus a dispensing fee. For the Maryland Plan, the network pharmacies were to be reimbursed at a rate of AWP minus 15% plus \$ 2.00. The PBM that can offer the greatest price discount gains an advantage in winning the contracts of large employers.

Pharmacies can decide to either join or not join a network and numerous factors influence their decision. These factors include the number of people covered by the plan, the pharmacy's market share, the PBM's reputation for prompt payment and whether a particular network is "open" or "closed." "Open" [*5] networks permit any pharmacy to enter or exit at any time. "Closed" networks fix the membership at a certain date and no other

pharmacies can join afterwards. Pharmacies are more willing to accept deep discounts in a "closed" network because they are more certain of their market share. The incentive to join an "open" network comes from an increase in volume of customers to the pharmacy who typically buy other incidental items for sale at the pharmacy, like magazines and non-prescription drugs. Increased volume is difficult to measure.

Some PBMs, like Medco, fill prescriptions by mail and, therefore, are not only administering the network but are also directly competing with the pharmacies in the network. Medco, as a subsidiary of Merck, a very large drug manufacturer, has a substantial advantage in discounting the price of prescription drugs. This practice by drug manufacturers has prompted retail pharmacies to file a suit in federal court in Chicago alleging price fixing, conspiracy and other antitrust violations. Hundreds of similar lawsuits from around the country have been consolidated before the United States District Court for the Northern District of Illinois.

During the time [*6] leading up to the filing of this lawsuit, the retail pharmacies in Maryland were not only attempting to determine if they should become part of Medco's network, but they were also attempting to have fair pricing laws enacted and attempting to carve out pharmacy benefits from a transfer of the state Medicare population into managed care.

After receiving bids from PBMs, the State awarded the contract to Medco on September 13, 1995, based on its representation that over 800 pharmacies would be members of the open network. Medco made this prediction without contacting any of the pharmacies and provided a list to the State of the pharmacies Medco expected to be in the network. This list included all appellees except NeighborCare. The contract required Medco to assemble participation by 86.3% of Maryland's pharmacies by January 1, 1996. Medco was unsuccessful in assembling the network because over half of Maryland's pharmacies refused to participate in the plan. Medco accused Rite Aid of leading a conspiracy to sabotage Medco's network.

On February 20, 1996, Medco filed the instant suit against appellees, alleging that they jointly agreed to sabotage the Plan by boycotting Medco's network [*7] and that appellees' actions constituted a violation of § 1 of the Sherman Antitrust Act and the Maryland Antitrust Act. Section 1 of the Sherman Act prohibits any conspiracy the object of which is to restrain trade or commerce.

After extensive discovery, the parties filed cross-motions for summary judgment, and after holding four hearings, the district court granted the appellees' motion for summary judgment on the antitrust claims and granted the appellant's motion for summary judgment as to some ancillary claims. In an 83-page decision, the district court concluded that Medco's evidence did not tend to exclude the possibility of independent conduct on the part of the appellees and the evidence was, therefore, insufficient to support a reasonable inference of a conspiracy to violate the antitrust laws.

Medco alleges that numerous actions by appellees indicate a conspiracy, such as: an advertisement placed in the Baltimore Sun and Washington Post by Rite Aid on December 21, 1995; various conference calls between the different pharmacies; denials of communication; statements by corporate officers; and, reactions of appellees. Medco catalogs over 450 instances of contact between defendants [*8] and others from September 11, 1995, to December 27, 1995.

In its answer, Rite Aid alleged that its Vice President of Government and Trade Relations, Jim Krahulec, did not discuss the Maryland Plan with any of the other appellees. In an unrelated case, Krahulec signed a Federal Trade Commission consent decree promising that he would not attend a formal or informal meeting of representatives of pharmacy firms that he expects, or reasonably should expect, will facilitate communications concerning the firms' participation in managed care benefit plans. Medco produced evidence that Krahulec participated in conversations with other pharmacies in which discussion of the Maryland plan occurred.

Discovery produced evidence that on September 15, 1995, Rite Aid's Senior Vice President, Joel Feldman, called Giant's Assistant Director of Managed Care Programs, Gary Wirth, and informed him that Medco received the contract. There was also a conference call on September 15 between EPIC and Rite Aid and another on September 17 involving Rite Aid, NeighborCare and others. Other conference calls occurred on September 18

involving Krahulec (Rite Aid), Giant, NeighborCare and representatives from the [*9] National Association of Chain Drug Stores; on September 19 involving Krahulec and NeighborCare; and, on September 20 involving Rite Aid and Giant.

I. STANDARD OF REVIEW

HN1 [↑] The court reviews a summary judgment motion by a district court *de novo*. Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See [Fed. R. Civ. P. 56\(c\)](#); [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Defendants bear the burden of initially coming forward and demonstrating the absence of a genuine issue of material fact. See [Celotex Corp. v. Catrett](#), 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); [Ross v. Communications Satellite Corp.](#), 759 F.2d 355, 364 (4th Cir. 1985). When making the summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. See [Anderson](#), 477 U.S. at 255. Defendants can bear their burden either by presenting affirmative evidence, or by demonstrating that Medco's evidence is insufficient to [*10] establish its claim. See [Celotex Corp.](#), 477 U.S. at 331 (Brennan, J., dissenting).

HN2 [↑] Once defendants have met their burden, Medco must then affirmatively demonstrate that there is a genuine issue of material fact which requires trial. See [Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.](#), 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). There is no issue for trial unless there is sufficient evidence favoring Medco for a jury to return a verdict for it. See [Anderson](#), 477 U.S. at 250. The standard for summary judgment therefore mirrors the standard for judgment as a matter of law under [Fed. R. Civ. P. 50\(a\)](#), viz. a trial court must grant a judgment if, under the governing law, there can be but one reasonable conclusion as to the verdict. See [Anderson](#), 477 U.S. at 250. A trial judge faced with a summary judgment motion "must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." [Id. at 252](#).

HN3 [↑] In opposing summary judgment, the non-moving party must "set [*11] forth such facts as would be admissible in evidence." [Fed. R. Civ. P. 56\(e\)](#). Inadmissible hearsay cannot be used to oppose summary judgment. See [Greensboro Prof. Fire Fighters Ass'n v. Greensboro](#), 64 F.3d 962, 967 (4th Cir. 1995).

At oral argument, counsel for Medco succinctly stated the issues in this appeal -- what is Medco's burden under the summary judgment standard and did Medco meet its burden?

II. SUMMARY JUDGMENT IN ANTITRUST CASES

HN4 [↑] While the summary judgment standard of [Fed. R. Civ. P. 56](#) for an antitrust suit is the same as that for any other action, the application of [Rule 56](#) to antitrust cases is somewhat unique. The inferences to be drawn from underlying facts on summary judgment must be viewed in a light most favorable to Medco. See [Matsushita](#), 475 U.S. at 587. "But **antitrust law** limits the range of permissible inferences from ambiguous evidence in a § 1 case . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* (citing [Monsanto Co. v. Spray-Rite Service Corp.](#), 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)); [*12] see also [Thompson Everett, Inc. v. National Cable Advertising, L.P.](#), 57 F.3d 1317, 1323 (4th Cir. 1995) ("Inferences which may be drawn vary from one substantive area of the law to another. . . .").

Section 1 of the Sherman Antitrust Act states in relevant part:

Every contract, combination in the form of trust or other wise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal.

HN5 [↑] [15 U.S.C. § 1 \(West 1997\)](#). **HN6** [↑] To prove a violation of this statute, Medco must establish: first, that there are at least two persons acting in concert and, second, that the restraint complained of constitutes an unreasonable restraint on trade or commerce. See [Estate Constr. Co. v. Miller & Smith Holding Co., Inc.](#), 14 F.3d 213, 220 (4th Cir. 1994).

A. Unreasonable Restraint on Trade

Medco must establish that an agreement among appellees not to participate in Medco's plan would be an unreasonable restraint on trade.

HN7 Certain restraints on trade are *per se* violations "which presume[] that the questionable conduct has anticompetitive effects without comprehensive [*13] inquiry into whether the concerted action produced adverse, anticompetitive effects." *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 118 (3rd Cir. 1999); see also *Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 708 (4th Cir. 1991) ("Certain forms of agreements, such as varieties of group boycotts, have been classified as *per se* violations."). Medco asserts a *per se* violation of § 1 and appellees do not contest this characterization.¹

[*14] Because Medco has alleged a *per se* violation of § 1, it is unnecessary for the court to evaluate appellees' conduct under the rule of reason which involves a case-by-case determination of whether the methods are anticompetitive and should be prohibited. See *id.*; see also *Oksanen*, 945 F.2d at 709 (discussing rule of reason test).

B. Conspiracy

HN8 A plaintiff alleging conspiracy must demonstrate a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1324 (4th Cir. 1995) (quoting *Monsanto*, 465 U.S. at 764). Monsanto requires "something more" than independent action, and must rise to the level of "a unity of purpose or a common design and understanding, or a meeting of minds." *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 805 (4th Cir. 1989) (quoting *Monsanto*, 465 U.S. at 764).

HN9 A party may demonstrate an agreement by direct evidence or circumstantial evidence. When relying upon circumstantial evidence, the range of permissible inferences [*15] that the court may draw from the evidence is limited by the "plausibility of the plaintiff's theory and the danger associated with such inferences." *In re Baby Food*, 166 F.3d at 124. A plaintiff may have a plausible theory, but the danger to the market or innocent participants in the market may be so great as to warrant a limitation of the inferences available to the plaintiff. Consequently, "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).

Therefore, **HN10** to withstand 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 competitors acted independently." *Id.* The heart of this case is to what degree Medco must produce evidence tending to exclude independent action by defendants and whether Medco has presented such evidence. The standards for summary judgment and the limits on inferences in antitrust lawsuits are often quoted but not universally agreed upon. The Supreme [*16] Court has considered numerous antitrust appeals and through *Matsushita*, *Monsanto and Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992), has established a framework within which to analyze antitrust summary judgment motions.

1. Matsushita and Monsanto

Matsushita involved a suit filed by American TV manufacturers alleging a 20-year conspiracy by Japanese TV manufacturers to unfairly price their products in America in violation of the Sherman Antitrust Act. The American manufacturers alleged that the intent of the conspiracy was to force the Americans out of business by fixing prices

¹ We believe that the characterization of appellees' alleged conduct as a *per se* violation of § 1 is appropriate. Most boycotts have been considered *per se* violations of § 1. Only boycotts having valid business justifications and procompetitive effects may possibly be considered under a rule of reason analysis. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). If appellees committed the acts alleged, the state's cost for administering the Plan would have increased and competition among PBMs would have been adversely affected, thereby resulting in an unfair restraint of trade.

below the market level in the United States. The losses sustained in the American market were offset by monopoly profits in the Japanese markets.² The Supreme Court concluded that "to survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." [475 U.S. at 588](#). The Supreme Court borrowed the "tends to exclude the possibility" language from the Court's earlier [*17] *Monsanto* decision.

Monsanto was a vertical antitrust case. The plaintiff, Spray-Rite, alleged that Monsanto, an agricultural herbicide manufacturer, along with its distributors, fixed the price of herbicide and unfairly prejudiced the plaintiff, a former distributor of Monsanto's products. The case went to trial and Spray-Rite won a \$ 10 million judgment that was upheld on appeal. The Supreme Court affirmed the judgment but on different grounds than those of the district or appellate courts. The Supreme Court held that "something more than evidence of complaints [about price fixing] is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." [Monsanto, 465 U.S. at 764](#).

Appellant attempts to distinguish *Monsanto* and *Matsushita* [*18] on the grounds that one was a vertical antitrust case and the other was a horizontal antitrust case.³ We do not agree that the cases turned on this distinction because the Supreme Court in *Matsushita*, decided after *Monsanto*, specifically held that in the absence of direct evidence of a conspiracy, "to survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 at 588. The Court later stated that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*

[*19] 2. *Eastman Kodak Company v. Image Technical Services*

Eastman Kodak did not involve a conspiracy claim under § 1 of the antitrust act as did *Monsanto* and *Matsushita*. In *Eastman Kodak*, the Court considered whether Eastman Kodak's market power was sufficient to find it guilty of "tying." Tying deals with the ability of a market participant to condition the sale of product A on the purchase of product B. A market participant can violate § 1 of the Sherman Antitrust 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." [Eastman Kodak, 504 U.S. at 462](#) (quoting [Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 \(1969\)](#)).

Kodak did not dispute that it began a program to condition the sale of replacement parts for its copiers on the use of Kodak service and repair programs. This policy adversely affected the independent servicers of Kodak equipment. Kodak also did not deny that its arrangement affected a substantial volume of commerce. However, Kodak denied that its practices [*20] were an unlawful tying arrangement. Kodak asserted that competition in a market foreclosed the finding of monopoly power in certain instances. Kodak further argued that the court's failure to adopt its view would deter procompetitive behavior. See [504 U.S. at 467](#).

Kodak relied on *Matsushita* in attempting to convince the court that if Kodak had a plausible economic theory, then the plaintiffs' claims could not make sense; thus, entitling Kodak to summary judgment. In discussing Kodak's summary judgment burden, the Court rejected Kodak's proposed presumption that "equipment competition precludes any finding of monopoly power in derivative aftermarkets."⁴ [Id. at 466](#). The Court explained:

² This agreement by Japanese manufacturers is called a horizontal antitrust claim because it deals with manufacturers banding together to unlawfully control a price.

³ By making this distinction, appellant attempts to convince the court that because *Monsanto* was a vertical antitrust case, it does not apply to horizontal antitrust cases. Therefore, we cannot rely on it to analyze the horizontal antitrust dispute between Medco and appellees.

⁴ Kodak presented no statistical evidence in support of its economic theory.

The . . . requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury [*21]

Id. at 468.

Because of the Court's response to Kodak's argument, Medco relies on *Eastman Kodak* to dismiss its requirement under *Monsanto* and *Matsushita* to produce evidence that tends to exclude that the defendants acted independently. However, we do not read *Eastman Kodak* as reaching that far. The Court was not dealing with a § 1 conspiracy in *Eastman Kodak* as it was in *Monsanto* and *Matsushita*. It was dealing with monopoly power under § 2 of the Antitrust Act. The Court did not overrule *Monsanto* and *Matsushita* with this statement, and it would be a mistake to dismiss the requirements imposed on Medco due to the inherent dangers to the market and innocent parties associated with a conspiracy case.

Our conclusion that *Eastman Kodak* did not overrule or modify the requirements explained in *Matsushita* and *Monsanto* is further bolstered by Fourth Circuit precedent. In [*22] *Thompson Everett*, this court recognized that *HN11* [↑] "on summary judgment motions in antitrust cases, the Supreme Court instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence." 57 F.3d at 1323; see also *Blomkest Fertilizer, Inc. v. Potash Corporation of Saskatchewan, Inc.*, 176 F.3d 1055, 1074 (8th Cir. 1999), vacated, reh'*g en banc* granted ("*Eastman Kodak* was not concerned with the sufficiency of the evidence of conspiratorial acts") (Beam, J., dissenting); *Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733 (6th Cir. 1999) (relying on *Matsushita* to grant summary judgment in § 1 case without discussing *Eastman Kodak*); *RE/MAX International, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1999 WL 184350 (6th Cir. 1999) (relying on principles of *Matsushita* and *Monsanto* to reverse district court's grant of summary judgment on § 1 claim); *In re Baby Food Antitrust Litigation*, 166 F.3d 112 [*23] (same as *Super Sulky*).

Therefore, Medco must forecast evidence which tips the balance in favor of a conspiracy. If it is as likely that the conduct was lawful as it was conspiratorial, it is improper to let the case proceed to trial.

In *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*, 924 F.2d 539 (4th Cir. 1990), we described the antitrust summary judgment procedure. *HN12* [↑] When there is no direct evidence of antitrust activity, "an agreement to restrain trade may be inferred from other conduct." *Id.* at 542.

HN13 [↑] There are two possible judicial interpretations when the conduct to restrain trade is ambiguous. The first interpretation is that the "suspected agreement may be found consistent with the independent conduct or a legitimate business purpose." *Id.* The second interpretation is that the agreement may be consistent with an illegal agreement. "To prove a violation through ambiguous conduct, proof must be offered that tends to exclude the first interpretation." *Id.* We concluded,

HN14 [↑] given the *Monsanto/Matsushita* standard, [plaintiffs] must discharge a twofold evidentiary burden. First, they must establish that [defendants] [*24] had a "conscious commitment to a common scheme designed to achieve an unlawful objective." Second, [plaintiffs] must bring forward evidence that excludes the possibility that the alleged coconspirators acted independently or based upon legitimate business purpose.

Id. at 543.

The district court correctly noted that *HN15* [↑] the quantum of evidence required to exclude the possibility of independent action or legitimate business purposes is directly related to the plausibility of the plaintiff's theory. Compare *Matsushita*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348, and *Super Sulky*, 174 F.3d 733, with *Monsanto*, 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464, and *Petrucci's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1242-43 (3d Cir.), cert. denied, 510 U.S. 994 (1993). If the plaintiff advances a strong, plausible

theory then the quantum of evidence tending to exclude independent action is not as great as if the plaintiff advances a weak or implausible theory. Likewise, when there is a risk that the threat of antitrust liability will chill legitimate, procompetitive [*25] conduct by market participants, the quantum of evidence is also high.

C. Conscious Parallelism

HN16 [↑] An agreement to boycott may be inferred from the business conduct of the parties. This pattern of uniform business practices is commonly referred to as "conscious parallelism." See ABA Section of **Antitrust Law**, **Antitrust Law** Developments, p. 8 (4th ed. 1997). The Court of Appeals for the Third Circuit has explained that courts may find consciously parallel behavior where a plaintiff shows: "(1) that the defendants' behavior was parallel; [and] (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making process." *Id.* n.39 (quoting Petrucci's IGA, 998 F.2d at 1242-43).

There is no doubt that conscious parallelism was at work in appellees' business conduct. Through newspaper articles and trade organization meetings, Rite Aid, EPIC, NeighborCare and Giant were each aware that the other had not participated in the Maryland Plan. Each also knew that if not enough pharmacies participated, the State would likely cancel the contract with Medco and award the contract to another pharmaceutical benefits [*26] manager that would offer better terms than Medco. However, it has long been recognized that **HN17** [↑] parallel behavior alone is not enough to prove a conspiracy. See Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 540, 98 L. Ed. 273, 74 S. Ct. 257 (1954) ("This Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.").

HN18 [↑] In order to infer a conspiracy, conscious parallelism must be accompanied by "plus factors." While the Supreme Court has not recounted a list of plus factors, numerous plus factors, such as "motive to conspire," "opportunity to conspire," "high level of interfirm communications," irrational acts or acts contrary to a defendant's economic interest, but rational if the alleged agreement existed, and departure from normal business practices, have been considered by other circuits. See City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 571 n.35 (11th Cir. 1998); Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2d Cir.), cert. denied, 484 U.S. 977 (1987). [*27]

HN19 [↑] If a party establishes the existence of plus factors, a rebuttable presumption of conspiracy arises. See In re Baby Food, 166 F.3d at 122; Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991). Viewing all the evidence and taking the plus factors into consideration, the court must then determine if the evidence tends to exclude the possibility that the alleged coconspirators acted independently or based upon legitimate business purposes.

III. APPLICATION OF THE STANDARD FOR ANTITRUST CASES TO MEDCO'S FORECAST OF EVIDENCE

In order to survive summary judgment, Medco must first forecast evidence of a conspiracy to restrain trade. If successful, Medco must then demonstrate evidence that tends to exclude independent action by the defendants.

A. Conscious Commitment to a Common Scheme

Medco has asserted a plausible theory of conspiracy. If the alleged conspiracy succeeded, the State would rescind the contract with Medco and the conspirators would likely receive more lucrative reimbursements from the next pharmaceutical benefits manager. If the conspiracy failed, the conspirators could merely join Medco's network after [*28] the plan went live.

While Medco's theory is plausible, it also creates a danger of chilling legitimate, procompetitive activity by other pharmaceutical service providers. A low quantum of proof tending to exclude independent action in cases such as this would threaten pharmacies with antitrust litigation when they have legitimate, procompetitive reasons for not joining a plan. Incentives to negotiate, to hold out for better terms and ultimately to not participate would have to be weighed in the light of a possible lawsuit if other pharmacies engaged in the same activities.

As discussed above, Medco has presented sufficient evidence that conscious parallelism occurred among appellees during the fall of 1995. Therefore, the court must examine the plus factors in order to determine if a conspiracy may be inferred from appellees' consciously parallel behavior.

1. Motive to Conspire

Rite Aid, Giant, NeighborCare and EPIC owned or controlled 50% of the pharmacies in Maryland. Medco's plan proposed deep cuts in profits from the pharmacies' previous plan. Additionally, Rite Aid had been sanctioned by the United States Justice Department for antitrust actions in New York where they [*29] conspired to boycott a Medco plan. Thus, construing all reasonable inferences in Medco's favor, it appears that the defendants had a motive to conspire against the Medco plan.

2. Opportunity to Conspire and High Level of Inter-Firm Contacts

Medco presented voluminous evidence of inter-firm contacts between the parties providing ample opportunity to conspire. The inter-firm contacts occurred between high level corporate officers. Reasonable inferences from this evidence establishes opportunity to conspire and high level of inter-firm contacts.

3. Acts Contrary to Economic Interest

Evidence of acts contrary to an alleged conspirator's economic interest is perhaps the strongest plus factor indicative of a conspiracy. Having reviewed the record, we conclude that rejecting the Medco plan was consistent with the pharmacies' economic interests. Particularly, NeighborCare's involvement would have been directly contrary to its economic interest. Ninety-eight percent of NeighborCare's business consisted of prescriptions. They did not sell ancillary items that Medco promised would make up for the lower reimbursement rate.

Also, it was in each company's best interest to hold out as [*30] long as possible in an effort to attain a better deal with Medco. Due to the plan's "open" nature, if the company did not receive better terms, it could merely join at a later date. Medco presents no evidence of price sharing among appellees. All indications from the evidence point to independent negotiations by Giant, NeighborCare and EPIC with Medco concerning the rate of reimbursement. Consequently, there are no acts by appellees inconsistent with their economic best interests.

4. Departure From Normal Business Practices

Medco has not asserted a departure from normal business practices. In fact, Medco concedes that both Giant and Rite Aid had a history of holding out until the last minute and negotiating for a better reimbursement rate. NeighborCare had never joined a plan with a reimbursement rate as low as the one offered by Medco. Only EPIC departed from the normal business practice of binding all 200 independent pharmacies at the Medco rate.

B. Appellees' Evidence Rebutting the Inference of Conspiracy

Medco's establishment of two plus factors requires appellees to rebut the resulting inference of conspiracy. The district court painstakingly reviewed the evidence [*31] presented by Rite Aid, Giant, EPIC and NeighborCare offered to rebut the inference of conspiracy.⁵

1. Rite Aid

Eagle, Rite Aid's subsidiary, submitted an unsuccessful bid for the Maryland Plan. As a result of the unsuccessful bid, Eagle and EPIC launched a bid protest on September 18, 1995. Eagle and EPIC contended that the State's failure to verify the accuracy of Medco's proposal amounted to an arbitrary [*32] and capricious award of the contract to Medco. As evidence of Medco's inaccurate proposal, Eagle relied on Medco's representation to the

⁵ The district court relied in part on the *Noerr-Pennington* doctrine. Medco assigned error to the district court's reliance on this doctrine because defendants had not affirmatively raised it in their pleadings. Under this doctrine, horizontal competitors may join together to lobby the government. The [First Amendment](#) shields this joint lobbying from antitrust liability, even when the competitors are seeking governmental action that would eliminate competition or exclude competitors. We do not believe it is necessary to invoke the *Noerr-Pennington* doctrine to affirm the district court's decision.

State that Rite Aid would join Medco's network.⁶ Rite Aid asserts that becoming a member of Medco's network while Eagle was protesting the award of the contract would undercut Eagle's appeal.

Rite Aid also presented evidence that part of its business practice was to initially decline participation in a plan and bargain for the best terms they could;⁷ particularly when the plan was open and there was no risk that they would be shut out if they did not join before the plan went live.

[*33] According to Rite Aid, the low reimbursement rate offered by Medco did not attract Rite Aid. Rite Aid presented evidence that its decision to join a plan at such a low reimbursement rate was governed by how large the plan was, Rite Aid's market share, whether the plan was open or closed and the prominence of the plan's sponsor. Rite Aid asserts that due to Rite Aid's prominent market share in Maryland,⁸ it was not quick to sacrifice prescription profits for unproven ancillary income.

2. *Giant*

Giant presented evidence that they had forecasted a loss of over \$ 1 million if they joined Medco's network at the offered reimbursement rate. Since the beginning of 1995, Giant had been in the process of abandoning plans⁹ with rates similar to those Medco offered.

[*34] Evidence presented by Giant indicates that Giant was deeply concerned about Medco's mail order program. According to Giant, their participation in another plan administered by Medco caused a loss of 225,485 prescriptions per year to Medco's mail order program, valued at over \$ 10 million. Giant engaged in negotiations with Medco through December 1995, attempting to bargain for "reasonable" reimbursement rates.

3. *EPIC*

EPIC asserts that its board chose not to participate in the Maryland Plan because of the low reimbursement rate and because of slow payments by Medco in other plans in which EPIC was involved. Medco requested to address EPIC's board two times in an attempt to convince them to join Medco's network. The board offered to participate in a plan with a rate of AWP minus 12% plus \$ 2.00, but Medco and EPIC were unable to reach an agreement. However, EPIC allowed Medco to directly solicit the independent pharmacies over which EPIC had contractual binding authority. Medco's solicitation yielded the participation of 100 independent pharmacies.

Additionally, EPIC was involved in the bid protest along with Eagle, and EPIC contends that until their protest was denied in late [*35] November 1995, they had absolutely no incentive to join Medco's network.

4. *NeighborCare*

NeighborCare had never participated in a plan with a reimbursement rate as low as the one offered by Medco. NeighborCare's two owners had a longstanding policy to reject any networks offering reimbursement rates which fell below their profitability threshold.

NeighborCare also did not engage in the sale of ancillary items to which an increase in customer flow would contribute. Ninety-eight percent of NeighborCare's profits came from prescriptions.

Based on the evidence presented by Rite Aid, Giant, EPIC and NeighborCare, we are convinced that they have rebutted Medco's inference of conspiracy. Medco may still survive summary judgment if it carries its ultimate burden and forecasts proof which tends to exclude independent action or legitimate business decisions by appellees.

⁶ Medco contends this is normal business practice in the industry.

⁷ Medco representatives admitted that Rite Aid typically held out before joining a plan and that Rite Aid's Joel Feldman was "a great negotiator."

⁸ In 1995, Rite Aid had 180 pharmacies in the State of Maryland.

⁹ Giant had dropped out of nine plans due to the reimbursement rate. Eight of the nine plans had rates greater than or equal to Medco's rate.

C. Medco's Evidence Tending to Exclude Independent Action or Legitimate Business Purpose

Medco does not forecast direct evidence of a conspiracy to restrain trade, but relies on circumstantial evidence. It advances at least seven factual arguments that purportedly demonstrate a conspiracy and exclude independent [*36] action: (1) appellees' reaction as soon as Maryland announced its plan; (2) the reaction of EPIC which had historically joined a plan at the price offered by Medco; (3) the actions of Rite Aid's Jim Krahulec; (4) the statement on September 29 by EPIC's representative that the plan would "kill us" if it went into effect; (5) Rite Aid's advertisement; (6) conversations between high level officers within appellees' companies; and (7) statements by EPIC and Giant on December 7, 1995.

1. Appellees' Reaction to Announcement of Award of Contract to Medco

No pharmacy reacted with joy to the news that Maryland had awarded Medco the pharmacy plan. The deep discount Medco attempted to achieve in its pricing forecasted large losses to some appellees.¹⁰ The offset to this deep discount was intended to be an increased flow of patrons to the pharmacies, but for pharmacies like NeighborCare, which derived 98% of profits from prescriptions, an increase in the sale of incidentals like magazines and candy could not make up for the loss in prescription dollars.

[*37] After learning on September 11, 1995, of the State's intention to award the contract to Medco at a Board of Public Works meeting on September 13, Rite Aid's Joel Feldman testified that "we were really focused on developing a strategy to somehow influence the process politically" comparable to a "red alert." (A. 451) The "red alert" was implemented by "getting on the telephone and . . . calling as many people as you can who you think will have some role in influencing the decision of the Board of Public Works." *Id.*

As indicated by the flurry of activity after the announcement, most pharmacies,¹¹ not just appellees, attempted to address concerns raised by the award of the Plan to Medco. The thrust of these activities appears to be influencing the governor and state representatives to rethink some of the details of the Plan.

[*38] 2. EPIC's Reaction to the Plan

Medco asserts EPIC's reaction to the plan creates an inference of conspiracy. EPIC was "up in arms" over the contract price Medco was offering even though they had always accepted contracts for similar prices in the past.

EPIC counters that it needed to accept low reimbursement rates in the past in order to prove that it could deliver on the participation of its 200 independent pharmacies. Now that EPIC had established that their pharmacies would honor contracts entered into on their behalf by EPIC, the board felt that it was time to seek higher rates of reimbursement. EPIC's board voted not to participate after brief negotiations with Medco due to the low rate and delays in payments by Medco on other contracts. If EPIC's board had voted to accept the contract, all 200 independent pharmacies would be bound by their decision. Rather than accept the rate, EPIC gave Medco permission to directly solicit the individual pharmacies.

3. Actions of Rite Aid's Jim Krahulec

Medco contends that the presence of Jim Krahulec at trade organization meetings and conference calls raises an inference of conspiracy given Krahulec's past activity. Krahulec entered [*39] into a consent judgment with the Federal Trade Commission ("FTC") whereby the FTC ordered him not attend "a formal or informal meeting of representatives of pharmacy firms that [he] expects or reasonably should expect will facilitate communications . . . concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into . . . any existing or proposed participation agreement . . ." (A.57).

¹⁰ Giant predicted that it would lose in excess of \$ 700,000 per year by joining the Plan at Medco's rate.

¹¹ As indicated by conference call participation, not only did appellees take part in the lobbying effort, but so did Safeway Inc., Thrift Drug, Inc., Revco D.S. Inc., CVS and the National Association of Chain Drug Stores.

4. EPIC's Statement that the Plan "Would Kill Us"

Jim Miller, EPIC's representative at a September 29 meeting of the Maryland Association of Chain Drug Stores, stated that he did not "know why we're having a meeting to discuss the Medicaid waiver considering that if the Maryland deal went through it would kill us."

EPIC negotiated with Medco until mid-December, giving Medco's representative numerous opportunities to address the board concerning the merits of Medco's plan. Even after rejecting Medco's plan, EPIC permitted direct solicitation of the independent pharmacies resulting in participation by half of them in Medco's network.

5. Rite Aid's Advertisement

Medco also contends that the advertisement that [*40] Rite Aid ran in the Baltimore Sun and the Washington Post is evidence of a conspiracy. When Rite Aid ran the ad, none of the other retailers gave Rite Aid permission to include their names, and none of them protested that their names were included.

As justification for its actions, Rite Aid relies on a December 19, 1995, article in the Baltimore Sun announcing that "three large chains and a network of independent pharmacies said yesterday that they are refusing to participate in the state employee's drug plan." (A. 60) Rite Aid allegedly ran the advertisement on December 21, because it felt that it should explain to its customers why it was not participating and wanted to make a public statement concerning the State's award of the contract to Medco. The advertisement asked State employees to contact the governor or their union to seek a change in the Plan and listed other pharmacies that had refused to participate in the Plan.

6. Conversations Between High Level Corporate Officers

As a forecast of evidence from which a reasonable inference of conspiracy may be drawn, Medco also relies on telephone conversations and September 15, 17, 18, 19 and 20 conference calls, and the appellees' [*41] failure to remember these conversations. In their answer to Medco's complaint, appellees denied having ever talked to each other. Later, in deposition testimony, representatives of Rite Aid, EPIC and NeighborCare testified under oath that they had not communicated with their competitors regarding the Maryland Plan. When new evidence surfaced, appellees admitted talking about the plan but submitted that they were only lobbying or that they had simply forgotten their prior conversations.

It challenges logic to assert that individuals concerned about the loss of millions of dollars to a new pharmacy plan would simply forget conversations about the plan. Evidence of these forgotten conversations is Medco's strongest argument for reversal of the district court's summary judgment order. This evidence must be viewed in light of all the evidence in determining if Medco has carried its ultimate burden of establishing a reasonable inference of a conspiracy.

7. Statements by EPIC and Giant on December 7, 1995

Finally, Medco asserts that statements made by NeighborCare and Giant on December 7, 1995, that Medco "would not have a network," excludes the possibility of independent action. This [*42] statement, along with the selective memories of appellees' corporate officers regarding their telephone conversations, does not meet the quantum of proof required to establish lack of independent action.

8. Evidence as a Whole

HN20 [A] court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if together it supports an inference of concerted action." Petrucci, 998 F.2d at 1230. Taking all of the evidence together, the court is not convinced that Medco has presented evidence to support an inference of concerted action. Two examples of an inference of conspiracy presented by Medco, fail under closer review.

The district court concluded that to infer improper restraint of trade from the advertisement was pure speculation, and we agree. There was no reason for the other retailers to object to Rite Aid's justification for their collective failure to join the network.

Medco contends that EPIC's failure to join the network was not a mere coincidence, but that EPIC's actions indicate a conspiracy. However, the court does not believe that a conspirator would permit Medco to essentially invalidate [*43] its decision not to participate by allowing Medco to directly solicit its independent pharmacies. A conspiracy based on EPIC's actions is not a reasonable inference from the facts.

We must avoid the danger of an inevitable competition chilling result that would occur should a low quantum of proof be required before a party may harness the power of the Sherman Antitrust Act against facially legitimate, procompetitive business practices. Viewing all the plus factors presented by Medco, the rebuttal by appellees and the additional evidence Medco asserts tends to exclude independent action, we conclude that Medco has not met the threshold of forecasting the quantum of proof required for its claims to survive summary judgment. All of the evidence viewed together does not create a reasonable inference of conspiracy.

Had Medco been able to forecast evidence of activity that was completely outside of normal business practices in negotiating for health care networks, actions not in the best economic interests of the appellees or an utter failure to negotiate with Medco along with the record of appellees' communications, this likely would be a different case.

Medco has failed to establish [*44] that the evidence is more consistent with conspiracy than with independent action. Medco's forecast of evidence does not tend to exclude the possibility that the pharmacies' decisions were independent or were made for legitimate business reasons. Thus, viewing the facts in a light most favorable to appellant, Medco has failed to present material issues of disputed fact necessitating a trial.

IV. CONCLUSION

For the reasons stated above, we conclude that the district court properly ruled that no genuine issue of material fact exists on the issue of Medco's claim that the defendants conspired to boycott the Maryland Plan. The district court correctly found that Medco failed to forecast sufficient evidence tending to exclude independent conduct by the defendants. Therefore, the ruling of the district court is

AFFIRMED.



National Asbestos Workers Med. Fund v. Philip Morris, Inc.

United States District Court for the Eastern District of New York

September 7, 1999, Decided ; September 7, 1999, Filed

98 CV 1492, 98 CV 3287

Reporter

74 F. Supp. 2d 221 *; 1999 U.S. Dist. LEXIS 14041 **

THE NATIONAL ASBESTOS WORKERS MEDICAL FUND, et al., Plaintiffs, -against- PHILIP MORRIS, INC., et al., Defendants. BLUE CROSS AND BLUE SHIELD OF NEW JERSEY, INC., et al., Plaintiffs, - against PHILIP MORRIS, INCORPORATED, et al., Defendants.

Disposition: [**1] Motions to dismiss amended complaints in Blue Cross and National Asbestos denied.

Core Terms

racketeering, plaintiffs', personal injury, subrogated, cases, court of appeals, subrogee, defendants', injuries, damages, insurers, pecuniary loss, complaints, parties, courts, healthcare, discovery, pecuniary, subrogors, remedies, costs, proximate cause, allegations, proximate causation, cause of action, predicate act, aggregate, policies, clinics, deter

LexisNexis® Headnotes

Torts > ... > Causation > Proximate Cause > General Overview

HN1[] Causation, Proximate Cause

The legal concept of proximate causation is a normative, flexible, and highly fact specific doctrine which requires individualized inquiry in each case.

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Causation > General Overview

HN2[] Causation, Proximate Cause

Proximate cause is an elusive concept, one always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.

Torts > ... > Causation > Proximate Cause > General Overview

HN3 Causation, Proximate Cause

The legal concept of proximate causation mandates a multi-faceted and highly fact specific inquiry. Proximate cause analysis is driven by considerations of policy, fairness, and practicability, rather than by a rigid adherence to classifications or abstractions.

Torts > ... > Causation > Proximate Cause > General Overview

HN4 Causation, Proximate Cause

Problems of proximate causation require a normative inquiry based at least in part upon notions of social justice.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5 Racketeering, Racketeer Influenced & Corrupt Organizations Act

A subrogee can assert a Racketeer Influenced and Corrupt Organizations Act claim.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN6 Racketeer Influenced & Corrupt Organizations, Remedies

Recovery of pecuniary losses associated with physical injuries directly caused by racketeering conduct is consistent with the language of the Racketeer Influenced and Corrupt Organizations Act. Such claims advance the statute's legislative purposes of deterring racketeering, in all its forms, and of remedying, as fully as practicable, the economic consequences of racketeering.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7 Racketeering, Racketeer Influenced & Corrupt Organizations Act

The most natural reading of the language in the Racketeer Influenced and Corrupt Organizations Act supports the conclusion that pecuniary losses resulting from racketeering personal injuries should be compensable under the statute.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN8 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

[**HN9**](#) **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Victims of racketeering who have been deprived of their monetary resources as a direct result of racketeers' predicate acts should, under the most natural interpretation of the phrase "business or property," recover their pecuniary losses.

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

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[**HN10**](#) **Justiciability, Standing**

Standing under the Racketeer Influenced and Corrupt Organizations Act has been interpreted much more broadly than antitrust law standing.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[**HN11**](#) **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The Racketeer Influenced and Corrupt Organizations Act contains an express admonition that the statute be read broadly in order to effectuate its policies. It provides that its provisions shall be liberally construed to effectuate its remedial purposes.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[**HN12**](#) **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Where the plaintiff alleges each element of the violation of the Racketeer Influenced and Corrupt Organizations Act, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[**HN13**](#) **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The Racketeer Influenced and Corrupt Organizations Act provides a civil recovery for businesses which have suffered economic loss as a result of actual or threatened physical violence conducted in a pattern of racketeering.

Counsel: For The National Asbestos Workers Medical Fund, et al., Plaintiffs: E. David Hoskins, Esq., David L. Palmer, Esq., Kenneth D. Pack, Esq., Law Offices of Peter G. Angelos, P.C., Baltimore, MD.

For The National Asbestos Workers Medical Fund, et al., Plaintiffs: Sally M. Tedrow, Esq., Louis P. Malone, Esq., O'Donoghue & O'Donoghue, Washington, D.C.

For Blue Cross & Blue Shield of N.J., Inc., et al., Plaintiffs: Paul J. Bschorr, Esq., Vincent R. Fitzpatrick, Jr. Esq., Michael C. Hefter, Esq., Heather K. McDevitt, Esq., Robert J. Morrow, Esq., Dewey Ballantine LLP, New York, NY.

For Philip Morris, Incorporated, Defendant: Herbert M. Wachtell, Esq., Steven M. Barna, Esq., Michael A. Charish, Esq., Peter C. Hein, Wachtell, Lipton, Rosen & Katz, New York, NY.

For Philip Morris, Incorporated, Defendant: Jeffrey M. Wagner, Esq., Winston & Strawn, Chicago, IL.

For Brown & Williamson Tobacco Corporation, Defendant: Marjorie Press Lindblom, Esq., Kirkland & Ellis, New York, NY.

For Brown & Williamson Tobacco Corporation, Defendant: David M. Covey, Esq., Sedgwick, Detert, Moran & Arnold, **[**2]** New York, NY.

For Lorillard Tobacco Company, Lorillard, Inc., Loews Corp., Defendants: Alan Mansfield, Esq., Greenberg Traurig, LLP, New York, NY.

For Lorillard Tobacco Company, Lorillard, Inc., Loews Corp., Defendants: Gary R. Long, Esq., Shook, Hardy & Bacon, L.L.P., Kansas City, MO.

For Council for Tobacco Research, U.S.A., Inc., Defendant: Harry Zirlin, Esq., Anne E. Cohen, Esq., Debevoise & Plimpton, New York, NY.

For Smokeless Tobacco Council, Inc., Defendant: David R. Crittenden, Esq., Jacob, Medinger & Finnegan, LLP, New York, NY.

For R.J. Reynolds Tobacco Co., RJR Nabisco, Inc., Defendants: Peter J. Busch, Esq., Howard, Rice, Nemerovski, Canady, Falk & Rabkin, San Francisco, CA.

For R.J. Reynolds Tobacco Co., RJR Nabisco, Inc., Defendants: Alan E. Kraus, Esq., Riker, Danzig, Scherer, Hyland & Perretti, LLP, Morristown, NJ.

For British American Tobacco (investments) limited (formerly known as British-American Tobacco Company Limited), Defendant: Joseph M. McLaughlin, Esq., Michael P. Panagrossi, Esq., Simpson Thacher & Bartlett, New York, NY.

For Hill & Knowlton, Inc., Defendant: Bruce M. Ginsberg, Esq., Marc J. Rachman, Esq., Davis & **[**3]** Gilbert, LLP, New York, NY.

Judges: Jack B. Weinstein, United States Senior District Judge.

Opinion by: Jack B. Weinstein

Opinion

[*222] MEMORANDUM AND ORDER

WEINSTEIN, United States Senior District Judge:

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IV. CONCLUSION**I. INTRODUCTION**

Defendants moved to dismiss the complaints in these two cases on the theory that a decision in Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., ("Laborers Local 17"), [191 F.3d 229, 1999 U.S. App. LEXIS 19576, 1999 WL 639865 \(2d Cir. 1999\)](#), superseding [172 F.3d 223 \(2d Cir. 1999\)](#), [***4] blocks the plaintiffs' federal causes of action and requires dismissal of all state law claims. The motions were denied. See Preliminary Memorandum And Order, August 2, 1999. This memorandum and order explains that decision.

Laborers Local 17 held that the plaintiffs' injuries in that case were too remote--i.e., were not proximately caused--to support a cause of action under RICO. As observed in an opinion issued prior to Laborers Local 17, and as Laborers Local 17 itself recognized, [HN1](#) [↑] the legal concept of proximate causation is a normative, flexible, and highly fact specific doctrine which requires individualized inquiry in each case. See [Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.](#), [36 F. Supp. 2d 560, 579 \(E.D.N.Y. 1999\)](#) ("This determination [of proximate cause] is primarily one of policy, requiring a highly flexible and case specific approach."); see also Laborers Local 17, [191 F.3d 229, 1999 U.S. App. LEXIS 19576](#), at *14, 1999 WL 639865, at *4 [HN2](#) [↑] ("Proximate cause is an elusive concept, one 'always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. [**5]'" (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 42, at 279 (5th ed. 1984) (quoting 1 Street, Foundations of Legal Liability 110 (1906)))).

There are differences between the parties and circumstances in the present cases and those in Laborers Local 17 relevant to the proximate cause inquiry and providing grounds to distinguish the two litigations. Laborers Local 17 does not preclude the instant cases' complaints. Even if the plaintiffs' federal causes of action, as originally stated, are ultimately found to be barred by Laborers Local 17, neither of the present actions can be dismissed at the pleading stage. The plaintiffs in both cases have amended their complaints to state valid, alternative theories of liability.

II. FACTS

A. Plaintiffs' Original Claims

Both cases involve claims by medical providers to be compensated for the economic injuries they have allegedly sustained as a result of the treatment of tobacco related illnesses. In both cases [*224] the defendants are the major tobacco manufacturers and related entities.

In Blue Cross & Blue Shield of New Jersey, Inc., et al. v. Philip Morris, Inc., et al. ("Blue Cross"), the plaintiffs [**6] are medical provider plans ("The Blues") claiming violations of both federal and state law. The federal causes of action are brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) and antitrust statutes. The pendent state law claims are asserted under various state statutes and under common law theories such as fraudulent misrepresentation, fraudulent concealment, breach of special duty, unjust enrichment, and conspiracy.

In The National Asbestos Workers Medical Fund, et al. v. Philip Morris, Inc., et al. ("National Asbestos"), the plaintiffs are self-insured ERISA trust funds which provide health care benefits to union workers in the building trades. The plaintiffs state claims under federal RICO and under federal common law on theories of unjust enrichment, restitution, indemnity, and breach of assumed duty. See [Blue Cross, 36 F. Supp. 2d 560 \(E.D.N.Y. 1999\)](#) (setting out original allegations in detail); [National Asbestos Workers Medical Fund v. Philip Morris, Inc., 23 F. Supp. 2d 321 \(E.D.N.Y. 1998\)](#).

B. Procedural Background

On October 19, 1998, defendants' [Rule 12\(b\)\(6\)](#) motion in National Asbestos was denied. See [National Asbestos, 23 F. Supp. 2d at 323](#). [*7] Given the expansive public policies of RICO, the comprehensive preemptive force of ERISA, and the conflicting decisions regarding the sufficiency of similar claims, a dismissal based on the pleadings was inappropriate.

On March 30, 1999, the defendants' motion to dismiss in Blue Cross was denied. See [Blue Cross, 36 F. Supp. 2d at 564](#). The RICO allegations contained in the Blues' complaint were sufficiently consonant with Supreme Court precedent, modern tort law's conception of proximate causation, and the statutory design and policy of RICO to withstand a motion directed at the complaint.

Ten days after the [Blue Cross](#) opinion was issued and approximately six months after the [National Asbestos](#) opinion, the court of appeals of the Second Circuit decided an interlocutory appeal in a case involving RICO allegations against the tobacco industry by union trust fund-insurers. See [Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 172 F.3d 223 \(2d Cir. 1999\)](#), withdrawn and superseded by [191 F.3d 229, 1999 U.S. App. LEXIS 19576, 1999 WL 639865 \(2d Cir. 1999\)](#). The court in [Laborers Local 17](#) found the claims of plaintiff [**8] trust funds to be compensated for tobacco related expenditures to be too "indirect." See [id., 1999 U.S. App. LEXIS 19576](#), at *29, 1999 WL 639865, at *9. The defendants then renewed their motions to dismiss the complaints in both Blue Cross and National Asbestos on the grounds that both suits are controlled by [Laborers Local 17](#).

C. Amendments To Plaintiffs' Original Complaints

In June 1999 plaintiffs in both Blue Cross and National Asbestos moved to amend their complaints to add new claims and to restate, in the alternative, the original federal and state claims under subrogation; they continued to press all their original claims. They were permitted to amend their complaints pursuant to the liberal standards of [Rule 15 of the Federal Rules of Civil Procedure](#). Decision was reserved on whether the amended complaints stated valid causes of action.

III. ANALYSIS OF CLAIMS

A. "Direct" RICO

Defendants contend that [Laborers Local 17](#) bars plaintiffs' original RICO claims. In contrast, plaintiffs argue that there are important factual and pleading distinctions between [Laborers Local 17](#) and Blue Cross and National Asbestos which distinguish [*9] the cases.

[*225] 1. Proximate Causation Generally

HN3 The legal concept of proximate causation mandates a multi-faceted and highly fact specific inquiry. Proximate cause analysis is driven by considerations of policy, fairness, and practicability, rather than by a rigid adherence to classifications or abstractions. The Supreme Court has pointed out that the proximate causation decision should be guided by a flexible, case-by-case approach. In *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536-37, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983), the Court stated:

The infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

[459 U.S. at 536-37](#). In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992), the Court reiterated the impropriety of black letter rules in a proximate cause context, adding, "our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out [in the opinion]." [503 U.S. at 272 n.20](#).

The formulation of rigid, simple rules for proximate cause is often inappropriate. The classification of claims and injuries into *a priori* categories such as "derivative" or "direct" is at times an exercise in obscurantism. See, e.g., *Blue Cross*, 36 F. Supp. 2d at 582 ("Courts' treatment of loss of consortium claims demonstrate how the decision to label an injury 'derivative' is itself a subjective and policy-based analysis."); see also *Laborers Local 17*, 191 F.3d 229, 1999 U.S. App. LEXIS 19576, at *27 n.4, 1999 WL 639865, at *9 n.4 ("The term "indirect" may connote concepts - such as remoteness in time or space - other than "derivative," which itself cannot be defined with absolute precision.").

New **HN4** problems of proximate causation require a normative inquiry based at least in part upon notions of social justice. As a leading treatise on tort law sums up the matter:

"Proximate cause" . . . is merely the limitation which [**11] the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. . . . Some boundaries must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

This limitation is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains. Often to greater extent, however, the legal limitation on the scope of liability is associated with policy--with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 264 (5th ed. 1984); see also *Holmes*, 503 U.S. at 268 (quoting Prosser & Keeton).

Analysis of proximate causation must remain flexible, rather than static: as society, its needs, and its norms change, so too must the contours of tort liability and enforcement procedures.

2. Laborers Local 17

In *Laborers Local 17*, the court concluded that the RICO claims of the union trust funds were "too remote" as a matter of law. The court acknowledged [**12] that a black letter rule precluding all claims capable of being characterized as "derivative" or "indirect" would be inconsistent with the modern notion of proximate cause and Supreme Court case law. "Where a plaintiff complains of injuries that are wholly derivative of harm to a third party," the court stated, "plaintiff's injuries are generally [*226] deemed indirect and as a consequence too remote, as a matter of law, to support recovery." *Laborers Local 17*, 191 F.3d 229, 1999 U.S. App. LEXIS 19576, at *19, 1999 WL 639865, at *6 (emphasis added). "At the same time," the court continued, "the Supreme Court noted the impossibility of articulating a black-letter rule capable of dictating a result in every case." *Id.* (citing *Holmes*, 503 U.S. at 272 n.20).

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The court of appeals proceeded to analyze the plaintiffs' claims in the context of the three policy concerns outlined in Holmes and discussed in the district court's Blue Cross memorandum. See Holmes, 503 U.S. at 269-70; Blue Cross, 36 F. Supp. 2d at 574-77. The court in Laborers Local 17 reiterated that the sufficiency of the plaintiffs' legal claims must [**13] be tested by reference to the general policy considerations set out in Holmes rather than by a facile characterization. It declared:

Accordingly, we follow the lead of the Holmes Court in making clear that, to the extent our description of "indirect" or "derivative" injury might seem to encompass cases where recovery by the plaintiff would not run afoul of the policy concerns set forth above, the outer limits of the direct injury test are described more by those concerns than by any bright-line, verbal definition.

Laborers Local 17, 191 F.3d 229, 1999 U.S. App. LEXIS 19576, at *27 n.4, 1999 WL 639865, at *9 n.4.

Laborers Local 17 rejected the plaintiffs' complaint only after it had concluded that the claims presented substantial difficulties with respect to the ascertainment and apportionment of damages and after it had decided that the rejection of plaintiffs' claims would not undermine the policies incorporated in the RICO statute. See Laborers Local 17, 191 F.3d 229, 1999 U.S. App. LEXIS 19576, at *29-36, 1999 WL 639865, at *9-12.

3. Application Of Law To Blue Cross And National Asbestos

In Blue Cross, 36 F. Supp. 2d 560 (E.D.N.Y. 1999), [**14] the district court concluded that the plaintiff health plan providers had standing to press their RICO claims by virtue of the application of the three policy considerations articulated in Holmes and in light of the common law's acceptance of analogous claims under proximate cause and tort analysis. Here, the statutory design and common law conceptions of proximate cause do not appreciably diverge. See Moore v. PaineWebber, 189 F.3d 165, 1999 U.S. App. LEXIS 20180, *42, 1999 WL 647118, at *13 (2d Cir. 1999) (Calabresi, J., concurring) ("Where the defendant's behavior is made actionable by a statute, it must of course be the statute that defines the extent of his liability.").

Even were a court to accept defendants' proposition that a large part of the reasoning in Blue Cross was rejected by Laborers Local 17, it does not follow that dismissal is required of the individual claims of the plaintiffs in the current separate Blue Cross cases. As pointed out in some detail in Blue Cross, there are a number of unique features of the Blue Cross plaintiffs and their injuries which are relevant to the proximate cause analysis. Some of these special characteristics were not present in [**15] Laborers Local 17. A court should hesitate before stretching precedent too broadly with respect to the flexible and highly fact specific analysis of proximate causation, particularly when a new case presents complicated and distinguishing aspects. See, e.g., People v. Olah, 300 N.Y. 96, 101, 89 N.E.2d 329, 332 (1949) ("No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association." (citation and quotation marks omitted)).

The Blues are not simply traditional insurers which passively receive premiums for the purpose of allocating risk. Rather, they play a far more active and direct role in the provision of health care to the general public than do traditional insurers, including the plaintiffs in Laborers Local 17. As observed in Blue Cross:

Today subscribers often rely on organizations such as the Blues not only to [**227] allocate risk, but also to help establish and administer networks of hospitals and physicians to make health care more affordable. The Blues are the largest provider of such managed care programs in the country. Some 45 million individuals [**16] are enrolled in some type of managed care administered by the Blues. Through these managed care programs plaintiffs take an active and leading role in shaping the delivery of health care in this country. Directly and indirectly, medical insurers-providers such as the Blues decide what medical procedures will be offered, to whom they will be offered and when and how they will be offered.

36 F. Supp. 2d at 586.

The active role of the Blues in providing medical care to the nation's population is relevant for a number of reasons. First, injuries to the Blues are analogous to other "derivative" injuries, such as loss of consortia, which the law generally favors as compensable. As pointed out in Blue Cross:

Recognizing a direct cause of action on the part of the Blues is consistent with the role plaintiffs play in today's society. In the same way that a spouse or parent has an obligation to provide for the medical injuries of his spouse or child, non-profit medical providers such as the Blues have an obligation to supply medical care to their covered populations. More and more, medical providers such as the Blues have assumed the responsibility for ensuring [**17] that individuals have access to medical care. For the nearly 70 million people, one out of every four Americans, who rely on the Blues to provide their medical care, plaintiffs occupy a type of *parens patriae* relationship with their insureds which is analogous to the parent-child relationship.

36 F. Supp. 2d at 581. Injury to the Blues was allegedly more foreseeable, and allegedly more calculated as part of the defendants' racketeering scheme, because of the Blues' dominant and highly visible role as health care providers throughout the nation.

These unique aspects of the Blues and their injuries are relevant to at least two of the three policy considerations set out in Holmes. The court in Laborers Local 17 reasoned that the apportionment of damages would be complicated by the existence of multiple layers of health care insurers. See 191 F.3d 229, 1999 U.S. App. LEXIS 19576, at *32-34, 1999 WL 639865, at *10-11. With respect to at least some of the Blues plaintiffs, the apportionment of damages may be substantially simplified where the Blues provide health care directly to the covered population. The Blues' dominant and central role [**18] as providers of health care coverage might also simplify the apportionment of damages.

Organizations with the incentives and resources of the Blues are uniquely suited to vindicate the economic injuries sustained by the nations' health care infrastructure, allegedly as a result of the defendants' racketeering. The court in Laborers Local 17 observed that the plaintiffs in that action could initiate a subrogated claim to recover their economic losses. See 191 F.3d 229, 1999 U.S. App. LEXIS 19576, at *35, 1999 WL 639865, at *11. Unless the subrogated claims are brought under RICO, however, those claims will not serve to fully vindicate the overriding policy of the RICO statute in deterring racketeering.

The unique features of the Blues and their injuries support their original RICO claims in light of Laborers Local 17. It is difficult to conclude that the court of appeals intended its proximate cause analysis to apply to the precise set of facts presented in Blue Cross. Despite the fact that the memoranda in Blue Cross and National Asbestos were issued prior to the court of appeals' decision in Laborers Local 17, and even though, according to the [**19] defendants, the decisions were brought to the panel's attention before it issued its decision, the facts of Blue Cross and National Asbestos were neither mentioned nor alluded to in Laborers Local 17.

[*228] While there appears to be sufficient legal bases for allowing the Blues' original RICO claims to proceed, that issue need not be definitively decided now. The Blues have amended their complaint to state a valid, alternative basis for recovery under RICO. As a result, there is little to be gained by the dismissal of their original RICO claim at this time. The discovery required by the different claims is virtually identical. Striking of portions of either complaint would not appreciably save time or expense. It would not refine the issues for trial in any meaningful way.

In the case of National Asbestos, there are few features distinguishing it from Laborers Local 17. Thus, dismissal of the plaintiffs' original stated RICO claims might arguably be warranted. Because these plaintiffs have also amended their complaint to state valid causes of action under an alternate theory, however, the defendants' motion to dismiss these "direct" RICO claims is denied, with leave [**20] to renew in the event that further developments during discovery demonstrate the desirability of pre-trial dismissal.

B. Subrogation

The plaintiffs in Blue Cross and National Asbestos have amended their complaints to add RICO causes of action under a theory of subrogation. These claims are consistent with the policies, legislative history, and statutory

language of RICO as well as Supreme Court case law interpreting the statute. The plaintiffs in both cases will be allowed to pursue this litigation under this theory.

1. RICO Claims

The equitable doctrine of subrogation allows insurers, analogous in some respects to the plaintiffs, to bring their own claims for the recovery of the economic damages incurred as a result of tortious injury to their insureds.

Subrogation functions as a form of assignment. RICO claims are assignable. See, e.g., Koehler v. NationsBank Corp., 1997 U.S. Dist. LEXIS 2732, *6, 1997 WL 112836, at *2 (N.D. Ill. March 10, 1997) ("Federal courts have consistently held that RICO claims are assignable."); Resolution Trust Corp. v. S & K Chevrolet, 868 F. Supp. 1047, 1054 (C.D. Ill. 1994) ("Lower federal courts which have addressed the issue of the assignability [**21] of RICO claims have universally found that they are assignable."); Nicholls Pointing Coulson, Ltd. v. Transportation Underwriters of La., Inc., 777 F. Supp. 493, 495 (E.D. La 1991) ("District courts in other circuits have uniformly held that RICO treble damages claims are assignable."); Federal Ins. Co. v. Parella, 767 F. Supp. 157, 163 (N.D. Ill. 1990) ("There is very little room to argue that Congress would intend to allow the assignment of antitrust claims and would prohibit the assignment of RICO claims."); In re National Mortgage Equity Corp. Mortgage Pool Certificates Securities Litig., 636 F. Supp. 1138, 1155-56 (C.D. Cal. 1986) ("Permitting the assignment of RICO claims . . . would not restrict RICO's scope, but would serve to effectuate RICO's 'broad remedial purposes'.").

A number of courts have agreed that HN5[↑] a subrogee can assert a RICO claim. See, e.g., Ramos v. Patrician Equities Corp., 1993 U.S. Dist. LEXIS 2979, 1993 WL 58428 (S.D.N.Y. March 3, 1993) (surety allowed to assert RICO claims of defaulting investors); Federal Ins. Co. v. Ayers, 760 F. Supp. 1118, 1119-20 (E.D. Pa. 1990); Securities Investor Protection Corp. v. Poirier, 653 F. Supp. 63, 65-66 (D. Or. 1986); [**22] General Accident Ins. Co. of America v. Fidelity & Deposit Co. of Md., 598 F. Supp. 1223, 1246 (E.D. Pa. 1984).

The Supreme Court has assumed, for purposes of argument, that it was proper for a plaintiff to assert a subrogated RICO claim. See Holmes, 503 U.S. at 271. Analogous precedent in this circuit includes Redington v. Touche Ross & Co., 592 F.2d 617, 624 (2d Cir. 1978), rev'd on other grounds, 442 U.S. 560, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979), in which the court of appeals allowed the plaintiff to [*229] bring an equitable subrogation claim under the securities laws.

2. Pecuniary Losses Associated With Personal Injuries

Defendants suggest that the plaintiffs cannot have a subrogated RICO claim because the subrogee plaintiffs "stand in the shoes" of their subrogors and, they argue, the subrogors themselves have no RICO claims for the economic injuries associated with treatment of smoking related illnesses.

The defendants' analysis is unpersuasive. The HN6[↑] recovery of pecuniary losses associated with physical injuries directly caused by racketeering conduct is consistent with the language of the RICO statute. Such [**23] claims, furthermore, would materially advance the statute's legislative purposes of deterring racketeering, in all its forms, and of remedying, as fully as practicable, the economic consequences of racketeering. Finally, the recovery of these pecuniary losses is consistent with the expansive scope of RICO's civil remedy provisions as consistently interpreted by the Supreme Court.

a. Statutory Language

HN7[↑] The most natural reading of the language in RICO supports the conclusion that pecuniary losses resulting from racketeering personal injuries should be compensable under the statute. The statute confers standing on "any person injured in his business or property by reason of [racketeering acts defined in the statute]." HN8[↑] 18 U.S.C. § 1964(c).

Money, the Supreme Court has recognized in another context, is a form of property. See Reiter v. Sonotone Corp., 442 U.S. 330, 338, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979) ("The word 'property has a naturally broad and inclusive

meaning. In its dictionary definition and in common usage 'property' comprehends anything of material value owned or possessed. Money, of course, is a form of property." (citation [**24] omitted)).

HN9 [↑] Victims of racketeering who have been deprived of their monetary resources as a direct result of racketeers' predicate acts should, under the most natural interpretation of the phrase "business or property," recover their pecuniary losses.

A hypothetical will illustrate the anomaly of the restrictive interpretation of the statutory language proposed by the defendants. Assume racketeers attack a manufacturing plant to coerce its owner and an employee, and in so doing throw the owner and her employee through a window. Defendants argue that the racketeers should be made to pay for the costs of the broken window under RICO, but not for the pecuniary costs, such as medical bills or lost wages and profits, associated with the broken arms and legs of the owner and employee. A line must be drawn under the "business and property" rubric of the statute, but it would seem more sensible to draw it between pain and suffering and outlays for repairing windows and limbs.

Limitations of the phrase "business and property" in the antitrust context do not apply to RICO. In an antitrust case, the Supreme Court stated that the phrase "business or injury" excluded "personal injuries suffered. [**25] " [Reiter, 442 U.S. at 339](#). The Court's use of the term "personal injuries" in [Reiter](#) may simply have been a reference to claims for emotional distress or pain and suffering. Even if the Court intended the phrase to refer to the pecuniary losses associated with personal injury, however, it would be inappropriate to apply this phrase in the RICO context. While analogies between RICO and the Clayton Act can be instructive, there are sharp differences between the two statutes and their aims which can sometimes render such comparisons inappropriate. A version of RICO was originally proposed in the Senate as an amendment to the Clayton Act. [See S. 2048, 90th Cong. \(1967\)](#). Congress ultimately rejected the notion that RICO should be a subsection of the antitrust laws apparently for the reason that it did not want RICO [*230] to be limited by existing interpretations of [antitrust law](#). [See, e.g., 115 Cong. Rec. 6994 \(1969\)](#) (recommendation of American Bar Association against attaching RICO to Clayton Act because the "use of antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles" to private litigants by requiring [**26] them to "contend with a body of precedent-appropriate in a purely antitrust context-setting requirements on questions such as 'standing to sue' and 'proximate cause.'"); [see also 115 Cong. Rec. 6993 \(1969\)](#) (statements of Sen. Hruska).

HN10 [↑] RICO standing has been interpreted much more broadly than [antitrust law](#) standing which, for example, contains an "antitrust injury" requirement. The concerns which animated RICO were different from those which inform the interpretation of the antitrust statutes. As noted below, RICO was an attempt to deter racketeering in all its aspects, including physical violence aimed at the person, and to remedy the full range of economic consequences of racketeering. Physical violence and attacks upon the person were standard tools of racketeers that RICO was designed to address; such attacks are specifically proscribed by the statute. The two statutes' coverage of "personal injuries" are not fully congruent.

Most importantly, **HN11** [↑] the RICO statute contains an express admonition that the statute be read broadly in order to effectuate its policies. It provides that, "the provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. [**27] L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970); [see also Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98, 87 L. Ed. 2d 346, 105 S. Ct. 3275 \(1985\)](#) ("RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach but also of its express admonition" (citation omitted)). The statute's "liberal construction" provision is particularly applicable to the civil remedies contained in [section 1964](#). [See Sedima, 473 U.S. at 491 n.10](#) ("Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in [§ 1964](#), where RICO's remedial purposes are most evident.").

While the phrase "business and property" could be interpreted to exclude all pecuniary losses associated in any way with a personal injury, such an interpretation would undermine the policies of RICO.

b. Legislative Purpose

Analysis of the statute's legislative history confirms that RICO was intended to deter the use of physical violence by racketeers and to remedy the economic consequences of those physical injuries resulting from racketeering violence.

In enacting RICO, Congress recognized that the use [**28] and threat of physical violence were traditional tools of the racketeer and that the infliction of personal injuries could result in substantial economic losses to the victims of racketeering. During the bill's debate, RICO's co-sponsor in the Senate summarized the problem Congress faced: "[Organized Crime] employs physical brutality, fear and corruption to intimidate competitors and customers to achieve increased sales and profits." 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska); see also 113 Cong. Rec. 17998 (1967) (Sen. Hruska, during consideration of a precursor to RICO, describing tools of racketeers as "large amounts of cash coupled with threats of violence, extortion, and similar techniques").

This concern for the economic consequences of the physical injuries caused by racketeers led Congress to include numerous references to personal injury offenses in RICO's definition of "racketeering activity." RICO's definition of "racketeering activity" includes, for example, "any act or threat" involving murder, kidnaping, robbery, and extortion, which is chargeable under State law and punishable by imprisonment for more than one year. [18 U.S.C. § 1961](#) [**29] ([1](#)). [*231] In addition, RICO's definition of predicate racketeering acts includes violations of federal laws designed to control damages to the person. See, e.g., 18 U.S.C. § 1513 (retaliating against a witness, victim, or informant), § 1951 ("Hobbs Act," proscribing interstate robbery, extortion and any threats or acts of physical violence to any person or property in furtherance of interstate robbery or extortion), § 1958 (use of interstate commerce facilities in the commission murder-for-hire) §§ 2251, 2251A, 2252, 2258 (sexual exploitation of children), and § 2421-24 ("white slave" traffic), found in 18 U.S.C. § 1961(1).

The commission of a "pattern" of any of these predicate offenses, when committed in conjunction with the statute's other requirements, affords a civil remedy for "any person" who has incurred business or property losses as a result of the commission of the predicate acts. [18 U.S.C. § 1964\(c\)](#). RICO's legislative scheme evinces a desire on the part of Congress to deter racketeering, in all its forms, including racketeering violence which inflicts personal injuries. As a result, it is reasonable [**30] to conclude that RICO is also intended to remedy the range of economic costs of racketeering, including those economic costs racketeers inflict when they choose to achieve their aims through a pattern of violence and physical injury or by fraud designed to injure the person.

c. Case Law

The Supreme Court's expansive interpretations of RICO standing support the conclusion that RICO should remedy the pecuniary losses caused by the infliction of personal injuries by racketeers.

In [Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 87 L. Ed. 2d 346, 105 S. Ct. 3275 \(1985\)](#), the Supreme Court rejected an attempt by the court of appeals for the Second Circuit to limit the classes of racketeering victims who can recover under the Act. The court of appeals had held that RICO plaintiffs were required to plead a "racketeering injury" in order to recover under the statute. In rejecting that ruling the Supreme Court [HN12](#) [↑] stated:

Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection [**31] with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

[Sedima, 473 U.S. at 497.](#)

When the racketeering conduct involves acts of physical violence and injury, the natural interpretation of the phrase "any recoverable damages . . . flowing from the commission of the predicate acts" suggests that those who pay an economic price for the racketeering acts are included in the class of individuals who may recover.

This conclusion is further supported by the fact that the majority in Sedima rejected an attempt by the dissent to limit RICO in a manner analogous to that now proposed by the defendants. In Sedima, the dissent urged that the direct victims of predicate acts such as murder and kidnapping be excluded from recovery under the statute in order to limit recovery to those parties suffering "commercial" losses. See Sedima 473 U.S. at 519 (Marshall, J., dissenting) ("Congress' concern was not for the direct victims [**32] of the racketeers' acts, whom state and federal laws already protected, but for the competitors and investors whose businesses and interests are harmed or destroyed by racketeers, or whose competitive positions decline because of infiltration in the relevant market."). The majority refused to adopt this approach, reasoning that there was no basis for inferring either a "racketeering injury" requirement or a "competitive injury" [*232] requirement in the statute's language or legislative history. Id. at 497 n.15 ("The dissent would also go further than did the Second Circuit in its requirement that the plaintiff have suffered a competitive injury. . . . The language [Congress] chose, allowing recovery to 'any person injured in his business or *property*,' § 1964(c) (emphasis added), applied to this situation, suggests that the statute is not so limited.").

Additional support is provided by the Supreme Court's holding and reasoning in National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994). In Scheidler, the plaintiffs included two health care centers that provided medical services including abortion. [**33] The defendants were a collection of organizations and individuals, some of whom allegedly constituted the RICO "enterprise," who opposed the performance of abortions at these and other health care facilities. In their efforts to prevent abortions at the plaintiff clinics, the defendants allegedly were involved in a pattern of "threatened or actual force, violence, or fear" intended to deter employees and patients from utilizing the clinics' services. See Scheidler, 510 U.S. at 253 (quoting plaintiffs' second amended complaint P 97). The plaintiff clinics alleged that these efforts by the defendants had resulted in economic and business losses.

Rejecting several lower court holdings that RICO's civil remedies require racketeering activity that is motivated by an economic purpose, the Supreme Court in Scheidler held that the plaintiff clinics' allegations were sufficient to state a claim under RICO:

[The plaintiffs clinics] alleged in their complaint that respondents conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere. Petitioners claimed that this conspiracy "has injured the business and/or [**34] property interests of the [petitioners]." In addition, petitioners claimed that respondent Scheidler threatened [plaintiff's] clinic administrator with reprisals if she refused to quit her job at the clinic. . . . Nothing more is needed to confer standing on [plaintiff clinics] at the pleading stage.

Scheidler, 510 U.S. at 256 (quoting second amended complaint) (citations omitted).

As the Court's reasoning in Scheidler HN13↑ illustrates, RICO provides a civil recovery for businesses which have suffered economic loss as a result of actual or threatened physical violence conducted in a pattern of racketeering. If a business were required to shut down by virtue of racketeering-inflicted personal injuries to its workers, the Court's analysis in Scheidler suggests that the business should also be allowed to recover those economic losses resulting from the closure. There appears to be no principled basis for allowing the business to recoup these costs while denying that same right to the injured employees, who also have sustained real pecuniary losses and therefore have been "injured in their property." The encompassing phrase "any person" contained in the [**35] statute's standing provision, as well as RICO's mandate to liberally construe the provisions of the statute to effectuate the statute's policies, require that the same remedies available to businesses also be extended to individuals who have sustained economic losses.

It is often difficult to draw a clear distinction between the economic losses borne by individuals and by businesses. In the instant case, where those injured in their "persons" were fortunate to have medical insurance, the costs have ultimately been borne by the Blues who are in the business of providing health care to the nation. These alleged economic injuries to the plaintiffs' business and property have allegedly undermined the financial health and stability of a critical industry in this nation --that devoted to health care of millions of people. See, e.g., Vernellia R. Randall, Managed Care, Utilization Review, [*233] and Financial Risk Shifting, 17 U. Puget Sound L. Rev. 1, 3 (1994) ("The costs of health care delivery has increased and has become a national concern."); Peter T. Kilborn, Experts

Offer Information About Americans Without Health Insurance, N.Y. Times, Feb. 26, 1999, at A1 (43.4 million Americans [**36] without insurance, "adding to the burdens on the nation's health care system"). Employers have even found it increasingly expensive and difficult to fund health care coverage for their own employees. See Jennifer Steinhauer, Health Insurance Costs Rise, Hitting Small Business Hard, N.Y. Times, Jan. 19, 1999, at A1. Businesses have been forced to devote larger and larger portions of their resources to providing health care or have reduced benefits to their workers, compelling taxpayers, the plaintiffs, and premium payers to subsidize the medical treatment of those who can no longer afford insurance. Research or treatment which would have been supported by resources of the health care industry have, it is contended, gone unfulfilled as a result of the defendants' racketeering. This is arguably precisely the type of economic injury which RICO was designed to address and deter.

A number of courts, including two district courts in this circuit, have accepted or shown a disposition in favor of allowing RICO claims for the pecuniary losses associated with physical injuries caused by racketeering. See Libertad v. Welch, 53 F.3d 428, 437 n.4 (1st Cir. 1995) ("Plaintiffs [**37] like Libertad and Emancipacion could have standing to sue under RICO, if they were to submit sufficient evidence of injury to business or property such as lost wages or travel expenses, *actual physical harm*, or specific property damage sustained as a result of a RICO defendant's actions." (emphasis added)); Jerry Kubecka, Inc. v. Avellino, 898 F. Supp. 963, 968 (E.D.N.Y. 1995) ("If [murder victims] had been merely disabled by the attempt on their lives but survived, presumably they would have had a RICO claim for lost earnings from their business activities because they had been injured in their 'business or property.'"); von Bulow v. von Bulow, 634 F. Supp. 1284, 1309 (S.D.N.Y. 1986) ("The cost to [comatose murder target] of her committee and her inability to enjoy her personal and real property may well be compensable monetary injuries under RICO."); Meyer v. First National Bank & Trust Co., 698 F. Supp. 798, 803 (D.N.D. 1987) (interpreting Sedima, "the direct damages resulting from the predicate acts would also be compensable (i.e., recovery for the cost of a burned building, or personal injury resulting from threats [**38]), just as damages for 'infiltration injury' to a legitimate business enterprise would be compensable." (emphasis added)); Hunt v. Weatherbee, 626 F. Supp. 1097, 1100-1101 (D. Mass. 1986) (sexual discrimination and harassment victim allowed to seek lost wages under RICO); Rice v. Janovich, 109 Wash. 2d 48, 742 P.2d 1230, 1237-38 (Wash. 1987) (assault victim allowed to seek lost wages under RICO).

The plaintiff in Rice, a night watchman and janitor at a business establishment, was allegedly assaulted and beaten while his place of employment was fire bombed. The court concluded that the plaintiff's loss of wages was a compensable injury under RICO:

The defendants' arguments that plaintiff's claim for lost wages should not be within the scope of injuries recoverable under RICO conflict with these conclusions in Sedima. Injuries resulting from the predicate offenses are compensable under the act. The scope of recoverable damages for injury "in his business or property" is to be broadly construed. . . . The narrow interpretation of "business and property" advocated by the defendants, based upon analogy to numerous cited cases of antitrust [**39] law, has been rejected by the Supreme Court.

Rice, 742 P.2d at 1237.

Other courts have allowed recovery for lost wages outside the "personal injury" [*234] context. See, e.g., Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1170 (3d Cir. 1989) (allowing RICO claim stating, "loss of earnings, benefits, and reputation constitute self-evident injury as in any standard wrongful discharge action"); Snead v. Hygrade Food Products Assocs., 1998 U.S. Dist. LEXIS 20296, 1998 WL 910223, at *3 (E.D. Pa. 1998) (claims for economic damages resulting from loss of employment allowed under RICO); Reynolds v. Condon, 908 F. Supp. 1494, 1517-19 (N.D. Iowa 1995) (claims for loss of income or employment opportunities compensable under RICO); Rodonich v. House Wreckers Union, 627 F. Supp. 176, 180 (S.D.N.Y. 1985) (lost wages claim allowed under RICO); Callan v. State Chemical Mfg. Co., 584 F. Supp. 619, 623 (E.D. Pa. 1984) (claim for lost income from plaintiffs' discharge allowed under RICO); cf. In re Cordis Corp. Pacemaker Product Liab. Litig., 1992 U.S. Dist. LEXIS 22612, 1992 WL 754061, at *3 (S.D. Ohio 1992) (medical costs associated [**40] with implanting and explanting defective pacemakers "property" under RICO).

d. RICO Limitations In Other Circuits

Defendants' support their position by reference to the holdings in some other circuits which have not allowed the pecuniary losses due to "personal injuries." See, e.g., *Bast v. Cohen, Dunn & Sinclair, P.C.*, 59 F.3d 492 (4th Cir. 1995); *Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992); *Oscar v. University Students Co-Operative Ass'n*, 965 F.2d 783 (9th Cir. 1992); *Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3d Cir. 1991); *Grogan v. Platt*, 835 F.2d 844, 848 (11th Cir. 1988); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 643-44 (6th Cir. 1986). But see *Libertad v. Welch, supra*, 53 F.3d at 437 n.4. To date the court of appeals for the Second Circuit has not cited these negative holdings of other circuits as binding.

Defendants' citation to *Bankers Trust Co. v. Rhoades* 741 F.2d 511 (2d Cir. 1984), vacated by 473 U.S. 922, 87 L. Ed. 2d 673, 105 S. Ct. 3550 (1985), is unavailing. See *741 F.2d at 515* (reasoning that plaintiff must show a "propriety" type of damage" which does not include "personal injuries"). The facts of *Bankers Trust* did not involve personal injuries and did not present the court with the unique issue of whether pecuniary damages associated with personal injuries are compensable under the statute. The decision in *Bankers Trust*, furthermore, was issued one day after the Second Circuit's decision in *Sedima* and espoused the same restrictive approach to RICO rejected by the Supreme Court in *Sedima*. *Bankers Trust* was vacated and remanded for further consideration by the Court the day after its decision in *Sedima*. See 473 U.S. 922 (1985). The court of appeal's subsequent opinion in *Bankers Trust* did not contain language attempting to define the types of injury encompassed by the phrase "business of property." See *859 F.2d 1096, 1100 (2d Cir. 1988)*. The issues now before this court are not controlled by a passing phrase of dictum embedded in a pre-*Sedima* holding that was ultimately vacated by the Supreme Court.

In *Grogan*, the court of appeals for the Eleventh Circuit recognized that there was "some merit" in allowing the pecuniary costs of personal injuries **[**42]** to be recovered under RICO. See *Grogan* 835 F.2d at 848; see also *Doe*, 958 F.2d at 770 (acknowledging that economic aspects of personal injuries could, "as a theoretical matter," be viewed as injury to business or property.). Nevertheless, the court in *Grogan* refused to allow injured FBI agents and the estates of murdered agents to seek the pecuniary losses they allegedly suffered as a result of predicate acts of racketeering. *835 F.2d at 847*. The court based its conclusion in part on the observation that "pecuniary and non-pecuniary aspects of personal injury claims . . . are often to be found, intertwined, in the same claim for relief." Id.

The courts reasoning in *Grogan* is not controlling. The pecuniary and non-pecuniary aspects of tort claims are not "intertwined" in a way that prevents the courts from treating the two sets of claims differently. **[*235]** Subrogation, where pecuniary claims of subrogees are often separated from non-pecuniary claims of subrogors, is one example of how the two types of claims are distinguished by courts and treated separately. See, e.g., *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 209 (2d Cir. 1985) **[**43]** ("These two claims [of subrogor and subrogee] are separate and distinct, and do not constitute unlawful splitting under New York law."); *Fidelity & Deposit Co. of Md. v. Gaspard*, 1997 U.S. Dist. LEXIS 8689, *5, 1997 WL 335598, at *2 (E.D. La. 1997) ("Since the two claims [of subrogee and subrogor] against [defendant] are distinct, a judgement rendered in the absence of [subrogor] would have no prejudicial affect on him."); *Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 582, 626 N.Y.S.2d 994, 650 N.E.2d 841 (1995) ("The claims of the insurer for amounts paid by it and the insured's claim for uninsured losses are divisible and independent, and 'permitting the insurer to sue . . . as equitable subrogee does not affect the insured's right to sue for the amount of the loss remaining unreimbursed.' (quoting *Federal Ins. Co. v. Arthur Andersen & Co.*, 75 N.Y.2d 366, 374, 553 N.Y.S.2d 291, 552 N.E.2d 870 (1990))).

Under federal law, subrogees and subrogors are allowed to pursue their claims in separate actions. See, e.g., *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973) ("Either party may bring the suit--the **[**44]** insurer-subrogee to the extent it has reimbursed the subrogor, or the subrogor for either the entire loss or only its unreimbursed loss."); 6A Charles A. Wright et al., *Federal Practice and Procedure* § 1546, at 360 (2d ed. 1990) ("Either the insured or the insurer may sue."). The general rule in federal courts is that the insured is not an indispensable party under Rule 19 and need not be joined in the subrogee's action against the tortfeasor if joinder would deprive the court of subject matter jurisdiction. See, e.g., *United States v. Aetna Casualty*

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& Surety Co., 338 U.S. 366, 382 n.19, 94 L. Ed. 171, 70 S. Ct. 207 (1949) (insureds and insurers "clearly not 'indispensable' parties"); Krueger v. Cartwright, 996 F.2d 928, 934 (7th Cir. 1993) ("We agree with the majority of courts that have addressed the issue and applied this principle [that neither is indispensable] as a general rule in cases of partial subrogation.").

As the example provided by subrogation suggests, there is no conceptual or practical difficulty in separating the "intertwined" pecuniary and non-pecuniary aspects of personal injury claims. See also, e.g., N.Y. C.P.L.R. [**45] 4111(d), (e) & (f) (New York juries, including those trying cases in federal courts applying New York substantive law, are required to itemize verdicts separating items of pecuniary and "non-pecuniary," including pain and suffering, damages). It would be inappropriate to frustrate the policies of RICO on the theory that the two types of claims--pecuniary and non-pecuniary--are "indivisible."

In Genty, 937 F.2d 899 (3d Cir. 1991), the court of appeals for the Third Circuit rejected the plaintiffs' pecuniary claims in part because of the existence of alternative state law remedies. See 937 F.2d at 918 ("Ample law already existed [at the time of RICO's passage] to provide recovery for wrongfully inflicted personal injuries. The unavailability of a civil RICO treble damages action for personal injuries in no way restricts the plaintiff's right to bring a pendent state wrongful death or personal injury action along with a RICO action for damages to business or property.").

The fact that alternative state law remedies may exist for victims of personal injury caused by racketeering is not a dispositive factor in the interpretation of the statute. There [**46] are alternative remedies for every injury caused by the predicate acts of racketeers. A victim whose window or arm was broken by racketeering has a number of alternative tort claims from which to choose. The purpose of RICO was to superimpose another layer [*236] of remedies in order to deter racketeering. As the statute's preface states, RICO is designed to "seek the eradication of organized crime in the United States . . . by providing *enhanced sanctions and new remedies.*" Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (1970) (emphasis added).

Similar attempts to limit RICO on the theory that it was not intended to supplant traditional remedies have been rejected by the Supreme Court. In Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), rev'd, 473 U.S. 479, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985), the court of appeals for the Second Circuit held that RICO plaintiffs were required to assert a "racketeering injury" in order to recover under RICO. The court based its conclusion in part on the assumption that Congress would not have wanted to provide additional remedies for already compensable injuries. See 741 F.2d at 494 n.37 [**47] ("State law offenses are not the gravamen of RICO offenses. RICO was not designed to punish state law violations." (quoting United States v. Forsythe, 560 F.2d 1127, 1135 (3d Cir. 1977))).

The Supreme rejected the court of appeal's reasoning as contradictory to the plain meaning of the statute. It pointed out that, "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." Sedima, 473 U.S. at 498.

The court of appeal's effort to limit RICO's standing provision in Sedima was also motivated in part by the court's fear of the effect of expansion of the statute into new areas. See Sedima, 473 U.S. at 499 ("Underlying the Court of Appeals' holding was its distress at the 'extraordinary, if not outrageous,' uses to which civil RICO has been put. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against 'respected and legitimate "enterprises.''" (quoting 741 F.2d at 487)).

The Supreme Court criticized the attempt to limit the statute's scope when such a limitation contradicted the statute's language and [**48] policies. It stated:

Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy. The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We

do not believe that the amorphous standing requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

Sedima, 473 U.S. at 500; cf. Blue Shield of Va. v. McCready, 457 U.S. 465, 472, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) ("Consistent with the congressional purpose, we have refused to engraft artificial limitations on the [standing provision of the Clayton Act].").

Similarly, in Scheidler the Supreme Court rejected efforts by the lower courts to reign in RICO by engrafting a requirement that the racketeering injury be "motivated by an economic purpose." Scheidler, 510 U.S. at 262 [**49] ("The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (quoting Sedima, 473 U.S. at 499 (quoting Haroco, Inc. v. American Nat'l. Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 473 U.S. 606, 87 L. Ed. 2d 437, 105 S. Ct. 3291 (1985)))).

As in Sedima and Scheidler, the exclusion of an entire class of pecuniary losses in the present litigation from the statute's reach would contravene the comprehensive Congressional scheme, contradict the most natural reading of the statute's language, and result in the underenforcement of the statute's policies. The interpretations of [*237] RICO relied upon by defendants are reminiscent of earlier attempts to engraft artificial limitations upon the standing provisions of RICO. Attempts to handcuff RICO have been rejected by the Supreme Court since the statute's plain language and legislative history call for a freer and more expansive interpretation.

e. Laborers Local 17

The defendants final argument is that the plaintiffs' subrogated RICO claims should be denied based on a paragraph of dictum [**50] contained in Laborers Local 17. In Laborers Local 17, the court of appeals recognized that the union trust funds retained their right to bring claims as subrogees notwithstanding the holding that their "direct" claims were barred. In contrast to the two instant cases, in Laborers Local 17 the position of the plaintiff trust funds was, for tactical purposes, that the smokers did not possess a RICO claim for the economic damages associated with the medical treatment of tobacco use. In dictum the court of appeals accepted the plaintiffs' position, concurred in by defendants for arguments sake, as a correct statement of law:

The Funds correctly note that these RICO causes of action could not be asserted by the smokers or by the Funds in a subrogation action because the RICO statute requires an injury to "business or property," whereas the smokers' injuries are personal in nature. . . . The Funds may still bring a subrogation action to recover the medical costs paid out for the individual smokers Although these will not be RICO claims, they will remedy the harm done by defendants' alleged misconduct.

Laborers Local 17, 191 F.3d 229, 1999 U.S. App. LEXIS 19576, [**51] at *35-36, 1999 WL 639865, at *11.

Defendants suggest that this passage of dictum in Laborers Local 17 should be interpreted as a holding by the court of appeals for the Second Circuit that smokers do not possess a RICO claim for the economic damage resulting from the medical treatment of tobacco use.

The argument is not persuasive. This circuit's court of appeals has recently cautioned against placing too heavy reliance on judicial dictum:

The rationale for the principle that preclusive effect will be given only to those findings that are necessary to a prior judgment is that "a collateral issue, although it may be the subject of a finding, is less likely to receive close judicial attention and the parties may well have only limited incentive to litigate the issue fully since it is not determinative."

United States v. Hussein, 178 F.3d 125, 129 (2d Cir. 1999) (quoting Commercial Assocs. v. Tilcon Gammino, Inc., 998 F.2d 1092, 1097 (1st Cir. 1993)).

The plaintiffs in Laborers Local 17 did not advance a subrogated claim in their pleadings. The plaintiffs never argued before the district court or the court of appeals [**52] that they possessed a subrogated RICO claim. To the

contrary, as noted, they suggested, arguendo, that the smokers did not possess a RICO claim for their economic injuries. The court of appeals' dictum appears to represent an assumption the court made for purposes of argument rather than an attempt to definitively state an important new rule of law on a complex and controversial issue without the benefit of adverse briefing, argument of counsel, or its own analysis. Such a leap to bind future parties actually litigating the issue for the first time would constitute an extraordinary and dangerous development in the common law process.

When both parties advocated the same view with respect to the pecuniary damages related to personal injuries, the Blue Cross memorandum accepted, in dictum, some of the views expressed in other circuits with respect to RICO claims for such injuries. See Blue Cross, 36 F. Supp. 2d at 571 ("In all the cases where pecuniary damages were not allowed, the gravamen of the plaintiffs' claims was for personal injuries."). After adverse briefing from [*238] counsel and an extended opportunity to analyze the statutory text, case law, and legislative [**53] history, conclusions which differ from the Blue Cross dictum are required. The court of appeals may reach the same conclusion favoring plaintiffs' subrogation claims if the issue were squarely presented on appeal by parties with a full incentive to litigate.

In summary, the plaintiffs' complaints in both Blue Cross and National Asbestos are sufficient to state a subrogated claim under federal RICO. According to the allegations, the plaintiffs qualify as subrogees of the smokers who have been injured economically as a result of the misconduct of the defendants. Plaintiffs have allegedly expended billions of dollars in the treatment of smoking related diseases. These payments were made as part of the plaintiffs' legal obligations to their subrogors. Any challenges to the plaintiffs' positions as proper subrogees raises factual issues best addressed at a later stage of these litigations. The factual allegations contained in the complaints are sufficient to state a cause of action under RICO. See Blue Cross, 36 F. Supp. 2d 560, 565-68 (E.D.N.Y. 1999).

C. Aggregation Of Claims

Defendants objections to the plaintiffs' "aggregation of claims" are misplaced at this stage [**54] of the litigation. As subrogees, the plaintiffs are real parties in interest who possess their own substantive rights. See, e.g., United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 379, 94 L. Ed. 171, 70 S. Ct. 207 (1949) ("Both the insured and insurer . . . have substantive rights against the tortfeasor which qualify them as real parties in interest."). As real parties in interest, plaintiffs have a right, pursuant to Rule 18, to join as many claims as they have against a defendant. See Fed. R. Civ. P. 18(a) ("A party asserting a claim to relief may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party."). In contrast to the class action context, furthermore, a subrogee may aggregate its own claims to meet the amount-in-controversy requirement of diversity jurisdiction. See Allstate Ins. Co. v. Hechinger Co., 982 F. Supp. 1169, 1172 (E.D. Va. 1997) ("As real party in interest, the insurer-subrogee owns the substantive rights on which it sues. Therefore, just as an individual can aggregate the claims it owns to meet the jurisdictional amount, so, too, [**55] can a subrogee aggregate the claims to which it is subrogated, and hence owns, to meet the jurisdictional amount." (citations omitted)); Ministry of Health v. Shiley Inc., 858 F. Supp. 1426, 1431 (C.D. Ca. 1994) (allowing subrogee to aggregate its own claims, distinguishing between class action context and aggregation by subrogee); Liberty Mut. Ins. Co. v. Tel-Mor Garage Corp., 92 F. Supp. 445, 446 (S.D.N.Y. 1950) ("Combining the [subrogee's] three claims to constitute the required jurisdictional amount was proper." (citations omitted)).

Defendants' "aggregation" objections amount to an assertion that the plaintiffs' pleadings do not demonstrate that they are entitled to the relief they request. In particular, defendants contend that plaintiffs have not alleged sufficient facts with respect to their subrogors, for example, the injuries each has suffered, the dates of each injury, and the brands of cigarettes each has smoked. These objections are more properly presented in the context of Federal Rules of Civil Procedure Rule 12(e) (motion for more definite statement) or Rule 8(a) (pleading claim for relief).

The federal rules of procedure employ [**56] liberal standards for pleading under Rule 8(a) (requiring "short and plain statement" showing party is entitled to relief). A party is not required to allege every particular and detail at the pleading stage. If defendants were correct, complaints in complicated and large cases such as this one would run into the thousands of pages. As the Second Circuit has explained:

[*239]

Such pleading of the evidence is surely not required and is on the whole undesirable. It is a matter for the discovery process, not for allegations of detail in the complaint. The complaint should not be burdened with possibly hundreds of specific instances; and if it were, it would be comparatively meaningless at trial where the parties could adduce further pertinent evidence if discovered. They can hardly know all their evidence, down to the last detail, long in advance of trial.

Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957); see also Conley v. Gibson, 355 U.S. 41, 47-48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) ("All the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds [*57] upon which it rests. . . . Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.").

The 205 page complaint in Blue Cross and the 87 page complaint in National Asbestos have set out sufficient facts, including detailed allegations with respect to the defendants' conduct, to give defendants "fair notice" of the plaintiffs' claims. The discovery process and Rule 16 conferences can be expected to identify further elements of both parties' claims.

Defendants aptly point out that plaintiffs face substantial difficulties in establishing numerous aspects of their claims, for example, issues related to causation. That fact, however, is not sufficient reason for dismissing the claims at the pleading stage.

Defendants' suggestion that the plaintiffs' claims should be dismissed because the plaintiffs "intend" to utilize improper and "unconstitutional" methods of statistical analysis to prove elements of their case is not a proper argument for a motion addressed to the [*58] pleadings. Whether plaintiffs will be allowed to use statistical methods of proof, and if so in what contexts, is an issue that can only be determined during and after the discovery process. The defendants' argument that plaintiffs will not be able to prove *all* their claims without recourse to "unconstitutional" means is no reason for striking, with prejudice, all the plaintiffs' claims or for attempting to winnow those claims without the benefits of discovery. Plaintiffs have alleged sufficient facts in their complaint to establish that, if proven, they are entitled to some relief. The appropriate time to determine how much relief they may be entitled to is after discovery reveals how many, if any, of their allegations they can prove.

The flexibility in structuring the litigation provided by the Federal Rules of Civil Procedure will help ensure that the rights of all parties will be protected throughout the litigation. See, e.g., Letter dated September 2, 1999 to magistrate judge by attorney for plaintiff suggesting "staged" discovery and trial.

D. State Claims

So much effort has already been invested in these cases that it is expedient to exercise supplemental jurisdiction [*59] over the state law claims in Blue Cross pursuant to section 1337 of title 28. The validity of the Blues' state law claims remain unaddressed by Laborers Local 17. These state law claims provide an independent basis for this court's retention of jurisdiction over Blue Cross. The case was filed in this court more than sixteen months ago. After more than a full year of discovery and motion practice, considerations of efficiency and fairness dictate that the parties be allowed to continue their closely related suits in this court.

The viability of state law claims has not been fully briefed. Discovery on all claims --federal and state-- appears at this pleading stage to be essentially the same.

[*240] IV. CONCLUSION

The motions to dismiss the amended complaints in Blue Cross and National Asbestos are denied. Discovery is to proceed under the close supervision of the magistrate judge with every effort made to limit the costs and to utilize

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materials already available from sources in the many tobacco litigations in state and federal courts. Both the magistrate judge and the district judge will entertain suggestions for effectively structuring the litigation.

SO ORDERED

Dated: September 7, 1999

Brooklyn, **[**60]** New York

Jack B. Weinstein

United States Senior District Judge

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American Ad Mgmt., Inc. v. General Tel. Co.

United States Court of Appeals for the Ninth Circuit

December 10, 1998, Argued and Submitted, Pasadena, California ; September 9, 1999, Filed

No. 97-55679

Reporter

190 F.3d 1051 *; 1999 U.S. App. LEXIS 21563 **; 1999-2 Trade Cas. (CCH) P72,648; 99 Cal. Daily Op. Service 7431; 99 Daily Journal DAR 9441

AMERICAN AD MANAGEMENT, INC., a California Corporation; O'CONNOR AGENCY, Plaintiffs-Appellants, v. GENERAL TELEPHONE COMPANY OF CALIFORNIA; GTE DIRECTORIES CORPORATION; GTE DIRECTORIES PUBLISHING CORP.; GTE DIRECTORIES SERVICE CORPORATION; GTE NATIONAL MARKETING SERVICE CORP.; GTE DIRECTORIES SALES CORP., Defendants-Appellees.

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Central District of California. D.C. No. CV 92-2810. LGB CV 93-3650 LGB. Lourdes G. Baird, District Judge, Presiding.

Disposition: REVERSED and REMANDED.

Core Terms

antitrust, advertising, competitor, damages, anti trust law, district court, discounting, consumer, alleged injury, prices, summary judgment, flows, yellow pages, commissions, speculative, factors, duplicative, publishers, customers, unlawful conduct, Sherman Act, space, lower price, anticompetitive, acquisitions, directories, purchasers, restrained, weighs

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 grant of summary judgment de novo.

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

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

HN2 Standards of Review, De Novo Review

Antitrust standing is a question of law reviewed de novo.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

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 > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN3 Private Actions, Costs & Attorney Fees

See [15 U.S.C.S. § 15\(a\)](#).

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN4 Regulated Industries, Communications

Courts construct the concept of antitrust standing, under which they evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them, to determine whether a plaintiff is a proper party to bring an antitrust claim.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN5 Regulated Industries, Communications

The factors for determining whether a plaintiff who has borne an injury has antitrust standing include: (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 > Regulated Industries > Communications > General Overview

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

HN6 Regulated Industries, Communications

To conclude that there is antitrust standing, a court need not find in favor of the plaintiff on each factor. Generally no single factor is decisive. Instead, the court balances the factors. Nevertheless, the court gives great weight to the nature of the plaintiff's alleged injury. A showing of antitrust injury is necessary, but not always sufficient, to establish standing under [15 U.S.C.S. § 4](#).

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

[**HN7**](#) [down] **Regulated Industries, Communications**

The antitrust laws do not provide a remedy to every party injured by unlawful economic conduct. It is well established that the antitrust laws are only intended to preserve competition for the benefit of consumers. It is competition, not competitors, which the act protects. A plaintiff may only pursue an antitrust action if it can show 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. There are four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

[**HN8**](#) [down] **Regulated Industries, Communications**

Without a violation of the antitrust laws, there can be no antitrust injury.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

[**HN9**](#) [down] **Regulated Industries, Communications**

A plaintiff must allege some credible injury caused by the unlawful conduct. There can be no antitrust injury if the plaintiff stands to gain from the alleged unlawful conduct.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

[**HN10**](#) [down] **Regulated Industries, Communications**

It is not enough that the plaintiff's claimed injury flows from the unlawful conduct. An antitrust injury must flow from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

[**HN11**](#) [down] **Regulated Industries, Communications**

The plaintiff's injury must be of the type the antitrust laws were intended to prevent. Injuries that result from increased competition or lower, but non-predatory, prices are not encompassed by the antitrust laws.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

[**HN12**](#) [down] **Regulated Industries, Communications**

Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury.

Governments > Courts > General Overview

HN13 Governments, Courts

In the absence of a showing of personal bias, reassignment to another district court judge is appropriate only in unusual circumstances.

Counsel: Maxwell M. Blecher, Blecher & Collins, Los Angeles, California, for the plaintiffs-appellants.

Mark L. Callister, Callister Nebeker & McCullough, Salt Lake City, Utah, for the defendants-appellees.

Judges: Before: Alfred T. Goodwin, A. Wallace Tashima, and Kim McLane Wardlaw, Circuit Judges. Opinion by Judge Tashima.

Opinion by: A. WALLACE TASHIMA

Opinion

[*1053] OPINION

TASHIMA, Circuit Judge:

American Ad Management, Inc. and O'Connor Agency (collectively "American") appeal the district court's grant of summary judgment in favor of General Telephone Company of California and related companies (collectively "GTE"), in American's suit against GTE for asserted violations of the federal antitrust laws and related state law claims. We previously reversed the district court's award of summary judgment on the merits in favor of GTE. See *American Ad Management, Inc. v. GTE Corp., 92 F.3d 781 (9th Cir. 1996)* ("American Ad I"). On remand, the district court again granted summary **[**2]** judgment to GTE, holding that American lacks antitrust standing. American appeals, contending that it has standing under the test set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*, and theories based on American's participation in the restrained market and the fact that American's injury was inextricably intertwined with GTE's anticompetitive scheme. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we reverse.

I.

GTE publishes telephone directories commonly known as Yellow Pages. Advertisers may purchase advertising space in the directories either directly from GTE or through an Authorized Selling Representative ("ASR"). American is an ASR.

Once an ASR receives an order for advertising space, the ASR purchases the space from the publisher. The publisher sells the space to the ASR at a lower price than that given to the public, thereby providing the ASR with a commission. By charging customers a price lower than the publicly available price, the ASR passes some of the commission on to the customers. This common practice is called **[**3]** "discounting."

GTE is a member of the Yellow Pages Publishers Association ("YPPA"). In 1992, American filed suit against GTE, raising claims under § 1 of the Sherman Act, 15 U.S.C. § 1, other federal antitrust laws, and state law.¹ American alleges that members of the YPPA agreed to eliminate commissions on local accounts and to restrict the definition of national accounts on which commissions are still paid with the effect of ending the ASRs' practice of discounting with respect to local accounts.

In 1994, the district court granted GTE's motion for summary judgment on American's antitrust claims and dismissed its supplemental state law claims on the ground that American had failed to raise a genuine issue of material fact as to whether GTE's conduct unreasonably restrained trade. American appealed. This court reversed the award of summary judgment, [*1054] finding that there were disputed [**4] issues of fact with respect to all of the elements of American's claim under § 1 of the Sherman Act. See *American Ad I*, 92 F.3d 781 at 792.² In the process of deciding whether the district court applied the correct analytical framework to the issue of whether the alleged conspiracy constituted an unreasonable restraint of trade, we found the relationship between the ASRs and the publishers to be one of agency, rather than one of retailer and wholesaler. See *id. at 785*. We stated, "in short, ASRs do not compete with publishers in the sale of yellow pages advertising, rather the relationship is one of agency." *Id. at 786* (footnote omitted). Because genuine issues of material fact existed, we remanded the case to the district court. See *id. at 792*.

On remand, the district court again [**5] granted summary judgment in favor of GTE, this time on the ground that American lacks antitrust standing to bring this suit. American appeals.

II.

HN1[] We review the grant of summary judgment de novo. See *Tri-State Dev., Ltd. v. Johnston*, 160 F.3d 528, 529 (9th Cir. 1998). Because the facts underlying the district court's conclusion that American lacked antitrust standing are not in dispute, the only question we must determine is whether the district court correctly applied the relevant law. See *id.* **HN2**[] Antitrust standing is a question of law reviewed de novo. See *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1997).

III.

A. Antitrust Standing

HN3[] Section 4 of the Clayton Act authorizes the award of damages under the antitrust laws: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . 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) (1999). This provision is quite broad, and if "read literally, could afford relief to all persons whose injuries are causally [**6] related to an antitrust violation." *Amarel*, 102 F.3d at 1507 (quoting *Lucas v. Bechtel Corp.*, 800 F.2d 839, 843 (9th Cir. 1986)) (internal quotation marks omitted) (alteration in the original). The Supreme Court has determined, however, that Congress did not intend § 4 to have such an expansive scope. See *Associated General*, 459 U.S. at 530-35. Therefore, **HN4**[] courts have constructed the concept of antitrust standing, under which they "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them," *id. at 535*, to determine whether a plaintiff is a proper party to bring an antitrust claim.³

¹ O'Connor Agency filed suit against GTE in 1993, and its action was consolidated with American's action.

² American waived its other antitrust claims in its prior appeal when it did not challenge their dismissal by the district court. See *American Ad I*, at 783 n.1.

³ Antitrust standing is distinct from Article III standing. A plaintiff who satisfies the constitutional requirement of injury in fact is not necessarily a proper party to bring a private antitrust action. See *Associated General*, 459 U.S. at 535 n.31.

Recognizing that it is "virtually impossible [**7] to announce a black-letter rule that will dictate the result in every case," *id. at 536*, the Supreme Court in *Associated General* identified **HN5** certain factors for determining whether a plaintiff who has borne an injury has antitrust standing. These factors include:

- (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.

[*1055] *Amarel*, 102 F.3d at 1507 (citing *Associated General*, 459 U.S. 519 at 535); see also *Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1232 (9th Cir. 1998) (citing same factors).

HN6 To conclude that there is antitrust standing, a court need not find in favor of the plaintiff on each factor. See *Amarel*, 102 F.3d at 1507. Generally "no single factor is decisive." *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc). Instead, we balance the factors. [**8] See *id.* Nevertheless, we give great weight to the nature of the plaintiff's alleged injury. See *Amarel*, 102 F.3d at 1507. In fact, the Supreme Court has noted that "[a] showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986).

The district court concluded that the factors weighed against American's having antitrust standing. The district court found that American's alleged injury was not the type that the antitrust laws were intended to forestall; American's damages were speculative; and allowing the suit to go forward could result in duplicative and complex damages. The only factor the district court found weighing in favor of finding antitrust standing was the directness of American's alleged injury. We respectfully disagree.⁴

[**9] 1. The Nature of American's Alleged Injury

HN7 The antitrust laws do not provide a remedy to every party injured by unlawful economic conduct. It is well established that the antitrust laws are only intended to preserve competition for the benefit of consumers. See *Associated General*, 459 U.S. at 538. Thus the famous aphorism, "it is competition, not competitors, which the Act protects." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). A plaintiff may only pursue an antitrust action if it can show "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." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990) ("ARCO") (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)). Parsing the Supreme Court's definition, we can identify four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that [**10] which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.

⁴ At the outset, we reject American's argument that this court implicitly found American to have antitrust standing in *American Ad I* because we reversed the district court's award of summary judgment instead of affirming on other grounds. *American Ad I*, although relevant to the antitrust standing inquiry, raised neither the question of antitrust standing nor any of the *Associated General* standing factors. Furthermore, because the issue of antitrust standing can be raised at any time, see *Amarel*, 102 F.3d at 1507, GTE has not waived this defense by failing to have raised it prior to this point. Therefore, neither *American Ad I* nor this case's procedural posture compels a reversal.

Because we conclude that American has antitrust standing under the test set forth in *Associated General*, we do not address American's alternative arguments.

(1) Plaintiffs sometimes forget that the antitrust injury analysis must begin with the identification of the defendant's specific unlawful conduct. In *Cargill*, for example, the plaintiff alleged only that if its two competitors were allowed to merge, they would lower prices to gain market share. The plaintiff claimed the lower prices would eventually drive it out of business, reducing competition. *Cargill, 479 U.S. at 114-17*. The Supreme Court rejected this allegation as a basis for antitrust injury because "the kind of competition that [plaintiff] alleges here, competition for increased market share, is not an activity forbidden by the [*1056] antitrust laws." *Id. at 116*. **HN8**[¹] Without a violation of the antitrust laws, there can be no antitrust injury. In this case, we have already held that American has raised genuine issues of material fact regarding whether GTE violated § 1 of the Sherman Act. See *American Ad I, 92 F.3d at 787-92*.

(2) **HN9**[¹] A plaintiff must also allege some credible injury caused by the unlawful conduct. There can be [*11] no antitrust injury if the plaintiff stands to gain from the alleged unlawful conduct. See e.g., *Associated General, 459 U.S. at 539* (no antitrust injury because union's goals might well be served by reduced competition among employers). Competitors who challenge a rival's price-fixing are often unable to show injury. In ARCO, for example, the plaintiff alleged ARCO was engaging in maximum-price-fixing of retail prices, then a per se violation of § 1 of the Sherman Act under *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*, overruled by *State Oil Co. v. Khan, 522 U.S. 3, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)*. In *Albrecht*, the Court worried that maximum-price-fixing might develop into minimum-price-fixing or might undermine the ability of dealers to provide services for which their customers were willing to pay. The plaintiff in ARCO was a competitor of ARCO's retailers, however, and the Supreme Court found it highly unlikely that the plaintiff stood to suffer from any increase in prices or from any inability of ARCO's dealers to serve their customers. The plaintiff's claim of antitrust [*12] injury was, consequently, rejected. See *ARCO, 495 U.S. 328 at 335-37*. See also, e.g., *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1999 WL 459519*, *4 (9th Cir. 1999) (no antitrust injury where "plaintiffs stand to benefit from the fact that prices for those services are inflated" as a result of alleged illegal price-fixing). We are satisfied that American stands to suffer, not gain, from GTE's alleged participation in the conspiracy to eliminate commissions to ASRs, thereby eliminating the practice of discounting to advertising consumers.

(3) **HN10**[¹] It is not enough that the plaintiff's claimed injury flows from the unlawful conduct. An antitrust injury must "flow[] from that which makes defendants' acts unlawful." The Supreme Court articulated this requirement in its seminal opinion in *Brunswick*. Due to the vagaries of the bowling industry, Brunswick, a large bowling equipment manufacturer, had become "by far the largest operator of bowling centers" in the country. *Brunswick, 429 U.S. at 480*. Pueblo challenged Brunswick's acquisition of some of Pueblo's competitors who were on the verge of bankruptcy. Pueblo [*13] alleged that the acquisitions threatened to create a monopoly, given Brunswick's market power. Pueblo's claimed injury was the additional profit it would have earned had its competitors been allowed to fold. See *id. at 479-80*. The Supreme Court held that Pueblo's claimed injury did not flow from the *illegality* of Brunswick's conduct. If the acquisitions violated § 7, it was only because the acquisitions "brought a 'deep pocket' parent into a market of 'pygmies.'" *Id. at 487*. Pueblo's injuries, however, were unrelated to Brunswick's potential to monopolize, that which made the acquisition potentially unlawful. Any rescue of the troubled centers would injure Pueblo in the same way. See *id.*

This case is easily distinguished from *Brunswick*. Pueblo's injury flowed from any rescue of its competitors, but the rescue of the bowling centers was not in itself unlawful. It was potentially unlawful only because of Brunswick's size. Here, American's injury, its lost commissions, flows from the agreement to eliminate ASR discounts to advertising consumers. This conduct is itself potentially unlawful. We have already held that any intent by GTE to eliminate [*14] discounting is equivalent to an intent to harm competition by increasing prices. *American Ad I, 92 F.3d at 789*. American's injury flows from that which makes unlawful GTE's conduct, the agreement to eliminate discounts.

[*1057] (4) **HN11**[¹] Finally, the plaintiff's injury must be "of the type the antitrust laws were intended to prevent." The Supreme Court has made clear that injuries which result from *increased* competition or lower (but non-predatory) prices are not encompassed by the antitrust laws. See e.g., *ARCO, 495 U.S. at 337-40* (holding no antitrust injury for business lost to lower, but non-predatory, prices resulting from alleged unlawful maximum-price-

fixing; noting antitrust laws were intended to promote this kind of injury). In this case, American has not suggested its injury is the result of increased competition or lower prices.

The Supreme Court's cases have also "emphasized the central interest [of the Sherman Act] in protecting the economic freedom of participants in the relevant market." *Associated General*, 459 U.S. at 538. We have derived from this principle the "corollary" that the "injured party be a participant in [**15] the same market as the alleged malefactors." *Bhan v. NME Hosp., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985). HN12[] Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury.⁵ As a broker for the advertisements whose prices are allegedly restrained, American is a participant in the relevant market and it has suffered an injury in that market, the loss of commissions on advertisement purchases.

[**16] GTE claims that the "market participant" test has been narrowed by our case law to a "consumer or competitor" test. Because American is not its consumer or competitor, GTE argues American has no antitrust injury. We reject GTE's contention. The Supreme Court has never imposed a "consumer or competitor" test but has instead held the antitrust laws are not so limited. The Supreme Court's only suggestion of such a restriction is a passing comment in *Associated General* that the plaintiff union was "neither a consumer nor a competitor" in the relevant market. *Associated General*, 459 U.S. at 539. The Court did not find that fact in any way dispositive, however, and concluded the antitrust injury of unions required case-by-case consideration. See *id.* The previous year, in *Blue Shield v. McCready*, 457 U.S. 465, 472, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982), the Court stated § 4 "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

While consumers [**17] and competitors are most likely to suffer antitrust injury, there are situations in which other market participants can suffer antitrust injury. See generally Areeda & Hovenkamp, *Antitrust Law* (1995 & 1998 Supp.) (analyzing possible antitrust injury of indirect purchasers (§ 371), potential entrants (§ 374), suppliers (§ 375), licensors and landlords (§ 376), and dealers (§ 362c)). Not surprisingly, courts routinely recognize the antitrust claims of market participants other than consumers or competitors.⁶ [**19] A [*1058] number of our opinions do use the phrase "competitor or consumer" as a rough gloss on the *Associated General/Bahn* "market participant" test. But those cases usually concern parties who are clearly not participants of any kind in the restrained market.⁷ We have not found any Ninth Circuit case rejecting a claim of antitrust injury by a market

⁵ We recognize that the Supreme Court has carved a narrow exception to the market participant requirement for parties whose injuries are "inextricably intertwined" with the injuries of market participants. See *Blue Shield v. McCready*, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982); see also *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 745-46 (9th Cir. 1984).

⁶ See, e.g., *ARCO*, 495 U.S. at 345 (recognizing ARCO's dealers' antitrust rights against ARCO and noting dealers could bring suit); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981) (analyzing dealer's antitrust injury under Robinson-Patman Act); *Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947 (9th Cir. 1998) (analyzing supplier's antitrust injury); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041-42 (9th Cir. 1987) (finding gasoline dealers suffered antitrust injury in Clayton Act suit against oil company), aff'd, 496 U.S. 543, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990); *Fine v. Barry and Enright Prod.*, 731 F.2d 1394, 1397-98 (9th Cir. 1984) (finding potential game show contestant has antitrust standing to bring § 1 claim against producers and networks limiting his appearances); *Caribe BMW, Inc. v. Bayerische Motoren Werke AG*, 19 F.3d 745, 753 (1st Cir. 1994) (finding dealer suffered antitrust injury from manufacturer's maximum-price-fixing); *Illinois Corp. Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 729 (7th Cir. 1986) (analyzing travel agent's claim against airline under rule of reason).

⁷ See e.g., *Oregon Laborers-Employers Health & Welfare Trust Fund v. Research USA Inc.*, 185 F.3d 957, 1999 U.S. App. LEXIS 15711, 1999 WL 493306 (9th Cir. 1999) (health plans suing tobacco companies for the costs of treating patients deceived by conspiracy among tobacco companies); *Vinci v. Waste Management, Inc.*, 80 F.3d 1372 (9th Cir. 1996) (terminated employee and former shareholder of defendant); *R.C. Dick*, 890 F.2d at 148-50 (landlord and lessor of mineral rights); *Eagle v.*

participant simply because the plaintiff was not a "consumer or competitor" of the defendant.⁸ We do not believe our case law has superceded Supreme Court precedent as understood in *Bahn*. Further, it is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's [**18] alleged unlawful conduct and the resulting harm to the plaintiff. See *Amaral, 102 F.3d at 1508* ("Losses a competitor suffers as a result of predatory pricing is a form of antitrust injury because 'predatory pricing has the requisite anticompetitive effect' against competitors.") (quoting *ARCO, 495 U.S. at 339*)).

[**20] Having analyzed all the prerequisites of antitrust injury, we conclude that American's showing is sufficient to establish that the alleged injury it suffered was an antitrust injury for purposes of antitrust standing.

2. The Directness of American's Alleged Injury

The second factor looks to whether American's alleged injury was the direct result of GTE's allegedly anticompetitive conduct. American contends that GTE increased the prices paid by consumers by eliminating the practice of discounting on local accounts, thereby causing American to suffer financial harm. To assess the directness of this injury, we look to the chain of causation between American's injury and the alleged restraint in the market for yellow pages advertising space. See *Associated General, 459 U.S. at 540*; *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158, 1162 (9th Cir. 1991)* ("Directness in the antitrust context means close in the chain of causation." (quoting *R.C. Dick, 890 F.2d at 147* (quoting *Associated General, 459 U.S. 519 at 540*)) (internal quotation marks omitted)).

This court was presented with a similar [**21] factual scenario in *Yellow Pages*. The plaintiffs in that case were consulting firms ("Consultants") who offered advice to businesses on advertising efficiently in telephone directories. See *Yellow Pages, 951 F.2d at 1159*. The Consultants sued the publishers of the directories under the federal antitrust laws after the publishers [*1059] announced that the Consultants would no longer be allowed to place advertisements in the directories on behalf of advertisers. See *id. at 1160*. We found the causal link between the defendant's refusal to allow the plaintiffs to place advertisements for their clients and the plaintiffs' loss of clients to be direct for purposes of antitrust standing; "there could hardly be a closer causal link than the one between GTE's refusal to let Consultants place advertisements for their clients and their clients' canceling contracts in letters to Consultants that mention the GTE policy change." *Id. at 1162*. There is no relevant distinction to be drawn between this scenario and that presented by the case at hand; American's alleged injury is the result of GTE's discontinuing commissions on local accounts because American's [**22] inability to provide advertisers with lower prices through discounting resulted in a loss of business.

Therefore, this factor weighs in favor of American's having antitrust standing.

3. The Speculative Measure of Harm

Under the third factor, we consider whether American's damages are only speculative. See *Associated General, 459 U.S. at 542*. In *Associated General*, the Supreme Court found the damages claim in question to be speculative because (1) the alleged injury was indirect; and (2) "the alleged effects . . . may have been produced by independent factors." *Id.*; see also *Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 542 (9th Cir. 1987)* (citing these considerations).

We conclude that American's alleged damages are not speculative. First, as discussed above, American's alleged injury flows directly from GTE's decision to eliminate commissions on local accounts. Second, there has been no suggestion that American's alleged injury may be the result of factors other than GTE's decision to eliminate

Star-Kist Foods, Inc., 812 F.2d 538, 540-41 (9th Cir. 1987) (crew members of defendant's suppliers and affiliated union); *Lucas v. Bechtel Corp., 800 F.2d at 844* (defendant's employees).

⁸ The one possible exception is *Exhibitors' Serv. Inc. v. American Multi-Cinema, Inc. 788 F.2d 574, 578-79 (9th Cir. 1986)*. We believe that case is properly analyzed, however, under *Brunswick*. The plaintiff's injury flowed from defendants' decision not to utilize its services. That decision, however, was independent of the defendants' unlawful conduct, agreeing to split the market. The plaintiff suffered no antitrust injury because its injury was not necessary to the unlawfulness of the defendants' conduct.

commissions. Third, although ascertaining the amount of American's damages is complicated by the fact that discounts given to customers were [**23] negotiated on a case-by-case basis and the fact that discounts varied over time, this complexity is not so unusual as to distinguish this case from other complex business disputes. "Complex antitrust cases . . . invariably involve complicated questions of causation and damages." *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997), aff'd on other grounds, 525 U.S. 299, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999). It is not uncommon for prices to fluctuate over time or by customer. Furthermore, evidence of American's past practices with respect to discounting, which may shed light on the amount of damages American has suffered, is presumably within American's control.

Thus, this is not a situation in which the determination of damages is so speculative as to call into question the existence of a link between the defendant's allegedly anticompetitive behavior and the plaintiff's injury.

4. The Risk of Duplicative Recoveries

"The risk to be avoided under [the duplicative recovery factor] is that potential plaintiffs may be in a 'position to assert conflicting claims to a common fund . . . thereby creating the danger of multiple liability [**24] for the fund.'" *Eagle*, 812 F.2d at 542 (quoting *Associated General*, 459 U.S. at 544) (omission in original). We conclude that this factor weighs in favor of finding that American has antitrust standing for two reasons.

First, the damages suffered by the ASRs and the advertisers are distinct despite their resulting from the same anticompetitive conduct. In *Associated General*, the Supreme Court explained the danger posed by duplicative recoveries in terms of suits by indirect purchasers to recover damages for the passing on to them of higher costs, which were the result of an antitrust violation higher up the distribution chain. See *Associated General*, 459 U.S. at 543-44. "Potential plaintiffs at each level in the distribution chain would be in a position to assert conflicting claims to a common fund, [*1060] the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund and prejudice to absent plaintiffs." *Id. at 544* (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)). Because American's loss of business flowed directly from [**25] the advertisers' having to pay higher prices, there was no opportunity for American to pass on part of its damages to the advertisers, and no corresponding danger of duplicative recoveries under a pass-on theory.

Moreover, *Yellow Pages* demonstrates how advertisers could recover damages for the increased cost of yellow pages advertising space while the ASRs could recover their lost profits without claiming overlapping damages.

An advertiser with a yellow pages advertising budget of \$ 1,000 might pay that entire sum to GTE rather than use Consultants because of the inconvenience caused by GTE's refusal to let Consultants place ads with them on its behalf. Had GTE allowed Consultants to place the ads, causing the advertiser to use Consultants, it might have paid only \$ 500 to GTE and \$ 200 to Consultants and retained \$ 300 itself. The Consultants would recover the \$ 200 in the instant suit; the advertiser might recover \$ 300 in a subsequent suit.

Yellow Pages, 951 F.2d at 1163.⁹ Applied to the case at bench, this calculation would result in American's receiving a \$ 500 commission and passing \$ 300 of it on to the advertiser in the form of discounting. [**26] American could recover the amount of its commission minus the discount (\$ 200), and the advertiser could recover the discount (\$ 300), without subjecting GTE to double recovery for the same injury.

Second, no advertiser has filed a related suit against GTE. Cf. *Eagle*, 812 F.2d at 542-43 (finding existence of related suit to pose danger of duplicative [**27] recoveries). That American alleges the conspiracy began in 1989

⁹ GTE tries to distinguish *Yellow Pages* on the ground that the Consultants in *Yellow Pages* apparently were compensated on the basis of a fixed percentage of the amount the advertisers saved by placing their ads through the plaintiffs instead of directly with the publisher, while American's customers were given a negotiable, and hence varying, discount. This distinction amounts to a suggestion that there is a danger of duplicative recoveries when the calculation of damages is complicated. The complexity of the calculation of damages is more appropriately considered under the third and fifth factors of the *Associated General* analysis.

and American filed suit in 1992 suggest that if an advertiser was going to file suit, it probably would have already done so.¹⁰

5. Complexity in Apportioning Damages

As discussed above with respect to the speculative measure of harm factor, we do not find the calculation of damages in this case to be exceedingly complicated. Furthermore, unlike *Associated General* in which damages would have had to have been apportioned among "directly victimized contractors and subcontractors and indirectly affected employees and union entities," *Associated General*, 459 U.S. at 545, apportioning damages in this case would require only a determination of the damages suffered by the ASRs and their customers. [**28] Therefore, this factor also weighs in favor of finding that American has antitrust standing.

In sum, all five of the *Associated General* factors support finding that American has antitrust standing. We conclude, therefore, that American has antitrust standing and is a proper plaintiff to bring this suit. Accordingly, we reverse the district court's award of summary judgment to GTE on American's antitrust claim. We also reverse the district court's dismissal of American's supplemental state [*1061] law claims pursuant to [28 U.S.C. § 1337\(c\)\(3\)](#). See [American Ad I, 92 F.3d at 792](#).

B. Request for Reassignment

Based on the fact that the district court has granted summary judgment to GTE three times, American asserts that "it is asking a lot of American to go back to the district court and expect to receive anything but another two year delay as the district court searches for one more basis to throw American out of court." It therefore requests that this case be remanded to a different district judge. [HN13](#)[] In the absence of a showing of personal bias, however, which American does not claim, reassignment is appropriate only in "unusual circumstances." [**29] " See [United States v. Sears, Roebuck & Co., Inc., 785 F.2d 777, 780 \(9th Cir. 1986\)](#) (quoting [United States v. Arnett, 628 F.2d 1162, 1165 \(9th Cir. 1979\)](#) (quoting [United States v. Robin, 553 F.2d 8, 10 \(2d Cir. 1977\)](#))) (internal quotation marks omitted). We conclude that the circumstances relied on by American for its request to reassign this case to another district judge are not such "unusual circumstances" as would warrant reassignment. We are confident that the district court will expeditiously set this case for trial.

IV.

The district court's grant of summary judgment to GTE on American's claim under [§ 1](#) of the Sherman Act and dismissal of American's state law claims are reversed, and this case is remanded to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

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¹⁰ The existence of a related lawsuit is by no means a prerequisite to finding a risk of duplicative recoveries. Rather, the existence or threat of a related lawsuit merely weighs against finding in the plaintiff's favor on this factor.



Redwood Empire Life Support v. County of Sonoma

United States Court of Appeals for the Ninth Circuit

June 18, 1999, Argued and Submitted, San Francisco, California ; September 10, 1999, Filed

Nos. 98-15170, 98-15637

Reporter

190 F.3d 949 *; 1999 U.S. App. LEXIS 21635 **; 1999-2 Trade Cas. (CCH) P72,650; 99 Cal. Daily Op. Service 7510; 99 Daily Journal DAR 9483

REDWOOD EMPIRE LIFE SUPPORT, a corporation; STANLEY P. CANTOR, Plaintiffs-Appellees, v. THE COUNTY OF SONOMA; THE SONOMA COUNTY EMERGENCY MEDICAL SERVICES AGENCY; MARK A. KOSTIELNEY; 911 EMERGENCY SERVICES, INC., dba SONOMA LIFE SUPPORT, Defendants-Appellants.

Subsequent History: Certiorari Denied January 18, 2000, Reported at: [2000 U.S. LEXIS 586](#).

Prior History: [\[*1\]](#) Appeals from the United States District Court for the Northern District of California. D.C. No. CV-91-01665-VRW. Vaughn R. Walker, District Judge, Presiding.

Disposition: REVERSED AND INJUNCTION VACATED.

Core Terms

Ambulance, ambulance service, life support, non-emergency, EMS Act, emergency, immunity, interfacility, transfers, level of service, district court, state action, providers, injunction, anti trust law, transportation, ordinances, monopoly, confer

LexisNexis® Headnotes

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

Governments > Local Governments > Administrative Boards

Public Health & Welfare Law > Healthcare > General Overview

[HN1](#) [down arrow] Exemptions & Immunities, Parker State Action Doctrine

Counties in California are authorized to develop emergency medical services programs within the auspices of the Emergency Medical Services System and Prehospital Emergency Medical Care Personnel Act (EMS Act). [Cal. Health & Safety Code §§ 1797.1799.200](#). Counties implementing a program under the EMS Act must designate a local emergency medical services agency that will be responsible for the administration of the county's program, including ambulance and paramedic services. The EMS Act permits a local EMS agency to create one or more exclusive operating areas for emergency ambulance services or providers of limited advanced life support or advanced life support. [Cal. Health & Safety Code §§ 1797.85, 1797.224](#).

Governments > Local Governments > Administrative Boards

Governments > State & Territorial Governments > Licenses

HN2 [down] **Local Governments, Administrative Boards**

See [Cal. Health & Safety Code § 1797.224.](#)

Governments > State & Territorial Governments > Licenses

HN3 [down] **State & Territorial Governments, Licenses**

See [Cal. Health & Safety Code § 1797.85.](#)

Governments > Local Governments > Administrative Boards

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Governments > Local Governments > Ordinances & Regulations

Governments > State & Territorial Governments > Claims By & Against

HN4 [down] **Local Governments, Administrative Boards**

So long as a local emergency medical services agency creates an exclusive operating area for services consistent with those described in [Cal. Health & Safety Code § 1797.85](#), the agency's action will not be subject to federal antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

HN5 [down] **Antitrust & Trade Law, Sherman Act**

[Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), declares that every contract "in restraint of trade" is illegal. This law applies to local governments.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6 [down] **Scope, Exemptions**

190 F.3d 949, *949 U.S. App. LEXIS 21635, **1

If a county's contract granting a monopoly for ambulance services is subject to [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), it is an illegal restraint of trade. But the contract is not subject to the Sherman Act if it is authorized by state law and hence protected by state action immunity.

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

[HN7](#) Exemptions & Immunities, Parker State Action Doctrine

Under the state action immunity doctrine, a local government may restrict trade without violating the antitrust laws if the state has "clearly articulated" and affirmatively expressed its intention to allow the municipality to replace competition with regulation or monopoly power.

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

[HN8](#) Exemptions & Immunities, Parker State Action Doctrine

California has "clearly articulated" its intention to grant state action immunity to local governments that implement emergency medical services plans that are consistent with the terms of the Emergency Medical Services System and Prehospital Emergency Medical Care Personnel Act. [Cal. Health & Safety Code § 1797.6\(b\)](#).

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

Governments > State & Territorial Governments > Licenses

[HN9](#) Exemptions & Immunities, Parker State Action Doctrine

Under the Emergency Medical Services System and Prehospital Emergency Medical Care Personnel Act, a county can establish an exclusive operating area for emergency ambulance services that encompasses all services rendered by emergency ambulances.

Governments > State & Territorial Governments > Licenses

[HN10](#) State & Territorial Governments, Licenses

"Emergency ambulances" can perform non-emergency interfacility transfers within an exclusive operating area under the Emergency Medical Services System and Prehospital Emergency Medical Care Personnel Act.

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

[HN11](#) Exemptions & Immunities, Parker State Action Doctrine

A state legislature need not explicitly authorize a municipality to engage in anticompetitive conduct to confer antitrust immunity. Rather, the state legislature satisfies the "clear articulation" requirement when the logical and foreseeable result of a statute is to displace competition either with regulation or monopoly.

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

HN12 [+] Exemptions & Immunities, Parker State Action Doctrine

Virtually any anti-competitive effect would appear to be well within the Emergency Medical Services System and Prehospital Emergency Medical Care Personnel Act's contemplation.

Counsel: Vernon I. Zvoleff, Preuss, Walker & Shanagher, LLP, San Francisco, California, for the defendants-appellants.

Richard P. Hill, Moody & Hill, San Francisco, California, for the plaintiffs-appellees.

Judges: Before: Mary M. Schroeder, Betty B. Fletcher, and Cynthia Holcomb Hall, Circuit Judges. Opinion by Judge Schroeder.

Opinion by: MARY M. SCHROEDER

Opinion

[*950] OPINION

SCHROEDER, Circuit Judge:

This case requires us again to consider the scope of state action immunity from the federal antitrust laws conferred by California's Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act ("EMS Act"). *Cal. Health & Safety Code §§ 1797*-1799.200. See *A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333 (9th Cir. 1996); *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755 (9th Cir. 1986). Appellee Redwood Empire Life Support ("Redwood") brought this antitrust action against Sonoma County and 911 Emergency Services, [*951] Inc., d/b/a Sonoma Life Support. Redwood challenged the County's exclusive contract with Sonoma [*951] Life Support to provide ambulance services, including non-emergency transports, in central Sonoma County.

The district court issued a permanent injunction against Sonoma County because it concluded that the EMS Act did not contemplate exclusive contracts for non-emergency ambulance services at a basic life support ("BLS") level of service. With the guidance of an intervening decision of the California courts interpreting the statute, *Schaefer's Ambulance Service v. County of San Bernardino*, 68 Cal. App. 4th 581, 80 Cal. Rptr. 2d 385 (Ct. App. 1998), review denied, March 31, 1999, we now reverse and hold that the statute authorizes exclusive franchises covering all levels of service provided by ambulances.

FACTS

A. Background

HN1 [+] Counties in California are authorized to develop emergency medical services programs within the auspices of the EMS Act. See *Cal. Health & Safety Code §§ 1797*-1799.200. Counties implementing a program under the

EMS Act must designate a local EMS agency that will be responsible for the administration of the county's program, including [**3] ambulance and paramedic services. The EMS Act permits a local EMS agency to create one or more exclusive operating areas for "emergency ambulance services or providers of limited advanced life support or advanced life support." [Cal. Health & Safety Code §§ 1797.85, 1797.224](#) (West 1990).¹

[Section 1797.6\(b\)](#) of the EMS Act explains that the California Legislature, [**4] by enacting [sections 1797.85](#) and [1797.224](#), intended to confer state action immunity from federal antitrust laws for actions taken by local governmental entities under the EMS Act. Therefore, [HN4](#)[[↑]] so long as a local EMS agency creates an exclusive operating area for services consistent with those described in [§ 1797.85](#), the agency's action will not be subject to federal antitrust laws. See [Mercy-Peninsula, 791 F.2d at 758](#).

The Sonoma County Board of Supervisors enacted two ordinances that authorized the creation of exclusive operating areas in Sonoma County and designated the Sonoma County Public Health Department to serve as the local Emergency Medical Services Agency ("the Agency"). The ordinances authorized the Agency to create an exclusive operating area in which all three types of services specified in [§ 1797.85](#) of the EMS Act are offered: emergency ambulance services, advanced life support ("ALS") and limited ALS. Advanced life support incorporates various techniques for emergency medical care including cardiopulmonary resuscitation, cardiac defibrillation and intravenous therapy. See [Cal. Health & Safety Code § 1797.52](#). Basic life support, which Redwood contends [**5] is not covered by [§ 1797.85](#), is a subset of ALS comprising emergency first aid and cardiopulmonary resuscitation. See *id.* § 1797.60. Limited ALS consists of techniques exceeding basic life support, but less than ALS. See *id.* § 1797.92. Sonoma County's ordinance required that all ambulances within the exclusive operating area provide a limited ALS service.

The County adopted an "exclusive franchise zone" covering a portion of Sonoma County in which only one provider would be allowed to provide ambulance services. In accordance with the EMS Act and the County's ordinances, the Agency initiated a competitive bidding process for the selection [^{*}952] of the exclusive ambulance services provider for this zone. The County awarded the contract to Sonoma Life Support. Plaintiff Redwood, which had previously provided emergency and nonemergency services in the county, was an unsuccessful bidder.

Following the contract award to Sonoma Life Support, the County notified Redwood that it could not continue to provide ambulance services in the exclusive operating area. Furthermore, the County denied Redwood's request for a permit to provide "non-emergency ambulance services" because the County's [**6] ordinances authorized the issuance of ambulance permits to operators of emergency ambulances that respond to 911 calls. In the exclusive operating area, only Sonoma Life Support was entitled to an emergency ambulance permit. Consequently, the County informed Redwood that it could operate "non-emergency vehicles," such as "gurney cars and wheelchair vans" within the exclusive operating area. These vehicles are not routinely equipped with the medical equipment and personnel required for the specialized care offered by ambulances. See Cal. Code Regs. tit. 22, §§ 51151.3, 51151.5 (defining "litter van" (similar to a gurney car) and "wheelchair van" for the purposes of Medi-Cal program).

B. Procedural History of this Litigation

¹ The material portions of the EMS Act provide as follows:

[HN2](#)[[↑]] A local EMS agency may create one or more exclusive operating areas in the development of a local plan, if a competitive process is utilized to select the provider or providers of the services pursuant to the plan.

[Cal. Health & Safety Code § 1797.224](#).

[HN3](#)[[↑]] "Exclusive operating area" means an EMS area or subarea defined by the emergency medical services plan for which a local EMS agency, upon the recommendation of a county, restricts operations to one or more emergency ambulance services or providers of limited advanced life support or advanced life support.

Id. [§ 1797.85](#).

In 1991, Redwood filed suit against Sonoma County and Sonoma Life Support, alleging that the County's exclusive contract with Sonoma Life Support is not immune from federal antitrust laws insofar as it purports to grant an exclusive franchise in non-emergency interfacility transfers. Non-emergency interfacility transfers involve the transportation of a patient from one health care facility, such as a hospital or nursing home, to another. The district court [**7] issued a preliminary injunction precluding the County from implementing the contract as to "nonemergency medical transportation as defined in Title 22 § 51151.7 of the California Code of Regulations." The preliminary injunction was affirmed by this court in an unpublished disposition.

After a trial, the district court dismissed Redwood's antitrust claims by relying on this court's decision in [A-1 Ambulance Service, Inc. v. County of Monterey, 90 F.3d 333 \(9th Cir. 1996\)](#). In *A-1 Ambulance*, we held that an exclusive provider of ALS ambulance services can engage in non-emergency interfacility transportation, even though ALS services typically are used for emergency responses. Following the reasoning of *A-1 Ambulance*, the district court concluded that the exemption from the antitrust laws covered Sonoma County's contract with Sonoma Life Support, including the provision of non-emergency transportation, because all of that company's ambulances are required to provide an advanced life support level of service.

Redwood filed a motion to amend the district court's judgment on the antitrust issue. Pointing to Footnote 1 of the *A-1 Ambulance* opinion, Redwood argued [**8] that the district court had failed to consider that Sonoma County's exclusive operating area also incorporates BLS ambulance services. Footnote 1 states that:

Nothing in this opinion should be read to imply that EMS agencies may establish exclusive operating areas for basic life support ambulance service.

A-1 Ambulance, 90 F.3d 333 at 335 n.1.

The district court requested the parties to brief whether Sonoma County had created an exclusive operating area for "basic life support ambulance service" as that term is used in *A-1 Ambulance*. The district court then granted Redwood's motion and issued a permanent injunction against the County prohibiting enforcement of the contract with Sonoma Life Support to the extent that the contract prevents Redwood from providing "non-emergency ambulance services at a basic life support level of service."

[*953] The district court awarded Redwood its costs of suit and attorney's fees in the amount of \$ 47,243.25 under [15 U.S.C. § 26](#).

ANALYSIS

I.

[HN5](#) [Section 1](#) of the Sherman Act declares that every contract "in restraint of trade" is illegal. See [15 U.S.C. § 1](#). This law applies [**9] to local governments. See [HN6](#) [City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 408, 55 L. Ed. 2d 364, 98 S. Ct. 1123 \(1978\)](#). If the County's contract granting a monopoly to Sonoma Life Support for ambulance services in central Sonoma County is subject to [§ 1](#) of the Sherman Act, it is an illegal restraint of trade. But the contract is not subject to the Sherman Act if it is authorized by state law and hence protected by state action immunity, a doctrine first recognized in [HN7](#) [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#).

Under the state action immunity doctrine, a local government may restrict trade without violating the antitrust laws if the state has "clearly articulated" and affirmatively expressed its intention to allow the municipality to replace competition with regulation or monopoly power. *A-1 Ambulance*, 90 F.3d at 336 (citing [City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 372, 113 L. Ed. 2d 382, 111 S. Ct. 1344 \(1991\)](#)). This court previously has held that [HN8](#) California has "clearly articulated" its intention to grant state action immunity to local governments that implement [**10] emergency medical services plans that are consistent with the terms of the EMS Act. See [Mercy-Peninsula, 791 F.2d at 758](#); see also [Cal. Health & Safety Code § 1797.6\(b\)](#). Therefore, so long as the County's

contract with Sonoma Life Support establishes an exclusive operating area for services contemplated by the EMS Act, it is immune from federal antitrust laws. Because the district court's decision to grant an injunction relies on the interpretation of a state statute, we review de novo. *A-1 Ambulance*, 90 F.3d at 335.

Sonoma County argues that its exclusive operating area falls squarely within the EMS Act because the Act authorizes a single provider to offer ALS and emergency ambulance services. Redwood responds that the County's ALS requirement effectively prohibits providers other than Sonoma Life Support from offering non-emergency BLS ambulance service in the exclusive operating area because ALS subsumes a BLS level of service. Redwood asserts that this monopoly in BLS ambulance services is not immune from the antitrust laws because the EMS Act covers only emergency services and services provided at an ALS level.

Relying upon this court's [**11] reservation in Footnote 1 of the *A-1 Ambulance* opinion, the district court agreed with Redwood's reasoning. Yet, *A-1 Ambulance* did not decide as a matter of law that a monopoly in non-emergency BLS ambulance services would fall outside the immunity provisions of the EMS Act. Footnote 1 explains only that the court had no need to consider the propriety of exclusive operating areas for BLS ambulance services. *A-1 Ambulance*, 90 F.3d at 335 n.1. The issue was left unresolved by the *A-1 Ambulance* court. It is essentially an issue of state statutory interpretation.

After the district court issued the permanent injunction in this case, the California Court of Appeal decided *Schaefer's Ambulance Service v. County of San Bernardino*, 68 Cal. App. 4th 581, 80 Cal. Rptr. 2d 385 (App. 1998). Interpreting the EMS Act, Schaefer's held that [HN9](#) [↑] a county can establish an exclusive operating area for "emergency ambulance services" that "encompasses all services rendered by emergency ambulances." [80 Cal. Rptr. 2d at 390](#). It did not limit the scope of the statute to the provision of advanced life support services.

Schaefer's involved an ambulance company that [**12] provided non-emergency interfacility transfers at a BLS level of service outside of its own exclusive operating area. Schaefer's argued that it was entitled to perform these transfers because in its view [*954] "all interfacility transfers constitute nonemergency ambulance services," [id. at 389](#), and thus fall outside the EMS Act's exclusive operating area scheme. San Bernardino County argued to the contrary, asserting that all interfacility transfers made by an "emergency ambulance," which it defined as an ambulance staffed and equipped to provide at least BLS service, constitute "emergency ambulance services." *Id.* The court agreed with the county, citing with approval our decision in *A-1 Ambulance*. Just as we had there held that ALS refers to the level of service available in an ambulance, not the needs of the patient being transported, the California Court of Appeal held that an "emergency ambulance" is one capable of providing a particular level of service, whether or not the patient is transported in an emergency situation. [Id. at 390](#); see *A-1 Ambulance*, 90 F.3d at 336.

The reasoning of the Schaefer's decision materially undercuts Redwood's position [**13] here. First, Schaefer's concluded that [HN10](#) [↑] "emergency ambulances" can perform non-emergency interfacility transfers within an exclusive operating area under the EMS Act. Second, noting that the EMS Act does not define "emergency ambulance services," Schaefer's implicitly accepted that an "emergency ambulance" provides at least a BLS level of service. Therefore, the court held that a county can establish an exclusive operating area within which the exclusive operator provides non-emergency BLS ambulance services.

In addition, the Schaefer's court agreed with policy arguments similar to those offered by Sonoma County in support of its position here. The court observed that the EMS Act contemplates a regulatory "deal" in which an exclusive operator receives protection from competition in profitable, populous areas of a county in exchange for the obligation to serve unprofitable, sparsely populated areas. See *Schaefer's*, [80 Cal. Rptr. 2d at 391](#) (quoting *Valley Med. Transport, Inc. v. Apple Valley Fire Protection Dist.*, 17 Cal. 4th 747, 952 P.2d 664, 671 (Cal. 1998)). As part of this deal, the EMS Act permits exclusive operators to perform non-emergency [**14] services that provide a stable source of income to offset the less predictable income derived from 911 responses. "If interfacility transfers were deemed nonemergency ambulance services, outside providers could invade an exclusive operating area and 'cherry-pick' this income." *Id.* The court concluded that the California Legislature drafted the EMS Act to serve as a prophylactic measure against such "cherry-picking" by permitting "emergency ambulances" and providers of ALS to perform non-emergency interfacility transfers.

The Schaefer's court also adopted the argument, advanced here by Sonoma County, that carving out interfacility transfers from an exclusive operating area "would pose serious enforcement problems." *Id.* The court observed that allowing non-exclusive operators to provide ambulance services in non-emergency situations would require a particularized evaluation of a patient's medical needs before each ambulance run. The court reasoned that the Legislature wanted to avoid this undesirable result and thus authorized that the scope of an exclusive operating area depend on the "nature of the ambulance providing the services." *Id.*

Applying the principles of [\[**15\] A-1 Ambulance](#) and Schaefer's, we conclude that Sonoma County's ordinances and its contract with Sonoma Life Support are protected by state action immunity. Because Sonoma Life Support provides ALS service, it is entitled to exclusively perform non-emergency interfacility transfers at an ALS level of service under our decision in *A-1 Ambulance*. Moreover, because Sonoma Life Support provides "emergency ambulance services," it is entitled to exclusively perform non-emergency interfacility transfers requiring an emergency ambulance, which encompasses a BLS level of service, under the decision in Schaefer's. Accordingly, we vacate the district court's injunction because the County has permissibly [\[*955\]](#) established an exclusive operating area for all "emergency ambulance services."

II.

Redwood alternatively contends that even if the California courts have disagreed with its interpretation of state law, we are not bound by state law in determining the scope of state action immunity. Redwood relies on this court's decision in [*Columbia Steel Casting Co. v. Portland General Electric Co.*, 111 F.3d 1427 \(9th Cir. 1997\)](#), where we held that a state public utility [\[**16\]](#) commission failed to confer state action immunity on two private utilities that attempted to allocate service territories in Portland, Oregon, because the commission did not clearly express its intent to create exclusive operating areas or to displace competition between the companies. *Id. at 1436-37*. In *Columbia Steel*, we concluded that the commission's approval of an exchange of properties between the two utilities did not satisfy the threshold test for state action immunity established in *Parker*. Here, in contrast, we find in the EMS Act a clearly expressed state policy to create exclusive operating areas for emergency ambulance services. See [*Cal. Health & Safety Code §§ 1797.6, 1797.85*](#).

Redwood also contends that the EMS Act does not clearly articulate an intent to confer state action immunity on exclusive operating areas for non-emergency BLS ambulance services. Redwood reasons that [§ 1797.85](#) does not expressly include basic life support services, but refers only to "emergency ambulance services" and "providers of advanced life support." Redwood's argument is foreclosed by the Supreme Court's decision in [*Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 \(1985\)](#). [\[**17\]](#) In *Town of Hallie*, the Court held that [HN11](#)[] a state legislature need not explicitly authorize a municipality to engage in anticompetitive conduct to confer antitrust immunity. Rather, the state legislature satisfies the "clear articulation" requirement when the logical and foreseeable result of a statute is to displace competition either with regulation or monopoly. *Id. at 42-43*. Relying on *Town of Hallie*, this court has concluded that [HN12](#)[] "virtually any anti-competitive effect . . . would appear to be well within" the EMS Act's contemplation. [*Mercy-Peninsula*, 791 F.2d at 758](#). We also have recognized that the EMS Act has the foreseeable effect of excluding some providers from a local EMS system. See *id.*

Finally, Redwood argues that the panel should affirm the injunction because the County's Board of Supervisors, not the EMS agency, created the exclusive operating area. See [*Memorial Hosp. Ass'n v. Randol*, 38 Cal. App. 4th 1300, 45 Cal. Rptr. 2d 547 \(1995\)](#). The County points out that Redwood raised this issue for the first time on appeal and therefore we should not consider it. The *A-1 Ambulance* court was presented with the same [\[**18\]](#) claim. We noted that "as it appears not to be a purely legal issue," we would not consider the issue on appeal when it was abandoned by plaintiff at trial. *A-1 Ambulance*, 90 F.3d at 337 n.3. Sonoma County argues that it established the exclusive operating area by adopting the recommendation of the EMS agency, a method it contends is permissible under *Randol*. Because the County has demonstrated that this issue turns on the resolution of disputed facts, we do not reach it.

190 F.3d 949, *955LÁ999 U.S. App. LEXIS 21635, **18

Because Redwood is no longer the "prevailing party," we vacate the district court's award of costs and fees to Redwood in the amount of \$ 47,243.25. See [15 U.S.C. § 26](#); [Fed. R. Civ. P. 54\(d\)](#).

The judgment is REVERSED AND INJUNCTION VACATED.

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Rockholt Furniture, Inc. v. Kincaid Furniture Co.

United States Court of Appeals for the Sixth Circuit

September 10, 1999, Filed

NO. 98-6106

Reporter

1999 U.S. App. LEXIS 22436 *

ROCKHOLT FURNITURE, INC., Plaintiff-Appellant, v. KINCAID FURNITURE COMPANY, INC.; RHODES FURNITURE COMPANY (TN-RHODES, INC.), doing business as Rhodes Furniture Company, Defendants-Appellees.

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 206 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 206 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: [1999 U.S. App. LEXIS 28243](#).

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE. 96-00588. Collier. 7-6-98.

Rockholt Furniture, Inc. v. Kincaid Furniture Co., 188 F.3d 509, 1999 U.S. App. LEXIS 28243 (6th Cir. Tenn., Sept. 10, 1999)

[*Rockholt Furniture, Inc. v. Kincaid Furniture Co.*, 1998 U.S. Dist. LEXIS 24255 \(E.D. Tenn., July 6, 1998\)](#)

Disposition: AFFIRMED.

Core Terms

furniture, summary judgment, district court, distributor, set price, terminated, discount, deposition testimony, independent action, civil conspiracy, anti trust law, no evidence, manufacturer, contradicts, complaints, antitrust, genuine, pricing

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

[HN1](#) [] Regulated Practices, Price Fixing & Restraints of Trade

Independent action by a manufacturer in response to a distributor's complaints is permitted under [antitrust law](#).

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > 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

HN2 [down arrow] **Summary Judgment, Motions for Summary Judgment**

A party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts its earlier deposition testimony.

Counsel: For ROCKHOLT FURNITURE, INC., Plaintiff - Appellant: Richard J. McAfee, Baker, Donelson, Bearman & Caldwell, Chattanooga, TN.

For ROCKHOLT FURNITURE, INC., Plaintiff - Appellant: Richard A. Fisher, Logan, Thompson, Miller, Bilbo, Thompson & Fisher, Cleveland, TN.

For KINCAID FURNITURE COMPANY, INC., Defendant - Appellee: Denise A. Miller, Miller, Martin & Trabue, Chattanooga, TN.

For KINCAID FURNITURE COMPANY, INC., Defendant - Appellee: John M. Murchison, Jr., Kennedy, Covington, Lobdell & Hickman, Charlotte, NC.

For RHODES FURNITURE COMPANY (TN-RHODES, INC.), Defendant - Appellee: William L. Maddux, City Attorney's Office, Chattanooga, TN.

For RHODES FURNITURE COMPANY (TN-RHODES, INC.), Defendant - Appellee: [*2] Joseph B. Haynes, Michael L. Brown, King & Spalding, Atlanta, GA.

Judges: BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges, and WEBER, District Judge. *

Opinion

PER CURIAM: Plaintiff discount furniture dealer, Rockholt Furniture, Inc. ("Rockholt"), appeals the summary judgment for Defendant retail furniture competitor, Rhodes Furniture Company ("Rhodes"), and Defendant furniture manufacturer, Kincaid Furniture Company, Inc. ("Kincaid"), on Plaintiff's claims of state and federal antitrust violations, breach of an oral distributor contract, tortious interference with that contract, and civil conspiracy. Rockholt claims that Kincaid stopped supplying it with products because Rhodes complained about Rockholt's "free-riding" and "price-cutting."

The district court found no evidence of an agreement to fix-prices between Kincaid and Rhodes and no evidence of a valid distributor contract between Rockholt and Kincaid that obligated Kincaid to indefinitely sell furniture to Rockholt. Accordingly, the district court dismissed the antitrust claims and the breach [*3] of contract claims.

* The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

Rockholt raises five issues: whether there was sufficient evidence for a jury to have found (1) violation of the Sherman Act; (2) a violation of Tennessee's antitrust laws; (3) an oral contract and breach of the contract; (4) an unlawful inducement to breach the contact; and (5) a civil conspiracy to do these acts.

We have reviewed the district court's well-reasoned opinion of July 6, 1998, granting summary judgment in favor of Defendants and adopt it as our own. We write only to address Rockholt's claim that an affidavit of Calvin Rockholt, owner and operator of Plaintiff Rockholt Furniture, Inc., creates a genuine issue of fact that a contract existed between Defendants Kincaid and Rhodes to set prices of Kincaid furniture.

In his discovery deposition Calvin Rockholt stated that Dennis Kincaid, an independent sales representative for Kincaid, told him that Kincaid terminated Rockholt in response to Rhodes' complaints about Rockholt's discount pricing. Calvin Rockholt also denied knowing whether Dennis Kincaid had an agreement with Rhodes to set prices and never mentioned any agreement between Kincaid and Rhodes to set prices. At most, Calvin Rockholt said that [*4] Dennis Kincaid told him that if Rockholt raised its profit margin to 42 percent, then Rhodes would stop complaining. J.A. at 264, 276, 289. The most that can be reasonably inferred from this evidence is Kincaid's independent action in response to a distributor's complaint of discount pricing. As the district court noted, [HN1](#) independent action by a manufacturer in response to distributor complaints is permitted under [antitrust law](#). See [Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 731, 99 L. Ed. 2d 808, 108 S. Ct. 1515 \(1988\)](#); [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#); [Bailey's Inc. v. Windsor Am., Inc., 948 F.2d 1018, 1030 \(6th Cir. 1991\)](#).

However, after Defendants moved for summary judgment, Plaintiff Rockholt filed an affidavit of Calvin Rockholt stating that Dennis Kincaid told him that Kincaid terminated Rockholt as the result of an agreement with Rhodes to terminate Rockholt. This affidavit essentially contradicts Calvin Rockholt's earlier deposition testimony. It is well-established that [HN2](#) a "party may not create a factual issue by filing an affidavit, [*5] after a motion for summary judgment has been made, which contradicts [its] earlier deposition testimony." [Reid v. Sears, Roebuck & Co., 790 F.2d 453, 460 \(6th Cir.1986\)](#). Therefore, Calvin Rockholt's affidavit cannot be used to create a genuine issue of material fact precluding summary judgment.

Accordingly, we **AFFIRM** the judgment of the district court.



Glen Holly Entertainment, Inc. v. Tektronix, Inc.

United States District Court for the Central District of California

September 14, 1999, Decided ; September 15, 1999, Filed

CV 99-02476 SVW (RCx)

Reporter

100 F. Supp. 2d 1073 *; 1999 U.S. Dist. LEXIS 18427 **; 1999-2 Trade Cas. (CCH) P72,679

GLEN HOLLY ENTERTAINMENT, INC., a California corporation dba Digital Images, Plaintiff, v. TEKTRONIX, INC., an Oregon corporation, and AVID TECHNOLOGY, INC. a Delaware corporation, Defendants.

Disposition: **[**1]** Antitrust claims DISMISSED WITHOUT PREJUDICE.

Core Terms

antitrust, anti trust law, editing, digital, discontinuation, product line, non-linear, customer, prices, video, manufacturer, allegations, restrained, consumers, anti-competitive, markets, antitrust claim, Defendants', injuries, lodging, Images, alleged conduct, competitor, distributor, inventory, purchaser, machines, factors, lock-in, renting

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN1 Defenses, Demurrsers & Objections, Motions to Dismiss

In evaluating a motion to dismiss, a court must take all facts alleged in a complaint as true and must draw all reasonable inferences in favor of the non-moving party. However, the court need not accept conclusory allegations.

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

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

HN2 Private Actions, Standing

Although the antitrust laws might on their face appear to provide a cause of action to anyone whose injuries are causally related to an antitrust violation, Congress did not intend the antitrust laws to have so expansive a scope. To provide meaningful application of the antitrust laws, courts therefore developed the notion of antitrust standing. To assure that a plaintiff is the proper plaintiff to bring suit, a court must evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. The existence of antitrust standing and antitrust injury are issues of law.

100 F. Supp. 2d 1073, *1073L⁹⁹⁹ U.S. Dist. LEXIS 18427, **1

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

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

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

HN3 **Private Actions, Standing**

To assist in the evaluation of antitrust standing, courts consider five factors. One of the five factors is of particular importance: antitrust injury. Antitrust injury is regularly described as necessary, but not always sufficient, to establish antitrust standing. In other words, although antitrust injury is sometimes discussed within the context of antitrust standing, it is easier to say that antitrust injury is a necessary precondition for antitrust standing. A court will evaluate antitrust injury first and then, if antitrust injury exists, the court will turn to the remaining factors for antitrust standing.

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN4 **Private Actions, Remedies**

To state an antitrust claim, a plaintiff must prove the existence of 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. An injury 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.

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

HN5 **Private Actions, Remedies**

There are four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. In addition to these four requirements, courts identify a fifth requirement: antitrust injury requires that the plaintiff have suffered its injury in the same market where competition is being restrained. Parties whose injuries are experienced in another market do not suffer antitrust injury. Although a plaintiff need not be a customer or competitor in the restrained market, a plaintiff does need to be a participant in the restrained market. However, there is an exception to the requirement. A plaintiff need not be a participant in the restrained market if the plaintiff's injuries are inextricably intertwined with the injuries of market participants.

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

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

HN6 **Private Actions, Standing**

If a plaintiff demonstrates antitrust injury, the court must then evaluate whether an antitrust plaintiff has antitrust standing. In other words, even if the plaintiff's injuries result from the unlawful nature of the defendants' alleged conduct, the court must assure itself that the plaintiff is the proper party to bring suit.

100 F. Supp. 2d 1073, *1073LÁ1999 U.S. Dist. LEXIS 18427, **1

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

HN7 [down] **Private Actions, Remedies**

In addition to antitrust injury, there are four other factors that courts regularly consider: (1) the directness of the injury, (2) the speculative measure of the harm, (3) the risk of duplicative recovery, and (4) the complexity in apportioning damages.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

HN8 [down] **Regulated Practices, Trade Practices & Unfair Competition**

The antitrust laws are intended to preserve competition for the benefit of consumers. The most basic form of competition is competition on price within a commodity product. But an equally important form of competition is competition between different lines of products that achieve similar goals. Particularly for products in which differences in features are important (and in which improvement is possible), consumers benefit from the competition between manufacturers who are creating different product lines. The importance of competing product lines may be particularly important in high technology fields. The antitrust laws favor competition of product lines, particularly in high technology fields.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9 [down] **Regulated Practices, Trade Practices & Unfair Competition**

The antitrust laws do not preclude any manufacturer from independently discontinuing a product line any more than they preclude a manufacturer from independently raising prices. When a manufacturer raises prices or discontinues a product in response to market forces, there is no antitrust violation. However, when a manufacturer discontinues a product in return for a benefit from a competitor, this conduct may violate the antitrust laws.

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN10 [down] **Private Actions, Remedies**

A harm may still be an antitrust harm if it might occur naturally, but in fact occurs because of an anti-competitive agreement.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN11 [down] **Regulated Practices, Trade Practices & Unfair Competition**

The discontinuation of a product line has a negative effect on competition. Where competitors reach an agreement that results in such a negative effect in return for a benefit to the discontinuing party, such conduct may be wrongful under the antitrust laws.

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN12 [] **Private Actions, Remedies**

Injuries which result from increased competition or lower (but non-predatory) prices are not encompassed by the antitrust laws.

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

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN13 [] **Private Actions, Remedies**

The antitrust laws are designed to ensure competition, so as to lower prices and to maximize quality and features at a given price. The antitrust laws are also designed to spur innovation. Nothing about the antitrust laws, however, is designed to insure that a plaintiff's inventory remains current.

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

HN14 [] **Private Actions, Remedies**

The antitrust laws do not seek to protect consumers against the lack of support or the expense involved in a product-transition.

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

HN15 [] **Private Actions, Remedies**

The antitrust laws do not protect consumers against the diminution in value of their current inventory, even when they are locked-into that inventory and will incur expenses in transition. The stigma of obsolescence is not the sort of harm against which the antitrust laws were designed to prevent.

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

HN16 [] **Private Actions, Remedies**

An antitrust plaintiff must suffer its harm as part of the market in which trade is being restrained. This requirement is a necessary part of antitrust injury rather than antitrust standing.

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

HN17 [blue download icon] Private Actions, Standing

It is not status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff. In other words, the mere fact that one has the status of "customer" in the restrained market will not make the injury antitrust injury if the injury is suffered in another market.

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

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

HN18 [blue download icon] Private Actions, Remedies

Where a plaintiff fails to establish antitrust injury, a court need not consider the remaining factors for antitrust standing because the plaintiff cannot establish antitrust standing.

Counsel: For GLEN HOLLY ENTERTAINMENT INC., plaintiff: Jeffrey T Makoff, Charlotte N Makoff, Makoff Kinnear Law Offices, San Francisco, CA.

For TEKTRONIX INC., defendant: Howard A Kroll, Preston Gates & Ellis, Los Angeles, CA.

For TEKTRONIX INC., defendant: Stanley M Gorinson, John L Longstreth, Jeffrey A Marks, Preston Gates Ellis & Rouvelas Meeds, Washington, DC.

For AVID TECHNOLOGY INC., defendant: Gregory N Pimstone, Stephen J Newman, Latham & Watkins, Los Angeles, CA.

For AVID TECHNOLOGY INC., defendant: Peter A Spaeth, James C Burling, Ethan J Brown, Hale & Dorr, Boston, MA.

Judges: STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

Opinion by: STEPHEN V. WILSON

Opinion

[*1074] ORDER DISMISSING ANTITRUST CLAIMS IN PLAINTIFF'S FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND

I. INTRODUCTION

As is so often the case in **antitrust law**, a deceptively simple set of facts forces the Court to confront a doctrinal quagmire. This case requires the Court to determine whether a rental firm, owning and renting only one type of video editing system, suffers antitrust injury if the only two manufacturers [*1075] of video editing systems conspire to discontinue this [**2] particular type of video editing system and thereby render the rental firm's current inventory obsolete and undesirable.

Notwithstanding the fact that Plaintiff's injury derives from the anti-competitive nature of the Defendants' alleged conduct, the Court concludes that Plaintiff's injury is not the sort of harm that the antitrust laws were intended to prevent. In addition, Plaintiff's harm is suffered in a different market than the market in which Defendants allegedly conspired. As a result, the Court concludes that Plaintiff has not demonstrated "antitrust injury" and therefore fails to state a claim. The Court will therefore DISMISS the current antitrust claims with leave to amend.

II. FACTS ALLEGED IN THE COMPLAINT RELEVANT TO PLAINTIFF'S ANTITRUST CLAIMS

HN1 In evaluating a motion to dismiss, the Court must take all facts alleged in the Complaint as true and must draw all reasonable inferences in favor of the non-moving party. However, the Court need not accept conclusory allegations. Under that standard the relevant allegations for the purposes of the current motion¹ can be summarized as follows:

[**3] The current case revolves around non-linear digital editing systems. Non-linear digital editing systems are computerized video editing systems, which allow video editors the ability to easily access and rearrange images and audio tracks without physically cutting and splicing film and audio track.²

Prior to September 3, 1998, Defendants Tektronix and Avid were the only two manufacturers of non-linear digital editing systems supplying the U.S. film market. Although the Tektronix "Lightworks" line had once commanded a dominant position in part of the video editing market, the total Lightworks market share had dropped to a mere 15% by September 3, 1998. Avid held the other 85% share of the video editing market.

Plaintiff [**4] Glen Holly Entertainment, Inc. ("Digital Images") is (or was) a business that specializes in video editing. Although Plaintiff Digital Images did some editing itself on behalf of movie and TV producers, it is clear that the vast majority of Plaintiff's business consisted of renting video editing equipment to producers so that the producers could do such editing themselves. At all relevant times to this Complaint, Plaintiff Digital Images based all of its operations around the Tektronix Lightworks line to the exclusion of Avid products.³

On September 3, 1998, Tektronix and Avid announced a "joint venture." As part of this [**5] joint venture, Tektronix agreed to discontinue its Lightworks line and thereby cease competition with Avid. In return for allowing Avid complete dominance of market for the manufacture and sale of non-linear digital editing systems, Tektronix was given a preferred position as an Avid distributor.

The "joint venture" had a devastating effect on Plaintiff's business. Aware that [*1076] the Lightworks line had been discontinued, video producers refused to have their work edited on Lightworks products.⁴ As Plaintiff's business consisted exclusively of using and renting Lightworks products, Plaintiff's business was abruptly destroyed.

[**6] III. LEGAL ANALYSIS

¹ Plaintiff has also alleged various state law fraud claims against Tektronix arising out of Tektronix statements about its future plans made before September 3, 1998. These statements are not relevant to the antitrust claims and are discussed in a separate Order.

² Although not explicitly alleged in the Complaint, it can be inferred from the various features discussed therein that digital editing systems are also advantageous because they allow easier manipulation of the images and sounds themselves, such as the addition of various special effects.

³ Digital Images describes itself in its complaint as an exclusive Lightworks "vendor." Although the entertainment industry may use this term to describe rental companies like Digital Images which rent only Lightworks equipment, the term "vendor" has apparently lead to some unnecessary confusion. The Court will refer to Digital Images in this capacity as a "lessor" of Lightworks equipment.

⁴ The Complaint does not specify why potential customers refused to use a discontinued product, but the Complaint implies that such customers recognized that they would have to use Avid products in the future and should therefore begin their training on Avid products. The Court also assumes that customers refused to use Lightworks because work done with a discontinued computer product is often difficult to use in the future; once a product line has been discontinued, it is often difficult to find equipment capable of working with files formatted for that discontinued product line.

A. Requirement of Antitrust Standing and Antitrust Injury

Defendants have both moved to dismiss the antitrust claims on the argument that Plaintiff has failed to adequately allege antitrust injury and antitrust standing. The Ninth Circuit's recent opinion in [American Ad Management, Inc. v. General Tel. Co., 190 F.3d 1051, 1999 WL 694859 \(9th Cir. 1999\)](#) ("American Ad II") contains an excellent discussion of the nature and relationship of antitrust injury and antitrust standing.

HN2 [↑] Although the antitrust laws might on their face appear to provide a cause of action to anyone "whose injuries are causally related to an antitrust violation," [Amarel v. Connell, 102 F.3d 1494, 1507 \(9th Cir. 1997\)](#), the Supreme Court has concluded that Congress did not intend the antitrust laws to have so expansive a scope. [American Ad II, 190 F.3d 1051, 1999 WL 694859](#) (citing [Associated General Contractors v. California States Council of Carpenters, 459 U.S. 519, 530-35, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#)). To provide meaningful application of the antitrust laws, courts therefore developed [**7] the notion of antitrust standing. To assure that a plaintiff is the proper plaintiff to bring suit, a court must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." [American Ad II](#) (quoting [Associated General, 459 U.S. 519 at 535, 74 L. Ed. 2d 723, 103 S. Ct. 897](#)). The existence of antitrust standing and antitrust injury are issues of law. [American Ad II](#).

HN3 [↑] To assist in this evaluation of antitrust standing, courts have considered five factors derived from the Supreme Court's decision in [Associated General](#). American Ad II (citing [Amarel, 102 F.3d 1494 at 1507](#) and [Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1232 \(9th Cir. 1998\)](#)). One of these five factors is of particular importance: antitrust injury. [American Ad II; Amarel, 102 F.3d at 1507](#). Antitrust injury is regularly described as "necessary, but not always sufficient, to establish [antitrust] standing." [American Ad II](#), quoting [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110 n.5, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#); see also [Barton & Pittinos, Inc. v. Smithkline Beecham Corp., 118 F.3d 178, 182 \(3rd. Cir. 1997\)](#) [**8] (citing [Cargill](#)).

In other words, although antitrust injury is sometimes discussed within the context of antitrust standing, it is easier to say that antitrust injury is a necessary precondition for antitrust standing. A court will therefore evaluate antitrust injury first and then, if antitrust injury exists, the court will turn to the remaining factors for antitrust standing.

1. Antitrust Injury

HN4 [↑] To state an antitrust claim, a plaintiff "must prove the existence of '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.'" [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#) ("ARCO") (quoting [*1077] [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 "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 [**9] quotations and citations omitted).

a. Four Requirements Derived from ARCO

In its recent discussion, the Ninth Circuit found in the above language "four **HN5** [↑] requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." [American Ad II](#).

b. Plaintiff Must Usually Be A Participant In the Market Restrained by Defendants' Conduct

In addition to these four requirements, however, the Ninth Circuit has also identified a fifth requirement: antitrust injury requires that the plaintiff have suffered its injury in the same market where competition is being restrained. [American Ad II](#). "Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." [Id.](#) Although a plaintiff need not be a customer or competitor in the restrained market, a plaintiff does need to be a participant in the restrained market. [Id.](#)

However, there is an exception to this requirement. A plaintiff need not be a participant in the restrained [**10] market if the plaintiff's injuries are "inextricably intertwined" with the injuries of market participants. *Id.* at n.5, citing *Blue Shield v. McCready*, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) and *Ostroff v. H.S. Crocker Co.*, 740 F.2d 739, 745-46 (9th Cir. 1984).

2. Antitrust Standing

HN6 If a plaintiff has demonstrated antitrust injury, the Court must then evaluate whether an antitrust plaintiff has antitrust standing. In other words, even if the plaintiff's injuries result from the unlawful nature of the defendants' alleged conduct, the Court must assure itself that the plaintiff is the proper party to bring suit.

HN7 In addition to antitrust injury, there are four other factors derived from *Associated General* that courts regularly consider:

- (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.

American Ad II, citing *Amarel*, 102 F.3d at 1507 (in turn citing *Associated General*, 459 U.S. at 535).

B. Market Definition

1. Level of Specificity at Which [**11] the Affected Market Must Be Defined

Defendants object that Plaintiff fails to adequately identify the affected market with sufficient particularity to allow the Court to evaluate the harm to competition. Plaintiff argues that it has alleged a per se violation and that the harm to competition is therefore presumed.

As discussed below, the Plaintiff has alleged the affected markets with sufficient particularity that the Court may evaluate antitrust injury. Because the Court finds that Plaintiff has failed to allege antitrust injury, the Court need not (and does not) consider whether Plaintiff's allegations would state a per se violation of the antitrust laws or a violation evaluated under the rule of reason.

2. There Are Two Separate Markets Disclosed in Plaintiff's Complaint: The Purchase Market and the Renting Market

In the original round of briefing for this motion, the parties disagreed on how to [*1078] characterize the Plaintiff's position in the video editing market. Digital Images argued that it was a purchaser of video equipment and therefore had antitrust standing to complain of the injury to its business. Defendants argued that Digital Images was a distributor because it [**12] was merely an intermediary between the manufacturer and the end user. Defendants argued that Digital Images therefore does not have antitrust standing because distributors usually do not have standing.

As the Court indicated in its May 25, 1999 Order, both characterizations failed to recognize that there are, in fact, two separate markets revealed in Plaintiff's Complaint. The first is the purchase market for new non-linear digital editing systems. The second is the rental market for non-linear digital editing systems. Plaintiff is a customer in the purchase market, and a lessor in the rental market.⁵

⁵ In response to this characterization, Avid cited *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956), for the proposition that "markets generally are defined at the consumer level according to product substitutability." This is a correct statement of the law.

However, the relevant products are viewed not only in terms of the physical item used but also in the way in which consumers purchase the product in question. Using the automotive example discussed *infra*, it is obvious that the car renting market is

[13] 3. The Two Markets Relate to Non-Linear Digital Editing Equipment Generally and Not the Lightworks Line in Particular**

The Court adds that the markets described in the complaint are markets for digital non-linear editing equipment generally, not markets for Lightworks equipment in particular. This is a significant distinction, because Plaintiff's allegations must be measured by the impact on the purchase market for non-linear digital editing equipment and the rental market for non-linear digital editing equipment. It may be true that Defendants have entirely destroyed the sub-markets relating to Lightworks equipment but the destruction of such a submarket will not give rise to antitrust claim.⁶

[14]**

[*1079] C. Plaintiff Has Failed to State a Claim for Injury in the Purchase Market

The Court begins by noting that, as a purchaser, Plaintiff might have standing to bring an antitrust claim for increased prices in the purchase market for new non-linear digital editing systems. Although Defendants have intimated that Plaintiff is merely be an intermediary, the Court concludes that Plaintiff as lessor would be the ultimate consumer in the purchase market and any harm to Plaintiff's customers is derivative of such harm to Plaintiff. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977); cf. *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 929 (9th Cir. 1994) (applying antitrust analysis to determine that subtenant had no

separate from the car buying market; there is very little cross-elasticity between the two markets because people do not generally choose between renting and buying cars. By contrast, it is less clear that the leasing market for automobiles is separate from the purchase market, because people may choose between leasing and buying a car.

Although it is possible that there is some cross-elasticity between renting and purchasing video editing equipment, the Court would assume that there is a reasonably clear point at which an entity does enough video editing to make it worth purchasing the equipment. The Court would further assume that the vast majority of video editors are well to one side or another of that point.

More importantly, despite an explicit invitation at Note 8 of the Court's May 25, 1999 Order, no party has chosen to disagree with the Court's characterization of two separate markets. Plaintiff, in fact, indicated that it "believes that the Court's analysis of this case in terms of two markets (purchase and rental markets) is correct."

The Court does not now rule out the possibility that, on amendment, Plaintiff may allege that there is only a single market for "use of video editing equipment." However, the Court would caution Plaintiff both that such an allegation must be made in good faith and that such an allegation runs the risk of placing Plaintiff in the position of being a distributor.

⁶ The Court draws this market definition from the allegations of the First Amended Complaint, which plainly allege a "U.S. Market for Non-Linear Film Editing Systems." See generally First Amended Complaint PP 7-10.

It is not inconceivable that Plaintiff could have alleged a market limited to Lightworks products alone. However, the Court notes that such a limited market would seem to fly in the face of the Ninth Circuit's decision in *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983). In that case, the Ninth Circuit rejected the argument that a market should be limited to one line of computers because purchasers were "locked into" that line of computers. *Id. at 972*. Instead, the Ninth Circuit held that the relevant market was all similar small business computer systems.

This is not to say that markets can never be limited to a particular product line, if there is no reasonable cross-elasticity between the particular market and markets for other brands. For example, replacement parts for Ford cars may be an entirely different market than replacement parts for Chrysler cars. See generally *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (replacement parts Kodak copiers may be cognizable market). However, this complaint focuses upon production of new systems, and courts have usually rejected the claim that one brand is its own market when there are competing brands. *Little Caesar Enterprises, Inc. v. Smith*, 34 F. Supp. 2d 459, 477 n.30 (E.D. Mi. 1998); cf. *State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275, 282, 139 L. Ed. 2d 199 (1997) ("The primary purpose of the antitrust laws is to protect interbrand competition.").

RICO standing to challenge increase in master tenant's lease, despite pass through provision for increase).⁷ In addition, to the extent that Plaintiff itself engages in actual editing at a client's request, Plaintiff would also have standing because Plaintiff would be purchasing on its own behalf.

[**15] In addition, the Court assumes without deciding that Plaintiff might have standing to bring suit for lack of future innovation of purchased machines in the non-linear digital editing market.⁸ Assuming without deciding that a lack of future innovation is a cognizable antitrust injury in a private antitrust action, Plaintiff would clearly have standing to the extent that Plaintiff itself engages in actual editing. The Court does not reach the question of whether Plaintiff as lessor or the end renter would be the appropriate party to bring suit.⁹

[**16] However, to have standing in the purchase market, Plaintiff must allege that it is actually a purchaser in that market. In other words, Plaintiff must allege that it will pay higher prices or purchase less-capable machines as a result of the anti-competitive behavior of the Defendants. Plaintiff's complaint does not allege that Digital Images has made or intends to [*1080] make any new purchases of digital editing equipment.¹⁰

Plaintiff must make such an allegation to demonstrate injury.¹¹ The injury described in Plaintiff's current complaint does not result from Plaintiff's position in the purchase market. If Plaintiff were never to have bought another machine, Plaintiff would still have suffered the injury described in the complaint.

[**17] In short, Plaintiff's allegations do not suffice to state a claim for antitrust injury in the purchase market.

D. Plaintiff's Injury as a Lessor of Obsolete Equipment in the Rental Market Does Not Constitute Antitrust Injury

1. Plaintiff's Allegations

Reduced to its essence, Plaintiff alleges that Defendants reached a deliberate decision to reduce competition by discontinuing one competing product line in a market that consisted only of two product lines. Plaintiff alleges that it was injured because its business depended upon the existence of the discontinued product line.

2. Application of American Ad II

⁷ The Court's May 25, 1999 Order contained an example that illustrated this point. Imagine that Ford and General Motors agreed not to sell their cars to any rental car agency, so that such rental car agencies would have to purchase cars at inflated prices from DaimlerChrysler. Although such rental car agencies are not the actual drivers of the cars, they are clearly the victims of the conspiracy as the parties who pay the higher prices. Moreover, although the artificial increase may be passed through in whole or in part to the ultimate car renters, it is obviously the rental agency and not the renter who has suffered the antitrust injury and who has antitrust standing.

The parallel is clear. If Digital Images pays an artificially increased price for new video editing equipment, Digital Images has suffered antitrust harm and has antitrust standing.

⁸ The Court notes that the parties have provided some briefing on the question of whether private plaintiffs may sue for an artificial constraint on innovation. Nevertheless, the Court need not and does not reach the issue now. The Court only notes that no court yet has addressed this question, and that the question requires balancing complex policy considerations.

⁹ Defendants argue that unlike a price increase, a lack of innovation is not "passed along" from lessor to renter but is felt only by the renter. Plaintiff responds that the lessor is the only party properly situated to bring suit on behalf of the end users.

As with the question above, the issue requires balancing complex policy issues which the Court need not now address.

¹⁰ In fact, the allegations in the current complaint would suggest that the destruction of demand for Plaintiff's current business has robbed it of any intention to make future purchases.

¹¹ Plaintiff must not only allege that it has made or will make a new purchase, but Plaintiff must also allege that the new purchase involved an artificially increased price or an artificially less-innovative machine. Moreover, to the extent that Plaintiff seeks to plead harm from purchasing a less-innovative machine, Plaintiff must allege that the machine is a less innovative digital editing system generally rather than a less innovative Lightworks machine.

The Ninth Circuit's recent decision in American Ad II provides a helpful guide in determining whether Plaintiff's have stated a claim for antitrust injury.

a. *Unlawful Conduct*: Plaintiff must first identify specific unlawful conduct by the Defendants.

The Defendants do not challenge this element, and Plaintiff has met this requirement. There is no question that Plaintiff has alleged conduct that would violate the antitrust laws.

b. *Causing an Injury to Plaintiff*: Plaintiff must next allege that it has suffered an injury in fact proximately caused [**18] by Defendants' alleged conduct.

Again, the Defendant do not challenge this element, and Plaintiff has met this requirement. Plaintiff has alleged an injury that was proximately caused by Defendants' alleged conduct.

c. *That Flows From That Which Makes the Conduct Unlawful*: Plaintiff must also allege that its injury flows from the wrongful nature of Defendant's alleged conduct. As the Ninth Circuit noted in American Ad II, this requirement was articulated by the Supreme Court's seminal opinion in Bruswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)), where the Supreme Court rejected a complaint because the plaintiff's injury would not have come from the illegal nature of the defendant's alleged conduct.

Defendants do challenge this element. Defendants argue that the discontinuation of a product line is not the sort of harm against which the antitrust laws protect consumers. Defendants place heavy reliance on Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228 (9th Cir. 1998), in which the Ninth Circuit considered the claim of a tire distributor that a rival had wrongfully [**19] gained control of a particular brand. The Ninth Circuit rejected the distributor's claim because the distributor's harm resulted from the natural fact of a third party's control of the brand, rather than the fact that the particular rival had gained control of the brand.

[*1081] Plaintiff responds that the discontinuation of a product line is the sort of harm against which the antitrust laws protect consumers. Moreover, the Plaintiff observes that discontinuation may be a natural event in some circumstances, but that it will not be a natural event where competitors conspire to kill one line to benefit another.

The Court agrees with Plaintiff. As the Ninth Circuit observed in American Ad II, HN8¹² the antitrust laws are "intended to preserve competition for the benefit of consumers." The most basic form of competition is competition on price within a commodity product. For example, two gold mines may compete to sell a troy ounce of gold more cheaply than the other. But an equally important form of competition is competition between different lines of products that achieve similar goals. Particularly for products in which differences in features are important (and in which improvement is [**20] possible), consumers benefit from the competition between manufacturers who are creating different product lines.¹² The importance of competing product lines may be particularly important in high technology fields. See generally Susan Creighton & Perry Narncic, "Mergers and Acquisitions: Antitrust Issues in High-Tech and Emerging Markets Growth Markets," 1122 PLI/Corp. 753, 762-64, 776 (1999) (discussing fact that

¹² The Court recognizes that there are countervailing benefits in standardization of technical elements. Such standardization will create a larger market for related products, which in turn will increase economies of scale and allow more competition within the larger market. See generally, Mark A Lemley & David McGowan, Legal Implications of Network Economic Effects, 86 Calif. L. Rev. 479, 518 (1998) (discussing benefits of standard-setting organizations). Returning to the automobile context for an example, there is a clear benefit to the fact that most automobiles use certain standard sizes of tires. If tires were not standardized, tire manufacturers would have to make a different size tire for each make and model of car and the market for each tire would be much smaller.

Had Plaintiff alleged that the Defendants agreed to standardize on the Avid system but continue to compete in creative Avid systems, the Court's conclusion on this element might well be different. Put another way, the Court does not mean that competing standards are always beneficial to the consumer so long as there are sufficient competitors within a given standard. However, in the absence of competition within a standard, competition between standards is presumptively better than no competition at all.

"high technology industries generally are characterized by intense non-price competition" and tendency of competing product lines to "leapfrog" each other in advancing innovation). The Court concludes that the antitrust laws favor competition of product lines, particularly in high technology fields.

[**21] Of course, [HN9](#) the antitrust laws do not preclude any manufacturer from independently discontinuing a product line any more than they preclude a manufacturer from independently raising prices. When a manufacturer raises prices or discontinues a product in response to market forces, there is no antitrust violation. However, when a manufacturer discontinues a product in return for a benefit from a competitor, this conduct may violate the antitrust laws.

Defendants' reliance on [Lucas](#) in this regard is misplaced, inasmuch as Defendants would read [Lucas](#) to say that a harm cannot be an antitrust harm unless it could only result from anti-competitive behavior. In fact, [Lucas](#) stands for a much more limited proposition: a harm is not an antitrust harm if it would necessarily have occurred without the anti-competitive behavior. As noted in the preceding paragraph, [HN10](#) a harm may still be an antitrust harm if it might occur naturally but in fact occurs because of an anti-competitive agreement.

Returning to the allegations of the present case, the Court has concluded that [HN11](#) the discontinuation of a product line has a negative effect on competition. Where competitors reach an agreement [**22] that results in such a negative effect in return for a benefit to the discontinuing party, such [*1082] conduct may be wrongful under the antitrust laws. Because Plaintiff's injury resulted from this discontinuation, Plaintiff's harm resulted from wrongful conduct under the antitrust laws.

d. That Is Of the Type that the Antitrust Laws Were Intended to Prevent. Finally, Plaintiff must allege an injury that is of the sort that the antitrust laws were intended to prevent. As the Ninth Circuit noted in [American Ad II](#), "injuries [HN12](#) which result from increased competition or lower (but non-predatory) prices are not encompassed by the antitrust laws."

The parties hotly contest this issue. Plaintiff argues that its injury is not an injury that resulted from increased competition or lower prices. Defendants argue that Plaintiff's injury is nevertheless not the sort of injury that the antitrust laws were intended to prevent. Defendants contend that Plaintiff's injury resulted from the obsolescence of its current inventory, and that the antitrust laws are not intended to prevent inventory from becoming obsolete.¹³

[**23] Clearly Plaintiff is correct that its injury is not an injury that resulted from increased competition or lower prices. If this requirement means only that Plaintiff's harm cannot result from the type of "injury" that is desired by the antitrust laws, then Plaintiff must prevail on this element as well.

However, neither the Supreme Court or the Ninth Circuit has formulated the requirement in this way. As formulated, the requirement affirmatively demands that the injury be of the sort that the antitrust laws were intended to prevent. In evaluating this question, the Court finds useful a quotation from two leading antitrust commentators contained within a recent Eleventh Circuit opinion:

Many mergers have been challenged by suppliers (including dealers, franchisees, and employees providing the merging firms with distribution and other services) displaced as a result of the merger. Injury-in-fact may be doubtful when equivalent opportunities are available elsewhere. If other opportunities do not exist [as alleged by Florida Seed], displaced suppliers made redundant by a merger suffer actual losses but not antitrust injury, for the rationale for condemning a merger lies [**24] in its potential for supracompetitive pricing, not in its potential for cost savings and other efficiencies. A merger that actually brings about supracompetitive prices

¹³ Defendants also contend that Plaintiff's injury is an injury to an intermediary rather than a consumer, and that the antitrust laws were not designed to protect intermediaries. However, the Court rejects the concept that a harm to an intermediary is never actionable and indeed, [American Ad II](#) and [Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158 \(9th Cir. 1991\)](#), would both stand for the proposition that harm to an intermediary may be actionable under the right circumstances. It is true that distributors rarely have antitrust standing, but this relates more to the fact that the antitrust laws do not exist to prefer one distributor over another.

and diminished output reduces the need for inputs and can therefore injure suppliers. Although such an injury connects more closely with the rationale for finding a violation, it is still not antitrust injury because it is neither the means by which output is restricted nor the direct concern of antitrust rules protecting product market competition.

[Florida Seed Co., Inc. v. Monsanto Co., 105 F.3d 1372, 1375 n.3 \(11th Cir. 1997\)](#) (quoting Philip Areeda & Herbert Hovenkamp, Antitrust Law P 381 (rev. ed. 1995)) (emphasis added by this Court). The Court notes that in this last example, the supplier's harm is not a result of lower prices or increased competition.

HN13 [↑] The antitrust laws are designed to ensure competition, so as to lower prices and to maximize quality and features at a given price. The Court will also assume, for the purposes of this Order, that the antitrust laws are designed to spur innovation. Nothing about the antitrust laws, however, [*1083] is designed to insure that a plaintiff's [**25] inventory remains current.

Plaintiff's injury is integrally related to the "lock-in" phenomena noted above in Footnote 6. Both the courts and commentators have observed that consumers may be locked into particular product lines and therefore be less willing to shift to another product line. Such a "lock-in" phenomena is regularly discussed as a potential barrier to entry and there has been much discussion about the extent to which "lock-ins" can define the relevant marketplace for the purpose of determining market power. See, e.g., [General Business Systems v. North American Philips Corp., 699 F.2d 965 \(9th Cir. 1983\)](#) (rejecting market limitation to particular product line despite possible lock-in of some consumers).

Plaintiff's claim raises a different "lock-in" concern. Plaintiff's basic position is that, because it is locked into a particular product line, it suffers harm when the product line is discontinued. Owners who are locked into a product line always suffer harm when the product line is discontinued, because there are many fewer developments for the product line either from the manufacturer or from third-party vendors. Returning to the automobile example, [**26] if General Motors were to cease producing Oldsmobile cars, every owner of an Oldsmobile would suffer some harm because there would be fewer after-market options and fewer Oldsmobile specialists. Indeed, every owner of an Oldsmobile might discover that, as a result of these factors, the resale value of their used car had dropped right after General Motors made the discontinuation announcement.¹⁴

In addition, if Plaintiff were to have remained in the rental market, Plaintiff would have had to shift from Lightworks to Avid and thereby incur the costs of such a product transition. In other words, the "lock-in" effect exists because shifting from one product line to another is costly, and the discontinuation of Lightworks would eventually require Plaintiff (and all other Lightworks users) to incur this expense.

In [**27] the Court's research, the Court has found [HN14](#) [↑] no suggestion that the antitrust laws seek to protect consumers against the lack of support or the expense involved in a product-transition. If Plaintiff were correct, all Lightworks owners (and all owners of any artificially discontinued system) would suffer an antitrust injury in the lessening of both manufacturer and third-party support. The Oldsmobile owners in the previous example would suffer an antitrust injury in the reduction in the used value of their cars. The Court notes that although such injury results from anticompetitive activity, it has no relation to any anti-competitive benefit, such as monopoly profits, received by the monopolist.

In other words, the Court agrees that such owners suffer an injury, but the Court concludes that this is not the sort of injury against which the antitrust laws were intended to protect. See generally [Associated General, 459 U.S. at 524](#) ("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."); [Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 580 n.7 \(9th Cir. 1986\)](#) [**28] ("The fact that injury has occurred and that other claims have failed does not permit this court to expand the coverage of antitrust law.").

¹⁴ The Court expects that owners of Peugeot automobiles suffered such an immediate drop in the value of their Peugeot automobiles when Peugeot announced that it would cease selling cars in this country.

Put yet another way, the Court concludes that [HN15](#)¹⁵ the antitrust laws do not protect consumers against the diminution in value of their current inventory, even when they are locked-into that inventory and will incur expenses in transition. Expressed in terms used by the Plaintiff, the Court concludes that the "stigma of obsolescence" is not the sort of harm against [\[*1084\]](#) which the antitrust laws were designed to prevent.¹⁵

[**29] The parallel between Areeda and Hovenkamp's last example and the current case is clear. In both cases, the potential plaintiff suffers an actual injury, proximately caused by the defendants' behavior, and traceable to the anti-competitive nature of that behavior. However, the harm to the plaintiff does not relate to the goals of the antitrust law in protecting competition in the market.

As such, the Plaintiff fails to state a claim for antitrust injury and consequently fails to state a claim for an antitrust violation.

e. *Participant In the Relevant Market*: In addition to the four ARCO elements discussed above, the Ninth Circuit in American Ad II identified a fifth requirement, the requirement that the plaintiff be a participant in the market in which trade was restrained by the defendants.

Plaintiff has effectively argued that it meets this requirement solely by virtue of the fact that it has been a customer in the purchase market for non-linear digital editing equipment. As a threshold matter, the Court would again note that although Plaintiff had previously been a customer in that market, there is no allegation that Plaintiff would continue to be a purchaser in that [**30](#) market. The fact that one was a past participant in the market is not relevant for this determination.

More importantly, the Court concludes that this requirement is really a requirement that [HN16](#)¹⁶ plaintiff must suffer its harm as part of the market in which trade is being restrained. In reaching this conclusion, the Court notes that the requirement is a necessary part of antitrust injury rather than antitrust standing; this highlights the fact that the market participation requirement is related to the injury and not merely to the actor's abstract status. As the Ninth Circuit explained in American Ad II, there is no magic about one's abstract status that meets this requirement: "it [HN17](#)¹⁷ is not status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff." American Ad II. In other words, the mere fact that one has the status of "customer" in the restrained market will not make the injury antitrust injury if the injury is suffered in another market.¹⁶

[**31] Plaintiff's allegations are that Defendants restrained trade in the market for new digital non-linear editing systems. However, Plaintiff did not suffer its injury as a customer in the market to buy new non-linear digital editing systems. Rather, [\[*1085\]](#) Plaintiff suffered its injury as a lessor in the market for renting out non-linear digital

¹⁵ Plaintiff's argument that the antitrust laws do protect against stigmatization is misplaced. It is true that the antitrust laws will prevent stigmatization where such stigmatization is a tool to limit competition. 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). The antitrust harm in those cases, however, is not the stigmatization per se but the use of stigmatization to limit competition and target competitors. See generally National Ass'n of Review Appraisers and Mortg. Underwriters, Inc. v. Appraisal Foundation, 64 F.3d 1130 (8th Cir. 1995) (holding that stigmatization not actionable where it does not restrain trade); Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989) (same).

In this case, Plaintiff's injury does not result from stigmatization intended to reduce competition, but merely as a by-product of Defendants' activity in a different market.

¹⁶ Reference to the last Areeda and Hovenkamp example may help clarify this point. Assume that a steel company supplies raw steel to a forklift manufacturer. Assume further that the forklift manufacturer merges with its only rival, and the resulting firm raises prices and cuts output. The steel company sells less steel to the combined forklift company.

The steel company's injury as a supplier is not antitrust injury merely because the company also happens to be a forklift customer who buys forklifts. The steel company may, of course, bring suit for higher forklift prices -- which is the market in which the steel company is the customer.

editing systems. Plaintiff's injury was not suffered in the market where Plaintiff has alleged that Defendants restrained trade.¹⁷

Plaintiff argues that it is a party who is "inextricably intertwined" with the injuries [**32] of market participants. See American Ad II at n.5 (citing *Blue Shield v. McCready*, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) and *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 745-46 (9th Cir. 1984)). However, Plaintiff has failed to focus on the proper market. It is true that Plaintiff is "inextricably intertwined" with those who rent its machines and to the extent that those customers were complaining of higher prices or less-innovative machines, Plaintiff's entanglement with those customers might give it antitrust standing. However, Plaintiff's customers are not market participants in the purchase market for new digital editing machines and Plaintiff's harm is not related to its customers' harm. Unlike the patient in McCready whose harm was related to the limitation on psychiatric services (and who was a customer in the relevant market), Plaintiff's injury is not "inextricably intertwined" with the harm suffered by end users.¹⁸

[**33] Plaintiff has relied on *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1999 WL 459519 (9th Cir. 1999) to argue that a plaintiff need not be a participant in the market in which competition was restrained, if plaintiff is a participant in a related market. However, Plaintiff's reliance is misplaced for two reasons. Big Bear involved an agreement between ski lift operators, preferred lodging operators and preferred lodging referral services to cut off the supply of discounted lift tickets to disfavored lodging operators and disfavored lodging referral services. First, the plaintiffs in Big Bear suffered their harm in the lift ticket market as consumers of lift tickets, because they had to buy full-price lift tickets to create lodging packages. In addition, however, Big Bear involved a conspiracy between the resort operators and preferred lodging operators. To the extent that the plaintiff lodging operators suffered their harm in the lodging market, they were competitors with the members of the conspiracy who the conspiracy attempted to benefit. By contrast, Plaintiff in this case did not suffer its harm in the purchase market, and it is [**34] not a competitor with any member of the conspiracy.

IV. CONCLUSION

The Court concludes that the allegations of the current complaint, as pled, do not demonstrate antitrust injury. HN18¹⁹ Where a plaintiff fails to establish antitrust injury, the Court need not consider the remaining factors for antitrust standing because the plaintiff cannot establish antitrust standing. *Florida Seed Co., Inc. v. Monsanto Co.*, 105 F.3d 1372, 1375 (11th Cir. 1997).

The Court DISMISSES WITHOUT PREJUDICE the antitrust claims. [*1086] Should Plaintiff desire to amend, Plaintiff should file an amended complaint by Tuesday, November 2, 1999.

IT IS SO ORDERED.

DATED: 9/14/99

¹⁷ It is not sufficient that the plaintiff's harm be closely tied to the market in which trade was restrained, if plaintiff is not a participant in that market. See Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 540-41 (9th Cir. 1987) (rejecting claims of crew members who received commission on fish catch because crew members were not participants in the sale of the fish, which was the market in which canneries were allegedly restricting trade.)

¹⁸ Although Ostrofe is more helpful to Plaintiff, it still does not expand the "narrow exception" sufficiently to bring Plaintiff within the exception. Ostrofe was an employee who was terminated for refusing to participate in a bid rigging-scheme. Ostrofe does say that the employee could sue because "the injury he sustained was such an integral part of the scheme to eliminate competition." 740 F.2d at 746. However, the Ninth Circuit made it clear that by "integral part," the Ninth Circuit meant that the plaintiff's injury was necessary to achieve the conspirators' illegal end. Id. at 746 ("The discharge of Ostrofe furthered the anti-competitive scheme.")

There is no allegation in this case that the harm to Digital Images was necessary to achieve the Defendants' goal.

100 F. Supp. 2d 1073, *1086 (1999 U.S. Dist. LEXIS 18427, **34

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE

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Western Parcel Express v. UPS of Am.

United States Court of Appeals for the Ninth Circuit

June 15, 1999, Argued and Submitted, San Francisco, California; June 25, 1999, Memorandum Filed ; September 14, 1999, Filed

No. 98-16338

Reporter

190 F.3d 974 *; 1999 U.S. App. LEXIS 14668 **; 1999-2 Trade Cas. (CCH) P72,623

WESTERN PARCEL EXPRESS, Plaintiff-Appellant, v. UNITED PARCEL SERVICE OF AMERICA, INC., a Delaware corporation; UNITED PARCEL SERVICE, INC., an Ohio corporation; UNITED PARCEL SERVICE, INC., a New York corporation; and UNITED PARCEL SERVICE GENERAL SERVICES CO., Defendants-Appellees.

Subsequent History: [**1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published September 14, 1999.

Prior History: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-96-01526-CAL. Charles A. Legge, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

contracts, delivery, package, relevant market, barriers, district court, Antitrust, terminability, dealings, Parcel, prices

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN1[] Antitrust & Trade Law, Sherman Act

To state a valid claim under Section 2 of the Sherman Antitrust Act for predatory pricing, a plaintiff must demonstrate that defendant has sufficient market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

190 F.3d 974, *974L 1999 U.S. App. LEXIS 14668, **1

To demonstrate market power 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.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3 **Regulated Practices, Market Definition**

Courts have defined entry barriers as additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4 **Regulated Practices, Market Definition**

The main sources of barriers to entry to a market are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preference; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5 **Regulated Practices, Market Definition**

To justify a finding that a defendant has the power to control prices sufficient to warrant judicial intervention, entry barriers must be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting.

Antitrust & Trade Law > Sherman Act > General Overview

HN6 **Antitrust & Trade Law, Sherman Act**

Where contracts could be terminated in sixty days, short duration and easy terminability substantially negated potential to foreclose competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

190 F.3d 974, *974L 1999 U.S. App. LEXIS 14668, **1

Antitrust & Trade Law > Sherman Act > General Overview

[**HN7**](#) Exclusive & Reciprocal Dealing, Exclusive Dealing

An exclusive dealing contract involves a commitment by a buyer to deal only with a particular seller.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN8**](#) Antitrust & Trade Law, Sherman Act

Volume discount contracts are legal under [antitrust law](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN9**](#) Exclusive & Reciprocal Dealing, Exclusive Dealing

Contracts that do not preclude consumers from using other delivery services are not exclusive dealings contracts that preclude competition in violation of the Sherman Antitrust Act.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN10**](#) Antitrust & Trade Law, Sherman Act

The decrease of plaintiff's profit margins since the deregulation of the plaintiff's market is alone insufficient to sustain an antitrust claim.

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

[**HN11**](#) Antitrust & Trade Law, Sherman Act

It is a basic fact of economic life that 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.

Counsel: Thomas Gundlach, San Francisco, California, for the plaintiff-appellant.

Paul T. Friedman, Morrison and Foerster, San Francisco, California, for the defendants-appellees.

Judges: Before: Joseph T. Sneed, David R. Thompson and William A. Fletcher, Circuit Judges. Opinion by Judge Sneed.

Opinion by: JOSEPH T. SNEED

Opinion

[*974] ORDER

The Memorandum disposition filed June 25, 1999, is redesignated as an authored Opinion by Judge Sneed.

[*975] OPINION

SNEED, Circuit Judge:

Western Parcel Express ("WPX") appeals from the decision of the United States District Court for the Northern District of California, the Honorable Charles A. Legge, Presiding, which granted summary judgment in favor of United Parcel Service of America, Inc., et al. ("UPS"). We affirm.

WPX in its complaint alleged that UPS: (1) monopolized and attempted to monopolize the package delivery market through predatory pricing; and (2) illegally [*2] restrained trade in the package delivery market by entering into exclusive dealing contracts with buyers. The parties stipulated to bifurcated proceedings and limited discovery to the issue of whether UPS had the required market power in the relevant market. At the close of discovery on this issue, UPS moved for summary judgment, arguing that WPX failed to establish the existence of market power in the relevant market. The district court agreed and granted summary judgment in favor of UPS. WPX now appeals that Order. We have jurisdiction pursuant to [28 U.S.C. § 1291](#) and affirm.

I.

HN1 [↑] To state a valid claim under Section 2 of the Sherman Antitrust Act for predatory pricing, WPX must demonstrate that UPS has sufficient market power. See [Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 \(9th Cir. 1995\)](#). **HN2** [↑] To demonstrate market power WPX 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. (citations omitted). [*3] The district court determined that WPX failed either to establish the proper boundaries of the relevant market or to demonstrate UPS' market share in that relevant market. We agree. Moreover, even if WPX has established properly the contours of the relevant market and has demonstrated that UPS owns a dominant share in that market, we nevertheless conclude that WPX's claims under Section 2 must fail because it cannot demonstrate that there are significant barriers to entry or expansion in the market it has defined. We focus on that element for purposes of this disposition.

II.

HN3 [↑] We have defined entry barriers as "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." [Los Angeles Land Co. v. Brunswick Co., 6 F.3d 1422, 1427-28 \(9th Cir. 1993\)](#). **HN4** [↑] "The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preference; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of [*4] scale." [Rebel Oil, 51 F.3d at 1439](#). **HN5** [↑] "To justify a finding that a defendant has the power to control prices" sufficient to warrant judicial intervention, "entry barriers

must be . . . capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting." *Id.* (citing [United States v. Syufy Enters., 903 F.2d 659, 663 \(9th Cir. 1990\)](#)).

WPX, in this appeal, claims that UPS' exclusive dealings contracts have created insurmountable barriers to entry. WPX argues that it presented sufficient evidence to withstand summary judgment that UPS entered into exclusive dealing contracts that will significantly constrain WPX's access to the parcel delivery market and likewise will prevent other carriers from entering the market. The district court rejected WPX's exclusive dealings contracts argument, concluding that the contracts were not actually exclusive dealings contracts that hindered competition. We agree.

[*976] First, the challenged contracts had termination provisions that allowed a customer to terminate the contract for any reason with very little notice. See [Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 \(9th Cir. 1997\)](#) [*5] (holding that [HN6](#) [↑] where contracts could be terminated in sixty days, "short duration and easy terminability" substantially negated potential to foreclose competition). In addition to being terminable on short notice, a UPS customer could cancel the contract for "virtually any reason at any time."

Second, the contracts did not foreclose consumers from entering into contracts with other delivery service providers. A company that entered into one of these contracts with UPS could nonetheless contract with another carrier for parcel delivery service. [HN7](#) [↑] "An exclusive dealing contract involves a commitment by a buyer to deal only with a particular seller." L. Sullivan, *Law of Antitrust* § 163, at 471 (1977). The district court properly concluded that UPS' contracts are volume discount contracts, not exclusive dealings contracts. Such [HN8](#) [↑] volume discount contracts are legal under [antitrust law](#). See [Fedway Assocs., v. United States Treasury, 298 U.S. App. D.C. 112, 976 F.2d 1416, 1418 \(D.C. Cir. 1992\)](#) (holding that volume discount contracts provide pro-competitive effects). [HN9](#) [↑] Because the contracts do not preclude consumers from using other delivery services, they are not exclusive [*6] dealings contracts that preclude competition in violation of the Sherman Antitrust Act.¹

WPX failed to present evidence that there were barriers to expansion in the relevant market. [HN10](#) [↑] While it is true that WPX's profit margins have decreased since the deregulation of the package delivery market, that fact alone is insufficient to sustain an antitrust claim. UPS has presented evidence that during the time period in which WPX alleges antitrust injury, the market has actually expanded; other carriers, including Roadway Packaging Systems, Inc. ("RPS"), have entered the market.

Moreover, WPX has seen significant increase in profits during that time period as well. Between 1994 and 1997, WPX's revenues in the geographic market it defined (i.e., California, Arizona and [*7] Nevada) grew from \$ 29 million to \$ 47 million. Although it is true that WPX's profit margin decreased from a remarkable rate of twenty-percent in 1993 to a robust, albeit significantly lower profit margin of ten-percent in 1997, WPX still has experienced significant growth.

In addition, competitors such as RPS have aggressively entered the market during the relevant time period. Since deregulation of the package delivery market in 1995, RPS has penetrated the next-day, ground based package delivery market and established a substantial presence there. RPS now offers next-day, local and regional coverage throughout a significant portion of California, Arizona and Nevada.² Uncontradicted evidence also demonstrates that both UPS and WPX consider RPS a significant competitor. In fact, in a WPX business plan, WPX proclaimed that RPS' anticipated entry into the next-day, ground-based package delivery market in California is "Western Parcel Express's single greatest threat."

¹ WPX also contends that these contracts unreasonably restrain trade in violation of Section 1 of the Sherman Anti-Trust Act. Because we conclude that the contracts are not exclusive dealings contracts as WPX argues, the Section 1 claim fails as well.

² WPX contended at oral argument that RPS does not provide next-day service in the western United States. WPX's own evidence belies this assertion. WPX presented evidence in the form of declarations that demonstrate that RPS does indeed provide next-day delivery service in the western United States and continues to develop routes and expand its next-day presence in the market in that region.

[**8] Federal Express ("FedEx") now owns RPS, thereby strengthening RPS' presence in the relevant package delivery market as defined by WPX. In addition, FedEx, independent of its purchase of RPS, [*977] has made significant headway into the package delivery market in the western United States. UPS presented evidence that FedEx has spent \$ 200 to \$ 300 million per year over the last several years developing its ground delivery capabilities so that it can compete in the market. To compete more effectively with UPS and WPX in the western United States, FedEx has undertaken the task of increasing its route density in the region and has broadened the services it offers to consumers. FedEx now has expanded its services and provides consumers with the opportunity to deliver their time-sensitive packages, via ground delivery, at a cost that competes with prices set by UPS and WPX.

We therefore conclude, based upon uncontradicted evidence in the record, that UPS does not have nor will have the ability to exclude competition in the relevant market as defined by HN11[] WPX. "Time after time, we have recognized . . . [a] basic fact of economic life: A high market share, though it may ordinarily raise an inference [**9] 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." Syufy Enters., 903 F.2d at 664 (quoting Oahu Gas Serv., Inc. v. Pacific Resources Inc., 838 F.2d 360, 366 (9th Cir. 1988)). There is simply no evidence before us that there are unnatural market barriers precluding robust competition in the relevant market.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

End of Document



Noack v. Blue Cross & Blue Shield, Inc.

Court of Appeal of Florida, First District

September 16, 1999, Opinion Filed

CASE NO. 98-3826

Reporter

742 So. 2d 433 *; 1999 Fla. App. LEXIS 12381 **; 1999-2 Trade Cas. (CCH) P72,656; 24 Fla. L. Weekly D 2153

LYNNE NOACK, HARRY NOACK, AND NOACK AND ASSOCIATES INSURANCE AND FINANCIAL SERVICES, INC., Appellants, v. BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.; FLORIDA COMBINED LIFE INSURANCE COMPANY; FLORIDA COMBINED AGENCY, INC.; HEALTH OPTIONS, INC.; AFFILIATED INSURANCE OF PENSACOLA, INC. AND MARK TUBBS, Appellees.

Subsequent History: [**1] Released for Publication October 4, 1999.

Subsequent appeal at, [Remanded by Noack v. Blue Cross & Blue Shield of Fla., Inc., 2003 Fla. App. LEXIS 18076 \(Fla. Dist. Ct. App. 1st Dist., Nov. 26, 2003\)](#)

Prior History: An appeal from the Circuit Court for Escambia County. Joseph Q. Tarbuck, Judge.

Disposition: Affirmed in part, reversed in part, remanded.

Core Terms

inducement, antitrust, promise, insurance business, reformation, cause of action, McCarran-Ferguson Act, alleges, exempts, insurer

LexisNexis® Headnotes

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

[HN1](#) [blue icon] Motions to Dismiss, Failure to State Claim

When ruling on a motion to dismiss for failure to state a cause of action, the trial court must accept the allegations of a complaint as true. Likewise, the appellate court must accept the facts alleged in a complaint as true when reviewing an order that determines the sufficiency of the complaint.

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

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

Civil Procedure > Appeals > Dismissal of Appeals > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

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

Whether a complaint is sufficient to state a cause of action is an issue of law. Consequently, a ruling on a motion to dismiss for failure to state a cause of action is reviewable on appeal by the de novo standard of review.

Business & Corporate Compliance > ... > Contract Formation > Contracts Law > Contract Formation

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

HN3 [down] **Contracts, Contract Formation**

Fraud in the inducement to make a contract is not barred by the economic loss rule.

Business & Corporate Compliance > ... > Contract Formation > Contracts Law > Contract Formation

HN4 [down] **Contracts, Contract Formation**

As a general rule, fraud cannot be predicated upon a mere promise not performed. However, under certain circumstances, a promise may be actionable as fraud where it can be shown that the promisor had a specific intent not to perform the promise at the time the promise was made, and the other elements of fraud are established.

Business & Corporate Compliance > ... > Contract Formation > Contracts Law > Contract Formation

HN5 [down] **Contracts, Contract Formation**

In order for a promise of future performance to serve as a predicate for a claim of fraud, it must be established that the promise was made with the present intention not to comply.

Business & Corporate Compliance > ... > Contract Formation > Contracts Law > Contract Formation

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

HN6 [down] **Contracts, Contract Formation**

Neither is the presence of a merger clause an impediment to a cause of action for fraud in the inducement.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Evidence > Admissibility > Statements as Evidence > Parol Evidence

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

HN7 Contract Conditions & Provisions, Integration Clauses

Parol evidence is admissible in a reformation action in equity for the purpose of demonstrating that the true intent of the parties was something other than that expressed in the written instrument.

Contracts Law > Remedies > Reformation

Evidence > Admissibility > Statements as Evidence > Parol Evidence

Real Property Law > Deeds > Remedies > Damages

HN8 Remedies, Reformation

The doctrine of merger in deed, under which preliminary understandings, negotiations, and agreements regarding a conveyance are held to merge in the deed leaving it as the sole expositor of the parties' intent, is inapplicable in an action seeking the equitable remedy of reformation.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN9 Exemptions & Immunities, McCarran-Ferguson Act Exemption

The United States Supreme Court, interpreting the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015 \(1997\)](#), exemption, holds that the act exempts only the "business of insurance" not the "business of insurance companies" from antitrust claims.

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

HN10 Private Actions, Remedies

A complaint which does not allege a per se violation must in sum contain three elements: a) a specifically defined market; b) an allegation that defendants possessed the ability to affect price or output; and c) an allegation that plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in that market. It is not enough to allege that plaintiffs were injured; there must be an allegation of harm to competition in general.

Counsel: Michael J. Pugh of Levin and Tannenbaum, P.A., Sarasota and Daniel Stewart, Milton, for Appellants.

Nancy W. Gregoire, W. Edward McIntyre, and Daniel Alter of Bunnell, Woulfe, Krischbaum, Keller, Cohen & McIntyre, P.A., Ft. Lauderdale for Appellees Blue Cross and Blue Shield of Florida, Inc., Florida Combined Life Insurance Company, Inc., and Health Options, Inc.; T.A. Borowski, Jr., of Emmanuel, Sheppard & Condon, Pensacola, for Appellees Affiliated Insurance of Pensacola, Inc. and Mark Tubbs; and Donald H. Partington of Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, Pensacola, for Appellees.

Judges: LAWRENCE, J., ERVIN and BROWNING, JJ., CONCUR.

Opinion by: LAWRENCE

Opinion

[*434] LAWRENCE, J.

Harry Noack, Lynne Noack, and Noack and Associates Insurance and Financial Services, Incorporated (Noack), appeal an order dismissing with prejudice their second amended complaint against Blue Cross and Blue Shield of Florida, Incorporated; Florida Combined Life [**2] Insurance Company; Florida Combined Agency, Incorporated; and Health Options, Incorporated (Blue Cross). We affirm in part, and reverse in part.

Noack's second amended complaint raises multiple claims surrounding the cancellation of its contract to sell insurance as an agent of Blue Cross. We affirm without discussion the dismissal of the counts which sought to allege a cause of action based upon a written contract, an oral contract, bad faith, and conspiracy.

We write to address the facial sufficiency of Noack's counts based upon fraud in the inducement, reformation, and antitrust. Our court tells us:

HN1 [↑] When ruling on a motion to dismiss for failure to state a cause of action, the trial court must accept the allegations of a complaint as true. Likewise, the appellate court must accept the facts alleged in a complaint as true when reviewing an order that determines the sufficiency of the complaint. **HN2** [↑] Whether a complaint is sufficient to state a cause of action is an issue of law. Consequently, a ruling on a motion to dismiss for failure to state a cause of action is reviewable on appeal by the *de novo* standard of review.

Sarkis v. Pafford Oil Co., 697 So. 2d 524, 526 (Fla. 1st DCA 1997) [**3] (citations omitted) (emphasis added).

Fraud in the Inducement

The trial court's order holds that Noack's claim alleging fraud in the inducement is barred by the economic loss rule; this holding is error, for our court holds that **HN3** [↑] "fraud in the inducement to make a contract is not barred by the economic loss rule." *Sarkis, 697 So. 2d at 527*. The order also recites that a claim for fraud cannot be predicated upon a mere promise that was not performed; this too is error, as our sister court observes:

HN4 [↑] As a general rule, fraud cannot be predicated upon a mere promise not performed. However, under certain circumstances, a promise may be actionable as fraud where it can be shown that the promisor had a specific intent not to perform the promise at the time the promise was made, and the other elements of fraud are established.

....

HN5 [↑] In order for a promise of future performance to serve as a predicate for a claim of fraud, it must be established that the promise was made with the present intention not to comply.

Alexander/Davis Properties, Inc. v. Graham, 397 So. 2d 699, 706, 707-08 (Fla. 4th DCA 1981) (citations [**4] omitted) (emphasis added). **HN6** [↑] Neither is the presence of a merger clause an impediment to a cause of action for fraud in the inducement. See *Wilson v. Equitable Life Assurance Soc'y, 622 So. 2d 25, 27 (Fla. 2d DCA 1993)* (it

is a well-established rule that "alleged fraudulent misrepresentations may be introduced [*435] into evidence to prove fraud notwithstanding a merger clause in a related contract").

Noack's complaint specifically alleges that Blue Cross, through its agent Suber, represented that if Noack received a written release from Tubbs, Noack would immediately become general agents able to sell Blue Cross insurance; that Suber's representation was made to induce Noack not to file suit against Tubbs and Blue Cross; that Suber's representation was false when made and Suber, when a general release was received, did not immediately make Noack a general agent. The complaint further alleges that Suber represented that if Noack moved out of their home into a commercial setting, and if Noack hired a secretary, then Noack would immediately become a general agent able to sell Blue Cross insurance and as long as Noack performed adequately Noack would remain a general agent; that [**5] Suber made these representations to induce Noack to forego filing suit to enforce earlier promises; that Noack complied with the conditions; and still Blue Cross withheld a contract. Noack's complaint thus states particular misrepresentations of fact. Noack further alleges that these representation were "false when made," "known by [Tubbs and Blue Cross] to be untrue when they were made," and "were made with intent to deceive, mislead, and defraud." Noack further alleges reliance, and damage. The trial court thus erred in dismissing Noack's action for fraud in the inducement.

Reformation

The trial court concluded that Noack's count seeking to reform its contract with Blue Cross is barred by the written contract's merger clause, and the parol evidence rule. This is error. Our court holds:

HN7 **Parol evidence is admissible** in a reformation action in equity for the purpose of demonstrating that the true intent of the parties was something other than that expressed in the written instrument. By the same token, **HN8** **"the doctrine of merger in deed**, under which preliminary understandings, negotiations, and agreements regarding a conveyance are held to merge in the deed leaving [**6] it as the sole expositor of the parties' intent, *is inapplicable* in an action seeking the equitable remedy of reformation."

Ayers v. Thompson, 536 So. 2d 1151, 1154 (Fla. 1st DCA 1988) (emphasis added) (affirming the trial court's reformation of a deed, and reversing for clarification of findings on damages).

Antitrust

The trial court dismissed Noack's count based on the Florida Antitrust Act ¹ because "the McCarran-Ferguson Act exempts insurance business from antitrust law." **HN9** The United States Supreme Court, interpreting the McCarran-Ferguson Act ² exemption, holds that the act exempts only the "business of insurance" not the "business of insurance companies" from antitrust claims. *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)* (holding that the McCarran-Ferguson Act exempts from antitrust laws the business of insurance and not the business of insurers, and where the challenged agreements were merely arrangements for the purchase of goods and services by the insurer, enabling the insurer to minimize costs and maximize profits, and where the agreements [**7] did not involve underwriting or spreading of risk, the agreements were not the "business of insurance" so as to be exempt from antitrust [*436] scrutiny by virtue of the McCarran-Ferguson Act). The instant claim has nothing to do with the spreading of insurance risks or the issuance of insurance policies, that is, the relationship between an insurer and its insureds. *Id.* (to include every business decision of an insurance company in the "business of insurance" would be plainly contrary to the statutory

¹ The relevant statutes provide: "Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful"; "It is unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce in this state." §§ 542.18, 542.19, Fla. Stat. (1997).

² See 15 U.S.C.A. §§ 1011-1015 (1997).

language). The court below thus erred in dismissing Noack's antitrust claim on the basis of the McCarran-Ferguson Act.

[**8] We agree that Noack's complaint alleges injury to the market, rather than mere injury to Noack. See [HN10](#) [Footnote] *Greenberg v. Mount Sinai Med. Ctr.*, 629 So. 2d 252, 257 (Fla. 3d DCA 1993) ("A complaint which does not allege a per se violation must in sum contain three elements: a) a specifically defined market; b) an allegation that defendants possessed the ability to affect price or output; and c) an allegation that plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in that market. It is not enough to allege that plaintiffs were injured; there must be an allegation of harm to competition in general.") (citations and footnote omitted).

We thus hold that the court below correctly dismissed Noack's claims for breach of oral and written contract, bad faith, and conspiracy, but incorrectly dismissed with prejudice claims for fraud in the inducement, reformation, and antitrust. We accordingly affirm in part and reverse in part the order below, and remand for consistent proceedings.

ERVIN and BROWNING, JJ., CONCUR.

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Amundson & Assocs. Art Studio v. Nat'l Council on Comp. Ins.

Court of Appeals of Kansas

September 17, 1999, Opinion Filed

No. 81,028

Reporter

26 Kan. App. 2d 489 *; 988 P.2d 1208 **; 1999 Kan. App. LEXIS 733 ***; 1999-2 Trade Cas. (CCH) P72,668

AMUNDSON & ASSOCIATES ART STUDIO, LTD., d/b/a THE AMUNDSON GROUP, Individually and representing a class of similarly situated persons, Appellant, v. NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC., et al., Appellees.

Subsequent History: As Amended December 7, 1999.

Prior History: [***1] Appeal from Wyandotte District Court; BILL D. ROBINSON, JR., judge.

Disposition: Affirmed.

Core Terms

rates, carriers, insurance commissioner, filed rate doctrine, insurers, residual, workers' compensation, regulation, antitrust, damages, argues, antitrust statute, allegations, conspiracy, insurance company, injunctive, Square, courts, anti trust law, insurance code, provisions, expertise, contends, shipper, collateral attack, regulatory scheme, equitable relief, district court, discriminatory, price-fixing

LexisNexis® Headnotes

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1 [down arrow] **Pretrial Judgments, Judgment on Pleadings**

When a motion to dismiss under [Kan. Stat. Ann. § 60-212\(b\)\(6\)](#) raises an issue concerning the legal sufficiency of a claim, the question must be decided from the well-pleaded facts of plaintiff's complaint. A court must accept the plaintiff's description of the events, along with any inferences reasonably to be drawn therefrom. However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened or if these allegations are contradicted by the description itself. Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

HN2 [down] **Public Enforcement, State Civil Actions**

Kan. Stat. Ann. § 50-101 defines a trust to be a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, to increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Insurance Law > Remedies > Costs & Attorney Fees > General Overview

HN3 [down] **Public Enforcement, State Civil Actions**

Kan. Stat. Ann. § 50-112 provides that all trusts, combinations, and agreements in restraint of trade and free competition are unlawful, including such trusts between persons or corporations, designed or which tend to control the cost or rate of insurance. Entities violating these sections are subject to suit seeking actual damages, treble damages, and reasonable attorney fees.

Governments > Legislation > Interpretation

HN4 [down] **Legislation, Interpretation**

It is a settled rule of statutory construction that where an irreconcilable conflict exists between statutes, the latest enactment will be held to supersede, repeal or supplant the earlier by implication; the later enactment must prevail.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

Criminal Law & Procedure > ... > Fraud > Insurance Fraud > Penalties

Insurance Law > Regulators > State Insurance Commissioners & Departments > General Overview

Insurance Law > Industry Practices > Rate Regulation > General Overview

HN5 [down] **Rate Regulation, Approval Process**

The Kansas Legislature has given the insurance commissioner the authority to administer all laws relating to insurance and insurance companies; included therein is the duty of setting or approving insurance rates. Kan. Stat. Ann. § 40-102. The insurance commissioner is deemed to have the expertise to determine proper rates. Kan. Stat. Ann. § 40-102 and Kan. Stat. Ann. § 40-110 (Supp. 1998). The Kansas Workers Compensation Act, Kan. Stat. Ann. § 44-501 et seq., contains a comprehensive regulatory scheme for insurance companies, including provisions for punishing violators of the act. Kan. Stat. Ann. § 44-563.

Administrative Law > Judicial Review > General Overview

Insurance Law > Regulators > State Insurance Commissioners & Departments > General Overview

Insurance Law > Industry Practices > Rate Regulation > General Overview

26 Kan. App. 2d 489, *489 P.2d 1208, **1208 LEXIS 733, ***1

Insurance Law > Industry Practices > Rate Regulation > Judicial Review

Insurance Law > ... > Hearings & Orders > Judicial Review > General Overview

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Discrimination

HN6 [PDF] Administrative Law, Judicial Review

The Kansas insurance code contains a comprehensive scheme for the insurance commissioner to regulate, control, and establish rates, and guard against excessive, inadequate, or unfairly discriminatory rates. [Kan. Stat. Ann. § 40-101 et seq.](#) Further, the insurance code provides that all decisions and findings of the insurance commissioner are subject to review in accordance with the Act for Judicial Review and Civil Enforcement of Agency Actions. [Kan. Stat. Ann. § 40-251\(b\)](#); [Kan. Stat. Ann. § 40-778](#).

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

HN7 [PDF] Federal Regulations, Antitrust Regulations

The Kansas Legislature has authorized cooperation among rating organizations and insurers, which tends to be in direct conflict with principles of antitrust. It is also clear the insurance commissioner has strict control over these cooperative activities in order to prevent violations of the insurance code.

Insurance Law > Industry Practices > General Overview

HN8 [PDF] Insurance Law, Industry Practices

See [Kan. Stat. Ann. § 40-956\(e\)](#) (Supp. 1998).

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

Governments > Federal Government > Claims By & Against

HN9 [PDF] Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine bars antitrust suits alleging competitive injury resulting from the payment of a rate filed with a federal regulatory agency.

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

HN10 [PDF] Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine has been held to apply equally to rates filed with state agencies.

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

[**HN11**](#) [blue icon] Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

[**HN12**](#) [blue icon] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The Kansas antitrust act, [Kan. Stat. Ann. § 50-101](#), is broader than the Sherman Antitrust Act, [15 U.S.C.S. §§ 1011-15](#), since it expressly applies to the business of insurance.

Insurance Law > Industry Practices > Rate Regulation > General Overview

[**HN13**](#) [blue icon] Industry Practices, Rate Regulation

[Kan. Stat. Ann. 40-955\(e\)](#) (Supp. 1998) provides that in reviewing a rate filing, the commissioner may require the insurer or rating organization to provide, at the insurer's or rating organization's expense, all information necessary to evaluate the reasonableness of the filing.

Insurance Law > Industry Practices > General Overview

Labor & Employment Law > Employer Liability > Third Party Insurers

[**HN14**](#) [blue icon] Insurance Law, Industry Practices

See [Kan. Stat. Ann. § 44-562](#).

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

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Rate Regulation > General Overview

Insurance Law > Regulators > State Insurance Commissioners & Departments > General Overview

Business & Corporate Compliance > ... > State Insurance Commissioners & Departments > Authorities & Powers > Examinations & Investigations

[**HN15**](#) [blue icon] Exemptions & Immunities, Filed Rate Doctrine

If proposed rates are filed with and approved by the insurance commissioner, the filed rate doctrine applies notwithstanding any allegation that the rates were affected by nonrate conduct or that such nonrate conduct was

not regulated by the insurance commissioner. The insurance commissioner has the sole power of regulating the rates and that power includes examining any information deemed necessary to determine the excessiveness or adequacy of the rates.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

HN16 [blue icon] **Regulated Practices, Private Actions**

Any claim for injunctive or equitable relief in the antitrust area is permissible by the government, not individuals.

Syllabus

SYLLABUS BY THE COURT

1. The Kansas Legislature has given the insurance commissioner the authority to administer all laws relating to insurance and insurance companies, which includes the duty of setting and approving insurance rates.
2. The Kansas insurance code contains a comprehensive scheme for the insurance commissioner to regulate, control, and establish rates, and guard against excessive, inadequate, or unfairly discriminatory rates.
3. The "filed rate doctrine" is recognized in Kansas.
4. The Kansas antitrust statutes contain express language seemingly prohibiting the control of insurance costs or rates. However, with the enactment of the insurance rating laws, the Kansas Legislature gave the insurance commissioner, not the market place, the power to control insurance and insurance companies.
5. Where an irreconcilable conflict exists between statutes, the latest enactment will be held to supersede, repeal, or supplant the earlier.
6. The availability of injunctive relief concerning insurance rates is discussed.

Counsel: Scott A. McCreight, Steven M. Sprenger, and **[***2]** Korey A. Kaul, of Sprenger & McCreight, L.C., of Kansas City, Missouri, for the appellant.

Reid F. Holbrook and Brent G. Wright, of Holbrook, Heaven & Osborn, P.A., of Kansas City, and David H. Bamberger, of Piper & Marbury, L.L.P., of Washington, D.C., for appellee United States Fidelity and Guaranty Company.

Jerome T. Wolf and Curtis E. Woods, of Sonnenschein, Nath & Rosenthal, of Kansas City, Missouri, and Mark F. Horning and Shannen W. Coffin, of Steptoe & Johnson, L.L.P., of Washington, D.C., for appellees Aetna Casualty & Surety Company and Travelers Insurance Company.

Floyd R. Finch, of Blackwell, Sanders, Matheny, Weary & Lombardi, L.L.P., of Kansas City, Missouri, for appellee Houston General Insurance Company.

Lori R. Schultz, of Morrison & Hecker L.L.P., of Kansas City, Missouri, for appellee Liberty Mutual Insurance Company.

David W. Hauber, of Boddington & Brown, Chtd., of Kansas City, and David J. Healy, of Arnold, White & Durkee, of Houston, Texas, for appellees Continental Western Insurance Company and Hartford Underwriters Insurance Company.

Roger D. Stanton, of Berkowitz, Feldmiller, Stanton, Brandt, Williams & Stueve, L.L.P., of Kansas [***3] City, Missouri, and James R. Safley, of Robins, Kaplan, Miller & Ciresi, L.L.P., of Minneapolis, Minnesota, for appellee Employers Insurance of Wausau.

Edward M. Boyle, of Payne & Jones, Chartered, of Overland Park, for appellee Commercial Union Insurance Company.

Robert B. Sullivan and Miriam Glueck, of Polsinelli, White, Vardeman & Shalton, a Professional Corporation, of Overland Park, for appellee Granite State Insurance Company.

Wyatt A. Hoch and Martha Aaron Ross, of Foulston & Siefkin, L.L.P., of Wichita, John A. Karaczynski, of Akin, Gump, Strauss, Hauer & Feld, L.L.P., of Los Angeles, California, and Kevin J. Arquit and Gary R. Carney, of Rogers & Wells, of New York, New York, for appellee National Council on Compensation Insurance, Inc.

Leslie A. Greathouse, of Shughart, Thomson & Kilroy, of Overland Park, R. Lawrence Ward, of Shughart, Thomson & Kilroy, of Kansas City, Missouri, and Richard G. Parker, of O'Melveny & Myers, L.L.P., of Washington, D.C., for appellee Insurance Company of North America.

William R. Sampson and Timothy M. O'Brien, of Shook, Hardy & Bacon, L.L.P., of Overland Park, and James P. Kleinberg, of McCutchen, Doyle, Brown & Enerson, [***4] L.L.P., of San Jose, California, for appellees Fireman's Fund Insurance Company and National Surety Corporation.

William R. Sampson and Timothy M. O'Brien, of Shook, Hardy & Bacon, L.L.P., of Overland Park, and Stanley B. Block, of Vedder, Price, Kaufman & Kammholz, of Chicago, Illinois, for appellee Continental Insurance Company. Wyatt A. Hoch and James D. Oliver, of Foulston & Siefkin L.L.P., of Wichita, for amici curiae American Insurance Association, Alliance of American Insurers, and National Association of Independent Insurers.

Judges: Before PIERRON, P.J., RULON, J., and ROBERT J. FLEMING, District Judge, assigned.

Opinion by: PIERRON

Opinion

[*491] [**1209] PIERRON, J.: Amundson & Associates Art Studio, Ltd. (Amundson) appeals from the district court's dismissal of its cause of action for failure to state a claim upon which relief may be granted. Amundson filed a class action lawsuit against the National Council on Compensation Insurance, Inc., and a number of insurance companies (collectively NCCI) challenging their conduct in managing the "residual" market for workers compensation insurance in Kansas. Amundson alleges that NCCI violated the Kansas Antitrust Act by conspiring to fix costs associated [***5] with the residual market.

[**1210] Amundson and the class of similarly situated persons it represents are Kansas employers. Kansas employers are generally required to purchase workers compensation insurance to protect their employees. See [K.S.A. 1998 Supp. 44-532\(b\)](#).

There are at least two bodies of employers purchasing workers compensation insurance in Kansas. The majority of employers purchase workers compensation insurance in the "voluntary market." In the voluntary market, employers purchase the insurance at the prevailing rate, based upon their individual circumstances. Employers who are considered high risk are typically unable to purchase workers compensation insurance in the voluntary market because of the nature of their businesses, their injury record, and the increased risk of insuring them. To remedy this problem, the legislature has mandated that every insurance company writing workers compensation insurance in Kansas participate in a plan for the equitable apportionment of these high risk employers. [K.S.A. 40-2109](#). Such a plan is known as the involuntary or "residual" market.

NCCI is a corporation owned and operated by its 700 member insurance carriers. NCCI is an insurance [***6] "rating organization" licensed in Kansas to develop and file proposed rates for the insurance commissioner's

approval. NCCI proposes rates that will be charged to employers within the residual market. The plan used in Kansas for the equitable apportionment of these high risk employers was promulgated by NCCI.

The rates proposed by NCCI are filed with the insurance commissioner, who has the authority to approve, reject, or modify the rates.

[*492] NCCI delegates responsibility for the daily administration of the risks written in the residual market to certain insurers known as "servicing carriers." The residual market imposes significant risk on insurers because employers insured in the residual market generally have worse loss experience than employers who are able to obtain coverage in the voluntary market. In order to mitigate these risks, most insurers in Kansas have entered into a contractual arrangement known as the National Workers' Compensation Reinsurance Pool.

NCCI selects certain insurers to act as servicing carriers. These servicing carriers accept the risks required by the plan, thereby fulfilling the obligation of all pool participating companies. The servicing carriers issue [***7] policies, collect premiums, investigate and pay claims, and provide other services to residual market policyholders. The servicing carriers then reinsurance 100 percent of their assigned risks with the pool companies. By this means, the servicing carriers avoid liability themselves for any loss sustained by the employers in the residual market. Any loss experienced in the residual market is allocated to every insurer writing workers compensation insurance in Kansas, based on each company's market share. The cost of losses experienced in the residual market and allocated to each insurer writing workers compensation insurance is treated as an expense in setting a company's rates.

As compensation for performing their duties, these service carriers are awarded fees (a servicing carrier allowance) in the form of a percentage of the premiums paid by the employers purchasing insurance in the residual market. In the past, NCCI has had complete discretion in picking the servicing carriers and determining the rate of compensation paid to them. NCCI has not chosen the servicing carriers based upon a competitive bidding process.

Amundson alleges that the servicing carrier allowance was excessive [***8] because NCCI selected servicing carriers and determined the allowance by mutual agreement rather than by competitive bidding. Amundson also alleges that NCCI conspired with the other defendants to systematically and fraudulently understate the net operating gain and/or overstate the net operating loss for the residual market. Amundson alleges rates are forced up by the use [*493] of the servicing carrier fees, which are undisclosed noncompetitive expenses, and loss factors that would have been demonstrably lower in a competitive residual market, thereby adversely affecting purchasers of workers compensation insurance in both the voluntary and residual markets.

Amundson contends a competitive bidding environment for the selection of the servicing [**1211] carriers would reduce the overall rates in both markets.

Amundson filed a petition alleging damages as a result of the price-fixing conspiracy among the defendants. The first count asserted a violation of the Kansas antitrust laws, [K.S.A. 50-101 et seq.](#), and sought treble damages under [K.S.A. 50-801\(b\)](#). The remaining counts alleged common-law fraud, unjust enrichment, and a civil conspiracy, and requested compensation, fees and costs, and [***9] an injunction prohibiting further illegal conduct. NCCI removed the case to federal court, which remanded it to state court for lack of subject matter jurisdiction.

NCCI filed a motion to dismiss based primarily on the "filed rate doctrine." The district court agreed and concluded that Amundson's allegations were an impermissible collateral attack on rates approved by the insurance commissioner and thus barred by the filed rate doctrine. The court stated that to allow Amundson to challenge the rates under the provisions of the [antitrust law](#) would infringe upon the authority of the insurance commissioner. The court indicated that no matter how Amundson framed the issue, it was challenging the rates established by the insurance commissioner.

Amundson argues the district court erred in granting NCCI's motion to dismiss based on the filed rate doctrine.

Our review of a motion to dismiss is clearly established. [HN1](#) When a motion to dismiss under [K.S.A. 60-212\(b\)\(6\)](#) raises an issue concerning the legal sufficiency of a claim, the question must be decided from the well-

pledged facts of plaintiff's complaint. A court must accept the plaintiff's description of the events, along with any inferences [***10] reasonably to be drawn therefrom. However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations [*494] do not reasonably follow from the description of what happened or if these allegations are contradicted by the description itself. Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim. See [Grindsted Products, Inc. v. Kansas Corporation Comm'n, 262 Kan. 294, 302-03, 937 P.2d 1 \(1997\)](#).

Amundson first argues the express language of the Kansas antitrust statutes explicitly allows an action for antitrust against entities that attempt to control the cost or rates of insurance. [HN2](#) [↑] [K.S.A. 50-101](#) **Second** defines a trust to be a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, "to increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance."

[HN3](#) [↑] [K.S.A. 50-112](#) provides that all trusts, combinations, and agreements in restraint of trade and free competition are unlawful, including [***11] such trusts "between persons or corporations, designed or which tend to . . . control the cost or rate of insurance." Entities violating these sections are subject to suit seeking actual damages, treble damages, and reasonable attorney fees. See [K.S.A. 50-108](#), [50-115](#), and [50-801\(b\)](#).

Amundson contends that NCCI conspired to control the cost or rates of workers compensation insurance by fixing the fees paid to NCCI's servicing carriers at levels far in excess of those that would exist under a competitive system. Applying statutory rules of construction, Amundson argues the plain and unambiguous language of the Kansas antitrust statutes permit its cause of action and the district court's failure to follow the statutes is grounds for reversal. Amundson directs our attention to the fact there are no statutory provisions excepting insurance from antitrust actions either in the antitrust statutes or the statutes regulating insurance and workers compensation. Without an express exemption, Amundson relies on the well-settled law that immunity from the antitrust laws is not lightly implied and is strongly disfavored. See [Otter Tail Power Co. v. United States, 410 U.S. 366, 372, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\)](#), [***12] and [U. S. v. Philadelphia Nat. Bank, 374 U.S. 321, 348, 10 L. Ed. 2d 915, 83 S. Ct. 1715 \(1963\)](#). [*495]

Amundson insists the filed rate doctrine cannot be applied in this case without rendering the Kansas antitrust statutes wholly inapplicable to insurance rates.

The purpose of regulating the workers compensation rates is to "protect policy holders [**1212] and the public against the adverse effects of excessive, inadequate or unfairly discriminatory rates." [K.S.A. 1998 Supp. 40-951\(a\)](#). However, the rating laws are also intended to "encourage, as the most effective way to produce rates that conform to the standards of paragraph (a), independent action by and reasonable price competition among insurers." [K.S.A. 1998 Supp. 40-951\(b\)](#). The parties rely on similar language in [K.S.A. 40-1111\(a\)](#) and [40-1112\(c\)](#). These statutes were repealed in 1997. But NCCI points out that these statutes were only changed in location, not substance, and can now be found in [K.S.A. 1998 Supp. 40-951 et seq.](#)

Amundson argues an injunction ordering NCCI to change its selection of servicing carriers and granting treble damages to the plaintiffs will not affect the insurance commissioner's ability to [***13] approve rates in the voluntary market and will not frustrate any previous rate decision by the insurance commissioner.

We recognize the express language in the Kansas antitrust statutes prohibiting the control of insurance costs or rates. However, the Kansas antitrust statutes were passed in 1897 at a time when Kansas laws did not provide for the regulation of insurance rates. See L. 1897, Ch. 265; R.S. 1923, 50-101 *et seq.* The workers compensation insurance rating laws were passed in 1927. See L. 1927, Ch. 231, 40-1106. With the enactment of the insurance rating laws, the Kansas Legislature gave the insurance commissioner, not the marketplace, the power to control insurance and insurance companies. "It [HN4](#) [↑] is a settled rule of statutory construction that where an irreconcilable conflict exists between statutes, the latest enactment will be held to supersede, repeal or supplant the earlier by implication; the later enactment must prevail." [HN5](#) [↑] [Richards v. Etzen, 231 Kan. 704, Syl. P 1, 647 P.2d 1331 \(1982\)](#).

The Kansas Legislature has given the insurance commissioner the authority to administer all laws relating to insurance and insurance companies; included therein [***14] is the duty of setting or approving [*496] insurance rates. [K.S.A. 40-102](#). The insurance commissioner is deemed to have the expertise to determine proper rates. See [K.S.A. 40-102](#) and [K.S.A. 1998 Supp. 40-110](#). The Kansas Workers Compensation Act, [K.S.A. 44-501 et seq.](#), contains a comprehensive regulatory scheme for insurance companies, including provisions for punishing violators of the act. See [K.S.A. 44-563](#) ("For any violation of the provisions of this act the commissioner of insurance may suspend or revoke the authority of any insurance carrier to do business in this state.").

HN6[[↑]] The Kansas insurance code also contains a comprehensive scheme for the insurance commissioner to regulate, control, and establish rates, and guard against excessive, inadequate, or unfairly discriminatory rates. [K.S.A. 40-101 et seq.](#) Further, the insurance code provides that all decisions and findings of the insurance commissioner are subject to review in accordance with the Act for Judicial Review and Civil Enforcement of Agency Actions. [K.S.A. 40-251\(b\); K.S.A. 40-778](#).

We also note that **HN7**[[↑]] the Kansas Legislature has authorized cooperation among rating organizations and insurers, which tends to be in direct [***15] conflict with principles of antitrust. It is also clear the insurance commissioner has strict control over these cooperative activities in order to prevent violations of the insurance code. **HN8**[[↑]] [K.S.A. 1998 Supp. 40-956\(e\)](#) provides:

"Cooperation among rating organizations or among rating organizations and insurers in rate making or in other matters within the scope of this act is hereby authorized, provided the filings resulting from such cooperation are subject to all the provisions of this act which are applicable to filings generally. The commissioner may review such cooperative activities and practices and if, after a hearing, the commissioner finds any such activity or practice is unfair, unreasonable or otherwise inconsistent with this act or other provision of the insurance laws of this state, the commissioner may issue a written order requiring discontinuance of such activities or practices."

We do not believe that with these comprehensive regulatory schemes the Kansas Legislature intended that the approved rates could be collaterally attacked. In this case, the insurance code, in conjunction with the filed rate doctrine, supersedes the Kansas Antitrust Act.

[*497] [**1213] Amundson argues we [***16] should decline to find the filed rate doctrine creates an exemption from the Kansas antitrust statutes. The filed rate doctrine, also called the "Keogh doctrine," originated in the United States Supreme Court case of [Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 \(1922\)](#), where a private shipper claimed that rates filed with and approved by the Interstate Commerce Commission (ICC) had been fixed by a conspiracy, and, as a result, the rates "were higher than the rates would have been, if competition had not been thus eliminated." [260 U.S. at 160](#). The defendants countered that the ICC's approval conclusively established that the rates were "reasonable and nondiscriminatory," and the **Keogh** court agreed. The court held that the plaintiff could not recover damages under the federal antitrust statute based on the claim that it would have paid lower rates absent the defendants' conspiracy to fix rates. [260 U.S. at 162](#).

The **Keogh** court based its decision on four rationales. First, under the Interstate Commerce Act, shippers injured by the price-fixing conspiracy could recover their damages in proceedings before the [***17] ICC. The court assumed Congress did not intend to provide a duplicative remedy under the Sherman Antitrust Act. Second, the **Keogh** court stated that granting a recovery only to those shippers that chose to sue could result in a discriminatory rate structure, because the successful litigants effectively would pay a lower rate than other shippers. Third, the court was concerned that antitrust damages would require calculation of a hypothetical lower rate, along with proof that such a lower rate would be adopted by the ICC. The court stated that whether this rate would be approved by the ICC should be left to the agency itself, rather than the courts. Last, the **Keogh** court stated that the plaintiff shipper had suffered no injury because it was able to simply pass along the overcharges to its customers. [260 U.S. at 162-65](#).

We agree with the district court's rationale in accepting and applying the filed rate doctrine to dismiss Amundson's claim. **HN9**[[↑]] The filed rate doctrine bars antitrust suits alleging competitive injury resulting from the payment of a

rate filed with a federal regulatory agency. See [HN10](#) [↑] **Keogh**, 260 U.S. at 162; **Arkansas Louisiana Gas Co. v. Hall**, 453 U.S. 571, 577, 584, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981). [***18]

The filed rate doctrine has been held to apply equally to rates filed with state agencies. See [Wegoland Ltd. v. NYNEX Corp.](#), 27 F.3d 17, 20 (2d Cir. 1994) ("the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies"); [Taffet v. Southern Co.](#), 967 F.2d 1483, 1494 (11th Cir.), cert. denied 506 U.S. 1021, 121 L. Ed. 2d 583, 113 S. Ct. 657 (1992) ("this principle, which is central to the filed rate doctrine . . . , applies with equal force to preclude recovery under RICO whether the rate at issue has been set by a state rate-making authority or a federal one"); [H.J. Inc. v. Northwestern Bell Telephone Co.](#), 954 F.2d 485, 494 (8th Cir.), cert. denied 504 U.S. 957, 119 L. Ed. 2d 228, 112 S. Ct. 2306 (1992) ("the rationale underlying the filed rate doctrine applies whether the rate in question is approved by a federal or state agency").

[HN11](#) [↑] The filed rate doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit. See [Montana-Dakota Co. v. Pub. Serv. Co.](#), 341 U.S. 246, 250-51, 95 L. Ed. 912, 71 S. Ct. 692 (1951); [***19] [Wegoland](#), 27 F.3d at 19.

Amundson relies on Judge Friendly's refutation of each of the rationales in **Keogh** in the case of [Square D. Co. v. Niagara Frontier Tariff Bur.](#), 760 F.2d 1347 (2d Cir. 1985), aff'd, 476 U.S. 409, 90 L. Ed. 2d 413, 106 S. Ct. 1922 (1986), for authority that this court should reject **Keogh**. The glaring quandary with **Square D** is that although Judge Friendly seemingly eviscerated the rationale in **Keogh**, the court still followed the doctrine due to stare decisis.

Amundson argues that **Keogh** is a weak and discredited doctrine that continues to exist at the federal level only through stare decisis. Amundson contends that in this case of first impression, this court should not extend the **Keogh** holding beyond its original boundaries where it has retained life at the federal level only in the narrow circumstances [**1214] of its original decision and it should not be utilized to override Kansas' antitrust statutes. The court in [Capital Freight Serv. v. Trailer Marine Transport](#), 704 F. Supp. 1190, 1195 (S.D.N.Y. 1989) stated: [*499]

"Although the Supreme Court's ruling in [***20] **Square D** saved **Keogh** from extinction, it did not breathe a new expansive energy into the doctrine. The decision represents simply an unwillingness to deliver a coup de grace to a weak and forcefully criticized doctrine because that function might be more appropriately carried out by Congress."

Amundson cites [Cellular Plus, Inc. v. Superior Court](#), 14 Cal. App. 4th 1224, 18 Cal. Rptr. 2d 308 (1993), for supporting authority that other courts have rejected **Keogh**. There, the California court refused to expand the **Keogh** doctrine to apply to causes of action brought under California's antitrust statute where individual consumers and corporate sales agents brought a wholesale and retail price fixing action against providers of cellular telephone service. The court reiterated the weakness of **Keogh** as stated by Judge Friendly in **Square D**. The court then added six additional reasons for refusing to extend the **Keogh** doctrine. [14 Cal. App. 4th at 1241-42](#).

Amundson applies these six reasons to the case at bar. First, [HN12](#) [↑] the Kansas antitrust act, similar to California's Cartwright Act, is broader than the Sherman Antitrust Act, [***21] since it expressly applies to the business of insurance. See [K.S.A. 50-101](#) Second; [14 Cal. App. 4th at 1242](#); [15 U.S.C. §§ 1011-15 \(1994\)](#). Second, **Keogh** dealt with the ICC's regulation of common carriers, whereas here, a different statutory scheme is involved in the insurance commissioner's regulation of insurance. Third, because of the procedural posture of the case, it must be presumed that regulating the servicing agreements would benefit the plaintiffs by lowering rates. Fourth, the **Cellular Plus** court concluded that "the **Keogh** court focused on whether the common carrier rates were illegal under the ICC statutes and regulations, whereas Cellular Plus does not argue the rates charged were not duly approved and legal under PUC [the California Public Utilities Commission] regulations, but it focuses on the alleged wrongful acts in fixing prices." [14 Cal. App. 4th at 1242](#). Here, Amundson similarly alleges that it does not contest the legality of the rates, but rather that NCCI illegally conspired to fix prices paid to the servicing agents. Fifth, **Keogh** and the current case are similar in that both deal [***22] with claims with individual consumers, not the insurance companies (a factor in [*500] NCCI's favor). Sixth, the **Cellular Plus** court stated that the PUC desired the cellular telephone service industry to be as freely competitive as possible, whereas the ICC in **Keogh**

and **Square D** appeared to be more concerned about price uniformity and nondiscrimination than competition. [14 Cal. App. 4th at 1242.](#)

Amundson states that it is undisputed that NCCI's servicing carrier agreements have never been filed with, reviewed by, or approved by the insurance commissioner. Amundson argues the insurance commissioner is by necessity ignorant of the price-fixing conspiracy of NCCI, and has never approved or endorsed that conspiracy. Amundson suggests that if NCCI escapes liability, then other regulated entities will be encouraged to engage in price-fixing knowing that the conduct will escape review.

We agree with NCCI that the filed rate doctrine, although not heretofore applied in Kansas by name, has nevertheless been recognized in principle. [Christl v. Missouri Pacific Railway Co., 92 Kan. 580, 585, 141 P. 587 \(1914\)](#) (shipper bound by tariffs filed and published in accordance [***23] with the interstate commerce law); [Schenberger v. Railroad Co., 84 Kan. 79, 81, 113 P. 433 \(1911\)](#) (The schedule of rates published and filed with the interstate commerce commission must govern. Any claim that such rate is unjust must be presented to that tribunal.); [Atchison, Topeka & Santa Fe Ry. Co. v. Superior Refining Co., 83 Kan. 732, 734, 112 P. 604 \(1911\)](#) (regulated entity seeking relief from an allegedly unreasonable rate must obtain redress from the rate regulator, not the courts).

A certain level of deference to an agency's expertise in performing the functions assigned by the legislature is not a new concept in Kansas. The court in [Southwestern Bell \[**1215\] Tele. Co. v. State Corporation Commission, 192 Kan. 39, 48-49, 386 P.2d 515 \(1963\)](#), emphasized that courts are ill-equipped to second guess a rate regulator's determination of a reasonable rate:

"Where [the Kansas Corporation Commission's] findings of fact are based upon substantial evidence and the other matters shown by the record with which that tribunal is authorized to deal, a court is not justified in setting its orders aside because the record shows that a different order or decision than [***24] the one made by the commission could fairly have been based thereon.' (Citation omitted.)"

[*501] "The Commission's decisions involve the difficult problems of policy, accounting, economics and other special knowledge that go into rate making. It is equipped with a staff of assistants, with experience as statisticians, accountants and engineers. The courts have no comparable suitability for making the determination."

Regardless of whether the filed rate doctrine is seen to protect the consumer or the competitor, it preserves the integrity of the agency's decision. An award of antitrust or common-law damages (the equivalent of a rate refund) or the granting of injunctive relief (the equivalent of a rate reduction) would undermine such rate regulatory schemes by allowing a jury or court to intrude upon the insurance commissioner's authority to determine the reasonableness of filed rates. The agency's authority would be frustrated because an award of damages or equitable relief would necessitate the substitution of the court's or jury's judgment for the insurance commissioner's expert determination of rate reasonableness. The filed rate doctrine prevents this result by barring such nonadministrative [***25] collateral attacks on approved rates.

Amundson makes much of the fact that the insurance commissioner did not review the servicing carrier agreements in setting the rates and, thus, there is no diminishing of the commissioner's authority or possibility of duplicative or inconsistent standards. We believe this is a good example of why questions involving rates should be settled by the insurance commissioner and not a jury. Whether the payment of the servicing carrier fees is a relevant factor which must be considered by the commissioner in setting rates pursuant to [K.S.A. 1998 Supp. 40-954](#) is a technical question which requires considerable expertise to answer. It is best decided by the commissioner, who has this expertise. It should not be decided by a court or jury, which does not have this expertise.

Amundson disagrees with the argument that the filing of rates by insurers in the voluntary market means the insurance commissioner has approved NCCI's servicing carrier agreements. Amundson maintains the mere filing of rates with the insurance commissioner does not place the agency's imprimatur on all conduct that affect the level of those rates. Rather, Amundson contends that if the [***26] insurance commissioner reviewed the rates filed by the voluntary [*502] market insurers, the commissioner at most determined that the rates filed by the nonparty

insurers met the minimum statutory requirements of being "reasonable, adequate and not unfairly discriminatory." K.S.A. 40-1112(d). The insurance code implies otherwise.

HN13[] K.S.A. 1998 Supp. 40-955(e) provides that in reviewing a rate filing, "the commissioner may require the insurer or rating organization to provide, at the insurer's or rating organization's expense, all information necessary to evaluate the reasonableness of the filing." HN14[] K.S.A. 44-562 also provides:

"Every insurance carrier writing insurance for liability hereunder, or the liability of employers rejecting this act, shall report to the commissioner of insurance, in accordance with such rules as he may adopt, such information as he may at any time require for the purpose of determining the solvency of the carrier or the fairness, reasonableness and adequacy of its rates, and for such purposes the commissioner of insurance may inspect the books and records of such carriers and examine its officers, agents and servants under oath."

Due to these statutes, we can assume [***27] the insurance commissioner is familiar with the servicing carrier process and has approved the subject rates.

We find the decision of N.C. Steel, Inc. v. National Council on Compensation Ins., 347 N.C. 627, 496 S.E.2d 369 (1998), to be persuasive. [**1216] There, the plaintiffs, like Amundson, claimed that "rates are forced up by the use of the servicing carrier fees, which are undisclosed noncompetitive expenses . . . thereby adversely affecting purchasers of workers' compensation insurance in both the voluntary and residual markets." 347 N.C. at 631. The North Carolina Supreme Court affirmed the dismissal of this claim, reasoning that:

"The General Assembly has given the Insurance Commissioner the duty of setting rates. The Commissioner, aided by his staff, has the expertise to determine proper rates. We do not believe that, by the enactment of [the North Carolina antitrust law], the General Assembly intended that duly set rates be challenged in another forum. When the Commissioner approved the rates, they became the proper rates.

"[The North Carolina Insurance Code] contains a comprehensive regulatory scheme for insurance companies, which includes provisions [***28] for punishing violators of the chapter. (Citation omitted.) It also contains a provision for the appeal of decisions of the Commissioner. (Citation omitted.) We do not believe that, with [*503] this comprehensive regulatory scheme, the General Assembly intended that the rates could be collaterally attacked." 347 N.C. at 632.

The case at bar is also similar to Uniforce Temp. Personnel v. National Council, 892 F. Supp. 1503 (S.D.Fla. 1995), aff'd, 87 F.3d 1296 (11th Cir. 1996), which involved a claim that the ratepayers were improperly insured in the residual market and thus forced to pay higher rates than they would have if they had obtained insurance in the voluntary market. The employers claimed that the defendant-insurance carriers conspired to fix excessively high servicing carrier fees, which resulted in the employers' being forced to purchase insurance in the residual market instead of the voluntary market. The **Uniforce** court determined the "plaintiffs' claims for damages [fell] squarely within the filed rate doctrine." 892 F. Supp. at 1512. A jury in the present case, similar to the jury in **Uniforce**, would [***29] have had

"to measure the difference between the properly approved workers' compensation insurance rates paid by plaintiffs and those mythical rates which would have been applicable but for the defendants' concerted activity. This undertaking is not within the province of the courts but should reside with the respective state regulators with authority over rate-setting." 892 F. Supp. at 1512.

We agree with the district court that Amundson was injured, if at all, only to the extent that the insurance companies that paid the servicing carrier fees passed those fees to their insureds in the form of higher rates. If Amundson paid a higher rate, it was an approved rate. HN15[] If proposed rates are filed with and approved by the insurance commissioner, the filed rate doctrine applies notwithstanding any allegation that the rates were affected by nonrate conduct or that such nonrate conduct was not regulated by the insurance commissioner. The insurance commissioner has the sole power of regulating the rates and that power includes examining any information deemed necessary to determine the excessiveness or adequacy of the rates.

Next, Amundson contends that even if we adopt the filed [***30] rate doctrine, it does not apply in this case. Amundson argues the **Keogh** doctrine applies only when a governmental agency has jurisdiction over and approves the allegedly anticompetitive conduct. Amundson [*504] argues that since it is undisputed that NCCI's servicing carrier agreements were never filed with, reviewed by, or approved by the insurance commissioner, then the **Keogh** doctrine does not apply.

In *Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992)*, the plaintiff alleged a conspiracy to fix price levels for title search and examination services. The court rejected the defendant's reliance on the **Keogh** doctrine.

"Ticor makes much of the fact that the filed rates are the only rates which it may legally charge in Arizona and Wisconsin. However, if those rates were the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge. The absence of meaningful state review allows the insurers to file [**1217] any rates they want. Therefore, the act of filing does not legitimize a rate arrived at by improper action." 982 F.2d at 393-94. [**31]

Amundson's claims that the **Keogh** doctrine does not apply because the insurance commissioner has no control over the servicing carrier agreements also fails. As previously discussed, the insurance commissioner has control over any and all information in determining whether the proposed rates are excessive, inadequate or unfairly discriminatory. See K.S.A. 1998 Supp. 40-955(e); K.S.A. 44-562. No matter how the issue is stated, Amundson is ultimately challenging the rates as established by the insurance commissioner. The district court correctly concluded: "However framed by the plaintiff the claim is an attack on the rate levels previously approved by the commissioner." Any claim of price-fixing or misstatement of losses or gains is a collateral attack on the reasonableness of the approved rate.

Last, Amundson argues the district court erroneously dismissed its claim for injunctive and declaratory relief along with the rest of the case without addressing the issue of whether the **Keogh** doctrine barred such claims. It contends the filed rate doctrine does not bar a claim for injunctive relief. In **Keogh**, the court stated: "Under the Anti-trust Act a combination of carriers [***32] to fix reasonable and nondiscriminatory rates may be illegal, and if so, the Government may have redress by criminal proceedings . . . [or] by injunction." 260 U.S. at 161. [*505]

Amundson relies on *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)*, which applied **Keogh** to bar the State of Georgia's claim for treble damages, but allowed the claim for injunctive relief. Amundson maintains the Court's holding that Georgia sought to enjoin the conspiracy, and not the approved rates, applies equally to the case at bar. See 324 U.S. at 455. Amundson also relies on a sentence in **Square D.**, 476 U.S. at 422, where the Court stated: "The alleged collective activities of the defendants . . . were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief."

We find Amundson's claims to be without merit. HN16↑ Any claim for injunctive or equitable relief in this area is permissible by the **government**, not individuals. See N.C. Steel, 347 N.C. at 636 ("We are not bound by the United States Supreme Court's ruling as to equitable [***33] relief. Nevertheless, we believe the two sentences [in **Keogh** and **Square D.**] relied upon by the plaintiffs say it is the government, and not individuals, that is entitled to equitable relief.").

By this decision we do not rule on the issue as to whether the Kansas Antitrust Act is never applicable to the insurance industry by private parties. NCCI argues, and may be correct, that there may be appropriate application of our antitrust laws in the insurance area by private parties. We need not reach that issue in this case.

Affirm.



Arkansas Carpenters' Health & Welfare Fund v. Philip Morris, Inc.

United States District Court for the Eastern District of Arkansas, Western Division

September 28, 1999, Decided ; September 28, 1999, Filed

Case No. LR-C- 97-754

Reporter

75 F. Supp. 2d 936 *; 1999 U.S. Dist. LEXIS 18388 **

ARKANSAS CARPENTERS' HEALTH & WELFARE FUND, on behalf of itself and on behalf of all others similarly situated, Plaintiff, v. PHILIP MORRIS INC; R J REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; BAT INDUSTRIES PLC; LORILLARD TOBACCO COMPANY; LIGGETT GROUP INC; AMERICAN TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH-U.S.A.; TOBACCO INSTITUTE, INC; SMOKELESS TOBACCO COUNCIL, INC., Defendants.

Disposition: [**1] Motions of defendants to dismiss matter with prejudice [DOC # 20, 29] granted. Motions to dismiss for failure to join party under Rule 19 [DOC # # 22, 30] and any other pending motions, moot.

Core Terms

cigarettes, smoking, defendants', damages, tobacco company, warranty, misrepresentations, alleges, special duty, Tobacco, labeled, smokers, proximate cause, injuries, products, plaintiff's claim, tobacco product, trust fund, remote, health and welfare, motion to dismiss, unjust enrichment, antitrust claim, racketeering, plan participant, wrongful conduct, anti trust law, manufacturers, plaintiffs', proximately

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

HN1 [down arrow] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

See [18 U.S.C.S. §§ 1962\(b\)](#) and [\(d\)](#).

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2 [down arrow] **Motions to Dismiss, Failure to State Claim**

When considering a motion to dismiss, the court assumes that all the factual obligations contained in the complaint are true. A motion to dismiss will be granted only if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle it to relief.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Securities Law > RICO Actions > General Overview

HN3 Remedies, Damages

The Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. § 1964\(c\)](#), provides a private right of action for damages only to those individuals injured in his business or property by reason of a violation of RICO's substantive provisions.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN4 Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 15\(a\)](#), provides a private right of action for any person injured in his business or property by reason of anything forbidden in the antitrust laws.

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

Securities Law > RICO Actions > General Overview

HN5 Private Actions, Standing

The language of both the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1964\(c\)](#), and the Sherman Act, [15 U.S.C.S. § 15\(a\)](#), has been interpreted to limit claimants to those who have suffered injuries "proximately caused" by the alleged wrongdoer.

Torts > ... > Causation > Proximate Cause > General Overview

HN6 Causation, Proximate Cause

The court uses "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. Accordingly, among the many shapes this concept took at common law, was a demand for 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. Although directness of relationship is not the sole requirement of Clayton Act causation, it has been one of its central elements for a variety of reasons.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Securities Law > RICO Actions > General Overview

[HN7](#) Public Enforcement, State Civil Actions

In Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. § 1964\(c\)](#), and antitrust actions brought by health and welfare trust funds which provide health care benefits to their participants, a three point test has emerged to gauge "remoteness." To determine whether an injury, is too remote to allow recovery under RICO and the antitrust laws, the court applies the following three-factor "remoteness" test: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Business & Corporate Compliance > ... > Sales of Goods > Warranties > Merchantability

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Merchantability

Torts > Products Liability > Theories of Liability > Breach of Warranty

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

Contracts Law > ... > Sales of Goods > Warranties > General Overview

[HN8](#) Warranties, Merchantability

An implied warranty claim cannot be maintained if the goods at issue: (1) pass without objection in the trade under the contract description; (2) are of fair average quality within the description; (3) are fit for the ordinary purposes for which such goods are used, and; (4) run of even kind, quality and quantity within each unit and among all units involved; (5) are adequately contained, packaged, and labeled; and (6) conform to the promises or affirmations of fact made on the container or label, if any. [Ark. Code Ann. § 4-2-314\(2\)](#).

Business & Corporate Compliance > ... > Sales of Goods > Warranties > Fitness

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Fitness

Torts > Products Liability > Theories of Liability > Breach of Warranty

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

Commercial Law (UCC) > ... > Contract Provisions > Warranties > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Contracts Law > ... > Sales of Goods > Warranties > General Overview

HNG[] **Warranties, Fitness**

To create an implied warranty of fitness for a particular purpose, the seller must have reason to know (1) the buyer's particular purpose, and (2) that the buyer is relying upon the seller's skill or judgment to select or furnish suitable goods. [Ark. Code Ann. § 4-2-315](#).

Contracts Law > Remedies > Restitution

HN10[] **Remedies, Restitution**

To maintain a claim for unjust enrichment, a plaintiff must show that the defendant obtained a benefit from the plaintiff to which he was not entitled through some operative act, intent, or situation to make the enrichment unjust and compensable. The courts will imply a promise to pay for services only where they were rendered in such circumstances as authorized the party performing them to entertain a reasonable expectation of their payment by the party beneficiary. Plaintiff must establish that defendant received money to which he was not entitled and which he should restore.

Counsel: For ARKANSAS CARPENTERS' HEALTH & WELFARE FUND, plaintiff: John McN. Broaddus, Robert J. Connerton, Connerton & Ray, Washington, D.C.

For ARKANSAS CARPENTERS' HEALTH & WELFARE FUND, plaintiff: Richard L. Gray, Shook, Hardy & Bacon, Kansas City, MO.

For ARKANSAS CARPENTERS' HEALTH & WELFARE FUND, plaintiff: Thomas H. McGowan, Nga C. Ostoja-Starzewski, Youngdahl, Sadin & McGowan, Little Rock, AR.

For ARKANSAS CARPENTERS' HEALTH & WELFARE FUND, plaintiff: George M. Fleming, D'Lisa R. Simmons, Sylvia Davidow, Fleming & Associates, Houston, TX.

For PHILIP MORRIS INC, R J REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, AMERICAN TOBACCO COMPANY, SMOKELESS TOBACCO COUNCIL INC, defendants: Sherry P. Bartley, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., Little Rock, AR.

For PHILIP MORRIS INC, defendant: Jack E. McClard, Maya M. Eckstein, Hunton & Williams, Richmond, VA.

For PHILIP MORRIS INC, defendant: John Lucas, Hunton & Williams, Knoxville, **[**2]** TN.

For R J REYNOLDS TOBACCO COMPANY, defendant: Robert Klonoff, Jones, Day, Reavis & Pogue, Washington, DC.

For BROWN & WILLIAMSON TOBACCO CORPORATION, AMERICAN TOBACCO COMPANY, defendants: Kenneth N. Bass, Kirkland & Ellis, Washington, DC.

For LORILLARD TOBACCO COMPANY, defendant: John S. Cherry, Jr., Robert L. Henry, III, Barber, McCaskill, Jones & Hale, P.A., Little Rock, AR.

For LORILLARD TOBACCO COMPANY, defendant: Jeffrey S. Nelson, Christine L. McDaniel, Shook, Hardy & Bacon, Kansas City, MO.

For LIGGETT GROUP INC, defendant: Overton S. Anderson, Anderson, Murphy & Hopkins, L.L.P., Little Rock, AR.

For COUNCIL FOR TOBACCO RESEARCH-U.S.A., TOBACCO INSTITUTE INC, defendants: James M. McHaney, Jr., Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., North Little Rock, AR.

For COUNCIL FOR TOBACCO RESEARCH-U.S.A. defendant: Peter G. Kumpe, Williams & Anderson, Little Rock, AR.

Judges: James M. Moody, United States District Judge.

Opinion by: James M. Moody

Opinion

[*938] ORDER

In the matter before the Court, the plaintiff, a union health and welfare trust fund, has brought suit against several cigarette manufacturers and related entities in which it seeks to recover **[**3]** reimbursement for medical payments it has paid out to its beneficiaries. It seeks recovery under several legal theories, including violation of federal "RICO" and antitrust laws and a variety of state statutory and common laws.

The defendants have moved for dismissal of all claims. For the reasons set out herein, the motions to dismiss are granted.

This Court exercises jurisdiction over the claims both on account of the complete diversity of the parties, [28 U.S.C. § 1332](#), and the presence of federal questions, [28 U.S.C. § 1331](#).

* * *

I. The Parties

The plaintiff is the Arkansas Carpenters Health and Welfare Trust Fund ("the Fund"). It is not disputed that the Fund is an "employee welfare benefit plan" and an "employee benefit plan" within the meaning of language of the Employee Retirement Income Security Act ("ERISA"), [29 U.S.C. § 1001, et seq.](#) As such, it **[*939]** provides comprehensive health care benefits to participants who are employed under various collective bargaining agreements, or retired from same, and their dependants. In its class action complaint, the Fund seeks to recover, for itself and on behalf **[**4]** of those similarly situated, reimbursements for what it describes as tobacco related benefit costs incurred when paying health and welfare claims to its plan participants. It also seeks various declaratory and equitable relief.

Defendants Philip Morris Incorporated ("Philip Morris"), R.J. Reynolds Tobacco Company ("RJR"), Brown & Williamson Tobacco Corporation ("Brown & Williamson"), Lorillard Tobacco Company ("Lorillard"), and the Liggett Group, Inc. ("Liggett") are domestic corporations which manufacture, market, sell, and distribute tobacco products, including cigarettes. Separate defendant American Tobacco Company is a corporation with activities similar to those of the defendants just named but which has been purchased by separate defendant Brown & Williamson. Separate defendant B.A.T. Industries P.L.C. is a British company which essentially owns Brown & Williamson.

Separate defendant Council for Tobacco Research ("CTR") is a successor to another research group, the Tobacco Industry Research Committee, and has engaged in tobacco related research, as has separate defendant Smokeless Tobacco Council ("STC"). Both are non-profit New York corporations.

Separate defendant The Tobacco **[**5]** Institute, Inc. ("TI") is a non-profit corporation which has done public relations work for many of the cigarette manufacturers. The firm of Hill & Knowlton is an ad agency which has been utilized by the major cigarette manufacturers and has been mentioned by the plaintiff in its complaint as a defendant. However, the firm was not set out as a defendant anywhere in the style of plaintiff's complaint.

II. The Claims

At the center of the plaintiff's claims are three groups of factual assertions: (1) smoking has severe health risks which have long been known to the defendants, (2) the defendants have conspired to withhold this information from the cigarette buying public, and in some cases, to knowingly and affirmatively present false evidence to the public which minimized the risks of smoking, and (3) the cigarette companies have manipulated the addictive qualities of some of the chemicals in cigarettes, such as nicotine, despite being aware of the dangerousness of those chemicals.¹

[**6] These factual assertions are made in support of the following legal claims:

Count I - Violation of "RICO"

Plaintiff has alleged a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), specifically [18 U.S.C. §§ 1962\(c\)](#) and [\(d\)](#), by the tobacco company defendants. Allegedly, the "persons" within the meaning of the Act were the tobacco companies and the "enterprise" was the public relations work and bogus scientific research conducted by the CTR and the Tobacco Institute. The alleged predicate acts of racketeering include mail and wire fraud in violation of [18 U.S.C. §§ 1341](#) and [1343](#).

The plaintiffs have arguably been injured in their business and property "because Plaintiffs have been required to [[*940](#)] incur significant costs and expenses attributable to tobacco-related diseases." *Plaintiff's Complaint* at p. 83, P 230.

Count II - Violation of RICO

The plaintiff alleges RICO was violated by all the defendants by investing income from racketeering activity in the "acquisition ..., establishment or operation of, any enterprise which is engaged in ... interstate commerce." [§ 1962\(a\)](#). The [**7] predicate acts of racketeering are alleged to have been the deliberate concealment of the medical risks related to smoking. The enterprise is alleged to have been a combination of CTR and the Tobacco Institute.

Count III - Violation of RICO

The plaintiff alleges violations of [§§ 1962\(b\)](#) and [\(d\)](#). [HN1](#) [↑] These two sub-sections provide:

- (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate commerce or foreign commerce.
- (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

For the purposes of this count, the plaintiff alleges that each defendant was a "person" within the meaning of the Act and the enterprises were potential witnesses, government investigators, prosecutors, legislators, and regulators concerned with the health risks of cigarette smoking. The racketeering acts were those relating to a pattern of deceiving the public and public officials about [**8] the true dangers of cigarettes.

Count IV - Sherman Act

¹ The factual allegations are much more detailed than this Court's abrupt summary suggests. The plaintiff describes a conspiracy dating at least as far back as the early 1950's during which the tobacco companies and their agents discovered, then withheld from the public, critical information about the dangers of tobacco use. The plaintiff also describes in detail the great lengths to which the defendants allegedly lied to and otherwise deceived the public, scientists, and government regulators. However, the Court sees no need in repeating most of that in this Order. The point of this Court's granting of the dismissal motions, as is the case with the granting of *any* dismissal motion, is that even if *all* the allegations are true, the plaintiff has nevertheless failed to state a claim.

The plaintiff has alleged that the defendants violated the Sherman Act, [15 U.S.C. § 1](#), by conspiring to eliminate competition for their products in the marketplace, which had the effect of limiting "the dissemination of product information regarding the quality, safety and composition of cigarettes and tobacco products, thereby eliminating alternative products from the market, restricting consumer choice, and causing consumers to suffer smoking-related illnesses and health care costs." *Complaint* at p. 90, P 259.

Count V - Fraud and Misrepresentation (labeled on plaintiff's complaint as Count IV)

The plaintiff alleges that the defendants had a duty to disclose to the public, including the plaintiff and its plan participants, all the material facts about the hazards of smoking, including the addictive qualities of cigarettes. Plaintiff claims the defendants breached that duty by fraudulently misrepresenting the true dangers of the products the tobacco companies were selling to the public. The plaintiff argues that by raising the issue of smoking, and by making "incomplete" [**9] statements on the subject, they were obligated to reveal all material facts about the dangers of cigarettes.

The plaintiff argues that "as a direct and proximate result of Defendants' fraudulent misrepresentations, nondisclosures and active concealment, Plaintiffs have suffered and will continue to suffer substantial injuries and damages for which Plaintiffs are entitled to recovery, and for which Defendants are jointly and severally liable." *Complaint* at p. 99, P 296.

Count VI - Intentional Breach of Special Duty (labeled by plaintiff as Count V)

In a separate count, the plaintiff claims that all defendants, because of certain public positions taken by them, have "assumed a special duty to protect the public health and a duty to those who advance the public health, including the Health and Welfare Trust Fund." *Complaint* at p. 100, P 298. Plaintiff claims that it and those similarly situated acted in reliance on those intentional misrepresentations and failed to act as soon as it might have to take measures which would have reduced substantially its pay outs on smoking related claims.

[*941] Count VII - Negligent Breach of Special Duty (labeled by plaintiff [**10] as Count VI)

In a related theory, in this count the plaintiff alleges that all defendants "knew or should have known" that each had undertaken this special duty and each failed to exercise reasonable care to discharge this duty.

Count VIII - Breach of Express and Implied Warranties (labeled by plaintiff as Count VI)

The plaintiff alleges that the tobacco company defendants made express warranties to the public regarding the safety of their products and made further promises to provide the public with accurate information as to the safety of their tobacco products, that the plaintiffs and their plan participants relied on these promises, and that these warranties were breached by the tobacco companies when they in fact provided unsafe products and misleading health information.

The plaintiff further alleges that the "defendants' products are unmerchantable and are unfit for safe use when sold and consumed as intended. Defendants breached their implied warranty of merchantability because their products are not fit for their intended purposes." *Complaint* at pp. 103-04, P 314.

Count IX - Unjust Enrichment (labeled by plaintiff as Count VII)

Plaintiffs [**11] also allege that because the defendants have breached the "special duty" discussed above, and the plaintiff has had to pay resulting medical expenses, the plaintiff has conferred a benefit upon the defendants, i.e., it has paid out sums to its plan participants which should have been borne by the defendants. The defendants should therefore have to make restitution to the plaintiff by reimbursing the plaintiff for the funds thus paid out.

III. The Dismissal Motions

Before the Court are the parties' motions to dismiss for "failure to state a claim," [F.R.Civ.Pro. 12\(b\)\(6\)](#) [DOC # # 20, 29], and "failure to join a party under Rule 19," [Rule 12\(b\)\(7\)](#) [DOC # # 22, 30]. The Court needs only to consider the 12(b)(6) motions.

HN2 When considering a motion to dismiss, the Court assumes that all the factual obligations contained in the complaint are true. [Westcott v. Omaha, 901 F.2d 1486, 1488 \(8th Cir. 1990\)](#). A motion to dismiss will be granted only if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle it to relief. In the instant case, even if the Court assumes that all of the factual allegations about the defendants' activities are [**12](#) true, i.e., that the defendants knew of the medical risks associated with their tobacco products, intentionally misled the public about same, and conspired with each other to do so, the Court nevertheless holds that the plaintiff has failed to state a claim upon which relief could be granted *for plaintiff*.

Each of the plaintiff's claims suffers from some version of the same fatal flaw: the aggrieved party or parties, legally speaking, in each of the claims is someone or some group other than the plaintiff. The plaintiff, in other words, is too far removed from the challenged harmful conduct to succeed on any of the several claims. Instead, the plaintiff derives its claims from the injuries allegedly occurring to others, i.e., smokers. Without any injury to smokers, the plaintiff would not have incurred any of the additional, smoking related expenses for which it is now seeking reimbursement. Therefore, there is no *direct* link between the alleged misconduct and the damages of which the plaintiff complains and the defendants did not proximately cause the injuries to the plaintiff. This lack of direct causation between the alleged improper acts of the defendants and the asserted [**13](#) injuries suffered by the plaintiff will be discussed in particular detail as the Court takes up each of the counts in turn.

A. RICO and Antitrust Claims

Counts I, II, and III of the complaint involve alleged violations of the RICO Act and Count IV alleges a violation of the [*942](#) Sherman Act. **HN3** The former provides a private right of action for damages only to those individuals "injured in his business or property by reason of" a violation of RICO's substantive provisions. [18 U.S.C. § 1964\(c\)](#). **HN4** The latter provides one for "any person ... injured in his business or property by reason of anything forbidden in the antitrust laws" [15 U.S.C. § 15\(a\)](#). The similarity in language is not coincidental. The Supreme Court has noted that "Congress modeled [§ 1964\(c\)](#) on the civil-action provision of the federal [antitrust law](#)" [Holmes v. SIPC, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 \(1992\)](#).

HN5 The language of both statutes has been interpreted to limit claimants to those who have suffered injuries "proximately caused" by the alleged wrongdoer. [Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#)(antitrust); [**14 Holmes, 503 U.S. at 268](#) (RICO)(holding "the reasoning [of Associated General] applies just as readily to [§ 1964\(c\)](#)"). We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used").

The Supreme Court has conceded the difficulty of formulating a "one size fits all" definition of proximate cause within the context of determining whether a party has standing to bring a claim of this type but has nevertheless emphasized the "directness" of the relationship between the conduct and the resulting injury.

HN6 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." [citation omitted] Accordingly, among the many shapes this concept took at common law, see *Associated General Contractors, [459 U.S. at 532-533]*, was a demand for some direct relation between the injury, asserted and the injurious conduct alleged. Thus, [**15](#) 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. [citation omitted]

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Although directness of relationship is not the sole requirement of Clayton Act causation, [footnote omitted] it has been one of its central elements, *Associated General Contractors*, 459 U.S. at 540, ... for a variety of reasons.

Holmes, 503 U.S. at 268-69, 117 L. Ed. 2d 532, 112 S. Ct. 1311.

HN7 In RICO and antitrust actions brought by health and welfare trust funds which, like the plaintiff in the instant case, provide health care benefits to their participants, a three point test has emerged to gauge "remoteness:"

To determine whether an injury, is "too remote" to allow recovery under RICO and the antitrust laws, the Court applies the following three-factor "remoteness" test: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether **[**16]** the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. See [*Holmes*] 503 U.S. at 269-70, 112 S. Ct. 1311 (RICO); AGC, 459 U.S. at 545, 103 S. Ct. 897 (antitrust).

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, 185 F.3d 957, 1999 WL 493306 (9th Cir. 1999).

In applying this test, the Court of Appeals in *Oregon Laborers-Employers*, which involved every one of the tobacco companies involved in the case before this Court, determined that:

[*943] (1) smokers who were participants in the funds in question were "more direct victims of the alleged wrongful conduct" and could be counted on "to vindicate the injury caused by defendants' alleged wrongful conduct;"

(2) "The difficulty of ascertaining the damages attributable to defendants' alleged wrongful conduct and the complexity involved in calculating these damages weigh heavily, if not dispositively, in favor of barring plaintiffs' actions," *Id.*; and

(3) the ability of smokers to seek recovery directly under various state law theories for personal injuries and the related medical costs - the same **[**17]** damages the plaintiff health care funds were seeking - would require courts "to adopt complicated rules apportioning damages among plaintiffs at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Id.*, citing *Holmes*, 503 U.S. at 269.

The Court of Appeals in *Oregon Laborers-Employers* concluded that all three of the factors of the remoteness test "weigh in favor of barring plaintiffs' claims. We therefore hold that plaintiffs lack standing to bring either a RICO or an antitrust claim for damages." *Oregon Laborers-Employers*, 1999 WL 493306 at *6. This decision by the Ninth Circuit was in keeping with those of two other Courts of Appeals presented with RICO and/or antitrust claims brought by health and welfare trust funds against some or all of these same tobacco companies: *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3rd. Cir. 1999)(addressing RICO and antitrust) and *Laborers Local 17 Health & Benefit Fund v. Philip Morris*, 1999 WL 639865 (2nd Cir. Aug. 18, 1999)(RICO only).² In both cases, the respective Courts of Appeals **[**18]** found that the claimed injuries of the plaintiff health care funds were "entirely derivative of the harm suffered by plan participants as a result of using tobacco products."

²The Second Circuit had previously issued this opinion at 172 F.3d 223 but requested it be withdrawn from the published volumes. Presumably, it will be published in the version distributed via Westlaw which the Circuit accessed after the parties had completed their briefing in the instant case.

Laborers Local 17, Id. at *9, and did not "proximately cause" the injuries alleged by the health funds. Thus, the funds' claims brought under RICO or federal antitrust law were dismissed in both of those cases.

Though the Eighth Circuit Court of Appeals has not yet passed on such a case, three Courts of Appeals, the Second, Third, and Ninth, have considered cases squarely on point with the one before this Court and involving the same defendant tobacco companies being sued by various health trust funds similar in all relevant respects [**19] to the plaintiff in this case. Each Court of Appeals has unanimously held that such a plaintiff's claims are too remote, too derivative to maintain a RICO or antitrust claim against these defendants. Though not binding authority on this Court, those decisions persuade the Court that the RICO and antitrust claims in the case at bar should be dismissed as well.

B. Fraud and Misrepresentation

In what the Court shall refer to as Count V, the Fund alleges that the defendants fraudulently misrepresented the true dangers of the products the tobacco companies were selling to the public. The plaintiff argues that "as a direct and proximate result of Defendants' fraudulent misrepresentations," the Fund has suffered damages.

In so doing, the plaintiff attempts to avoid the appearance of suing the defendants because of some injury inflicted on others, i.e., smokers. As was the case with Oregon law in *Oregon Laborers-Employers*, Arkansas follows the traditional, and prevailing, rule that a plaintiff may not recover for fraud and misrepresentation directed to a third party. Therefore, plaintiff has argued that misrepresentations were made by the defendants to the Fund.

[*944] However, [**20] it is inescapable that the Fund's claims are directly linked to the alleged misrepresentations made to the Fund's participants who smoked, not to the Fund itself. This is borne out by the fact that the damages it claims is the amount of smoking related medical claims it has paid. In barring a virtually identical claim for fraud in *Oregon Laborers-Employers*, the Ninth Circuit concluded:

plaintiffs seek only to recover medical costs paid on behalf of their beneficiaries. This is a classic claim for indemnity, with plaintiffs attempting to recover for the economic loss they have suffered as a result of the physical harm suffered by third parties - the smokers. ... This claim for damages is barred.

Moreover, for the same reasons that proximate cause did not exist for plaintiff's RICO and antitrust claims, proximate cause is lacking for their fraud claim.

Oregon Laborers-Employers, 1999 WL 493306.

The fraud and misrepresentation claims before this Court are no different. In its complaint, the Fund alleges that the defendants' "fraudulent statements, concealment and conduct, ... was [sic] a substantial cause persuading Plaintiffs' participants and [**21] beneficiaries to purchase and use [cigarettes]." *Complaint* at P 292. Despite allegations that the fraud was perpetrated on the Fund, this is simply a case of a third party (the Fund) attempting to recover on account of a fraud allegedly being perpetrated on someone else (the smokers). The claim must fail as a matter of law.

Accordingly, the Court need not address the defendants' alternate defense: that even if misrepresentations were made to the Fund and the Fund relied on such misrepresentations, any such reliance on what the tobacco companies said would have been unreasonable as a matter of law.

C. "Special Duty"

Counts VI & VII allege both intentional and negligent failure to discharge a "special duty" it had to the plaintiff. As to the former claim, this Court is aware of no theory recognized under Arkansas law for a claim of "intentional breach" of a "special duty." An examination of the allegations in plaintiff's complaint causes the Court to conclude that this is nothing more than a restatement of the fraud and misrepresentation claims discussed above. It fails for those reasons.

As to "negligent breach" of a special duty, the Fund argues that by running advertisements [**22] like the so called "Frank Statement," the defendants took on a special duty or "responsibility" to act as a sort of guardian of the public health with regard to tobacco products. The defendants were therefore obligated to provide accurate and helpful scientific information about tobacco products to, among others, health trust funds like the plaintiff. It is argued that the defendants' conspiracy to distribute disinformation about the relationship between smoking and certain health problems was a failure to discharge that duty and prevented the plaintiff from "undertaking measures sooner to discourage tobacco use by their participants and beneficiaries." *Complaint* at P 309. This, in turn, caused the Fund to incur greater expenses relating to paying smoking related health claims.

This Court finds no Arkansas case even remotely suggesting that one can assume the sort of "special responsibility" plaintiff describes simply by placing advertisements or issuing corporate statements. Furthermore, any cause of action involving negligence requires the element of proximate cause. The scenario described by plaintiff has much too tenuous a causal connection between the defendants' actions [**23] and plaintiff's injuries for the former to be the proximate cause of the latter. Even if one were to assume that defendants' public statements and advertisements were directed to the Fund (though the ads were plainly targeted toward consumers), it is difficult to say with any measure of certainty, much less precision, how many of its participants the Fund might have been [*945] dissuaded from smoking but for the defendants' suppression of critical information.

This lack of certainty as to causation, the difficulty in fixing the portion of plaintiff's damages which are fairly attributable to defendants' conduct,³ etc., speak to the practical considerations of why such a claim should not be allowed. Simply put, plaintiff cannot show that defendants' alleged conduct was the proximate cause of its injuries.

[**24] As the Second Circuit put it last month, "hence, analogous principles to those that doomed plaintiffs' RICO causes of action also bar plaintiffs' common law fraud and special duty actions." *Laborers Local 17*, 1999 WL 639865 at *13 (2nd Cir. 1999).

D. Warranties

Count VIII⁴ contains the Fund's allegations that the defendants have violated express and implied warranties made to the public, including the Fund and its participants. However, there is no allegation that defendants ever provided the plaintiff with any sort of *product* to which these warranties would apply. Furthermore, there is no allegation that defendants made any express warranties to the Fund as to any product it sold.

³This uncertainty as to both causation and damages was precisely the sort of policy consideration discussed by the Second Circuit in *Laborers Local 17*, albeit in the context of evaluating standing to bring a RICO claim:

These concerns become particularly pointed in a case, like the present one, where the injuries are alleged to derive not simply from defendants' affirmative misconduct but also from plaintiffs' fraudulently induced inaction. That is, it is often easier to ascertain the damages that flow from actual, affirmative conduct, than to speculate what damages arose from a party's failure to act. In the latter situation, as in the case at hand, it becomes difficult to distinguish among the multitude of factors that might have affected the damages. Here, for example, plaintiffs' alleged damages might have derived from inefficiencies in the Funds own management, as well as from non-smoking related health problems suffered by the smokers, and it would be the sheerest sort of speculation to determine how these damages might have been lessened had the Funds adopted the measures defendants allegedly induced them not to adopt.

The complexity of these calculations makes the ultimate question of damages suffered by the Funds virtually impossible to determine. Indeed, this case seems to present precisely the type of large, complicated damages claims that *Holmes and Associated General Contractors* sought to avoid.

Laborers Local 17, 1999 WL 639865 at *10 (2nd Cir. 1999).

⁴This was numbered as "Count VI" in plaintiff's complaint on page 103.

With respect to any claim of breach of an implied warranty of merchantability, the Court first looks to Arkansas' statutes. [HN8](#)[] An implied warranty claim cannot be maintained if the goods at issue: (1) "pass without objection in the [**25] trade under the contract description;" (2) "are of fair average quality within the description;" (3) "are fit for the ordinary purposes for which such goods are used, and;" (4) "run ... of even kind, quality and quantity within each unit and among all units involved;" (5) "are adequately contained, packaged, and labeled;" and (6) "conform to the promises or affirmations of fact made on the container or label, if any." [Ark. Code Ann. § 4-2-314\(2\)](#).

Plaintiff has not alleged that the cigarettes manufactured and sold by the defendants failed to meet any of the criteria set out above. For example, there is no charge that the cigarettes were not properly labeled or that the cigarettes smoked by the Fund's participants were of an inferior or atypical grade from those usually sold or that they failed to live up to promises made on the container. On the contrary, read as a whole, it is plaintiff's claim that a typical cigarette, like all cigarettes, is "generally defective." This type of allegation cannot state a claim for breach of implied warranty of merchantability.

To the extent plaintiff attempts to state a claim for a breach of implied warranty of fitness for a particular purpose, [**26] [*946] the Court finds it fails as well. [HN9](#)[] To create a such a warranty, the seller must have reason to know (1) the buyer's particular purpose, and (2) that the buyer is relying upon "the seller's skill or judgment to select or furnish suitable goods." [Ark. Code Ann. § 4-2-315](#).

In its complaint the Fund made no allegation of any particular purpose for which it (or its participants) bought cigarettes. There is likewise no allegation that the Fund or its participants ever told the defendants of any such need. Accordingly, the plaintiff has not properly stated such a claim.

E. Unjust Enrichment

Finally, Count IX of the complaint is a claim for unjust enrichment against the defendants. In a nutshell, plaintiff argues that the medical payments it has made to its participants over the years for smoking related problems *should* have been made by the defendants. That plaintiff made them instead means the defendants have received a benefit, *i.e.*, the defendants have been "unjustly enriched."

[HN10](#)[] To maintain such a claim, a plaintiff must show that the defendant obtained a benefit from the plaintiff to which he was not entitled through "some operative act, intent, or situation to make [**27] the enrichment unjust and compensable. The courts will imply a promise to pay for services only where they were rendered in such circumstances as authorized the party performing them to entertain a reasonable expectation of their payment by the party beneficiary." [Sparks Regional Medical Center v. Blatt, 55 Ark. App. 311, 935 S.W.2d 304, 307 \(Ark.Ct.App. 1996\)](#). Plaintiff must establish that defendant received money "to which he was not entitled and which he should restore." *Id.*

The Court finds that the defendants received nothing of value, within the meaning of unjust enrichment analysis, when the plaintiff paid the smoking related health claims which it was legally obligated to pay.

Because plaintiffs had an independent obligation to pay the smokers' medical expenses, they cannot maintain an action for unjust enrichment against defendants just because defendants were incidentally benefitted. See *Restatement of Restitution* § 106 (1936) ("A person who, incidentally to the performance of his own duty ... has conferred a benefit upon another, is not thereby entitled to contribution.").

Oregon Laborers-Employers, 1999 WL 493306 at *10.

It was the [**28] plaintiff's legal obligation to pay the smokers, not the defendants' obligation. With no benefit having been conveyed, the issue of whether it would be "unjust" for defendant to keep such a benefit is moot.

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For the foregoing reasons, the motions of the defendants to dismiss this matter with prejudice [DOC # 20, 29] are granted. The motions to dismiss for failure to join a party under Rule 19 [DOC # # 22, 30], and any other pending motions, are deemed moot.

IT IS SO ORDERED.

James M. Moody

United States District Judge

September 28, 1999

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Philip Morris, Inc. v. Grinnell Litho. Co.

United States District Court for the Eastern District of New York

September 28, 1999, Decided ; September 28, 1999, Filed

95-CV-0733 (DRH)

Reporter

67 F. Supp. 2d 126 *; 1999 U.S. Dist. LEXIS 15638 **; 1999-2 Trade Cas. (CCH) P72,708

PHILIP MORRIS, INCORPORATED, Plaintiff, -against- GRINNELL LITHOGRAPHIC CO., INC., OLIVER MUNSON and LES SUTORIUS, Defendants.

Disposition: [**1] Relief sought by defendants in the motion denied except (1) plaintiff's claim under [§ 180.03](#) of the New York State Penal Law dismissed and (2) defendants' application to preclude Rapp's testimony and the Rapp Report granted in part.

Core Terms

antitrust, competitive injury, treble damages, Robinson-Patman Act, bribes, commercial bribery, defendants', damages, anti trust law, cause of action, private right of action, anticompetitive, cases, products, vendor, price discrimination, summary judgment, Clayton Act, violations, Penal Law, decisions, summary judgment motion, district court, courts, business practice, plaintiff's claim, lithographic, competitors, purchaser, purposes

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 may be granted only when it is shown 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\(c\)](#).

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

[HN2](#)[] Entitlement as Matter of Law, Genuine Disputes

The party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying which materials it believes demonstrate the absence of a genuine issue of material fact. The substantive law governing the case will identify those facts that are material, and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

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 > Genuine Disputes

[**HN3**](#) **Discovery, Methods of Discovery**

Once the moving party has come forward with support demonstrating that no genuine issue of material fact remains to be tried, including pleadings, depositions, interrogatory answers, and affidavits, the burden shifts to the non-moving party to provide similar support setting forth specific facts about which a genuine triable issue remains. [Fed. R. Civ. P. 56\(e\)](#). The court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. Moreover, the court's role on a motion for summary judgment in short, is confined to issue-finding; it does not extend to issue-resolution.

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > 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

[**HN4**](#) **Summary Judgment, Opposing Materials**

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Moreover, conclusory allegations will not suffice to create a genuine issue. There must be more than a scintilla of evidence, and more than some metaphysical doubt as to the material facts. The non-movant cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[**HN5**](#) **Antitrust & Trade Law, Robinson-Patman Act**

There is a legal presumption that, at a minimum, the prices paid by plaintiff to produce supplier were inflated by the amount of the bribes and, accordingly, the bribe amounts are recoverable as damages.

67 F. Supp. 2d 126, *126LÁ999 U.S. Dist. LEXIS 15638, **1

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN6 **Robinson-Patman Act, Claims**

See [15 U.S.C.S. § 13\(c\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Injunctions

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN7 **Remedies, Injunctions**

For a plaintiff's cause of action predicated on [15 U.S.C.S. § 13\(c\)](#) to survive a defendants' motion for summary judgment, it must first appear that there is a factual basis to maintain that the conduct alleged constitutes "commercial bribery" within the purview of the statute.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

HN8 **Remedies, Damages**

The terms "antitrust injury" and "competitive injury" are not interchangeable, or synonymous, for purposes of a private antitrust claim for treble damages based on a substantive violation of [15 U.S.C.S. § 13\(c\)](#).

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Torts > Business Torts > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

67 F. Supp. 2d 126, *126L999 U.S. Dist. LEXIS 15638, **1

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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 > Robinson-Patman Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN9 Standing, Clayton Act

[15 U.S.C.S. § 13\(c\)](#) simply defines that certain conduct is illegal. To pursue a private claim for treble damages requires reference to [15 U.S.C.S. § 15](#) which expressly creates the right. [Section 13\(c\)](#) makes certain business practices unlawful, while [§ 15](#) provides for an express private right of action for treble damages to any person injured in his business or property as a result of any antitrust violation.

Antitrust & Trade Law > Clayton Act > General Overview

HN10 Antitrust & Trade Law, Clayton Act

See [15 U.S.C.S. § 15\(a\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

HN11 Antitrust & Trade Law, Clayton Act

Although the expansive language of [15 U.S.C.S. § 15\(a\)](#), particularly the phrase "by reason of," would appear to authorize treble damages to any aggrieved party that was able to establish a nexus between an injury sustained and a defendant's violation of an [antitrust law](#) provision, the statute has not been so broadly construed. To recover treble damages a plaintiff must prove more than injury causally linked to an illegal presence in the market.

Antitrust & Trade Law > Clayton Act > General Overview

HN12 Antitrust & Trade Law, Clayton Act

Antitrust injury is an element of a cause of action seeking treble damages.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

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Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Injunctions

[HN13](#) [] **Robinson-Patman Act, Claims**

A per se unlawful practice under [15 U.S.C.S. §13\(c\)](#) is inherently anticompetitive, thus obviating the need to prove anticompetitive injury when the relief sought is injunctive or declaratory in nature; for a non per se practice, such injury is not implicit and, thus, more than the mere commission of the act must be shown in order to establish a substantive violation of the statute.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN14](#) [] **Price Discrimination, Competitive Injuries**

The Clayton Act, [15 U.S.C.S. §15\(a\)](#), including the Robinson-Patman Act, [15 U.S.C.S. § 13\(c\)](#), the Sherman Act, [15 U.S.C.S. § 1](#), and certain parts of a federal tariff act, constitute the federal antitrust laws. [15 U.S.C.S. § 12](#). Their shared goal is to protect competition and, in the case of the Robinson-Patman Act, to protect competitors as well. Unlike the Sherman Act which protects competition, not competitors, the Robinson-Patman Act extends its protection to competitors. From that, however, it may not be inferred that proof of an effect on competition, or competitive injury, is a sine qua non to a charged Robinson-Patman Act violation. Such may, or may not be the case depending on the statutory provision involved.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[HN15](#) [] **Antitrust & Trade Law, Robinson-Patman Act**

5 U.S.C.S. § 13(a) makes unlawful price discriminations 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. This price discrimination provision is hedged with qualifications. An exception is made for price differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery. Care was taken that price changes are not outlawed where made in response to changing market conditions. Finally, 13(a) codifies the rule protecting the right of a person in commerce to select his own customers in bona fide transactions and not in restraint of trade.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

67 F. Supp. 2d 126, *126LÁ999 U.S. Dist. LEXIS 15638, **1

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN16 [] Price Discrimination, Competitive Injuries

[15 U.S.C.S. §§ 13\(c\), \(d\), and \(e\)](#) unqualifiedly make unlawful certain business practices other than price discriminations. In terms, the proscriptions of these three subsections are absolute. Unlike [§ 13\(a\)](#), none of them requires, as proof of a *prima facie* violation, a showing that the illicit practice has had an injurious or destructive effect on competition.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN17 [] Robinson-Patman Act, Claims

With respect to per se violations of the Robinson-Patman Act, [15 U.S.C.S. § 13](#), it is not that the targeted practices do not effect competition. Were that the case, the antitrust laws would not be implicated. Instead, Congress decided that such practices are necessarily anticompetitive and, thus, no proof to that effect is required to establish a violation.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN18 [] Robinson-Patman Act, Claims

It is well established that certain practices are per se unlawful under the Robinson-Patman Act, [15 U.S.C.S. § 13](#), as inherently anticompetitive, while others are not. Commercial bribery falls within the former category.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN19 [] Price Discrimination, Competitive Injuries

Any examination of a plaintiff's right to sue under a statute must begin with the language of the statute itself. There is nothing in the language of [15 U.S.C.S. § 13\(c\)](#) to justify imposing a competitive injury requirement on potential plaintiffs. Unlike [15 U.S.C.S. § 13\(a\)](#) which outlaws price discrimination whose effect may be substantially to lessen competition or tend to create a monopoly, [15 U.S.C.S. §§ 13\(c\), \(d\), and \(e\)](#) prohibit business practices other than price discrimination. None of these latter sections requires, as proof of a *prima facie* violation, a showing that the illicit practice has had an injurious or destructive effect on competition.

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 > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

[**HN20**](#) [] Remedies, Damages

Suits for damages by private plaintiffs injured in business or property are authorized by the Clayton Act, [15 U.S.C. § 15](#), which has long been read to include a requirement that any potential plaintiff under the antitrust laws be within the so-called target area of the antitrust violations.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

[**HN21**](#) [] Remedies, Damages

When commercial bribes are paid to a company's employees to obtain contracts for the sale of goods, the company has standing to bring an action for damages under the Robinson-Patman Act, [15 U.S.C.S. § 13\(c\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

[**HN22**](#) [] Remedies, Damages

While price discrimination may, or may not be violative of [15 U.S.C.S. § 13\(a\)](#), commercial bribery is always violative of [15 U.S.C.S. § 13\(c\)](#) and is never in the public interest. There is no reason that the per se character of such conduct should not be recognized in private suits for damages under [15 U.S.C.S. § 15](#). To the contrary, such private suits will serve to curtail such purely pernicious business practices in the marketplace, consistent with the purpose of [§ 15](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[**HN23**](#) [+] **Robinson-Patman Act, Claims**

The holdings in antitrust cases involving non per se violations are not interchangeable with those involving per se unlawful business practices under the Robinson-Patman Act, [15 U.S.C.S. § 13](#), such as commercial bribery under [15 U.S.C.S. § 13\(c\)](#).

Banking Law > ... > Criminal Offenses > Employee Fraud > General Overview

[**HN24**](#) [+] **Criminal Offenses, Employee Fraud**

See [N.Y. Penal Law § 180.03](#).

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

Governments > Legislation > Types of Statutes

[**HN25**](#) [+] **Crimes Against Persons, Bribery**

[N.Y. Penal Law § 180.03](#) does not itself create a private right of action. Absent such a directive, the courts are to determine themselves, considering such factors as legislative history, consistency with the overall legislative scheme for creating the private right and whether the plaintiff is one of the class for whose special benefit the statute was enacted.

Counsel: For Plaintiff: Edward M. Spiro, Esq., Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., New York, New York.

For Grinnell Lithographic Co., Inc., and Oliver Munson, Defendants: Joseph W. Ryan, Jr., Esq., Uniondale, New York.

For Les Sutorius, Defendant: David J. Sutton, Esq., Garden City, New York.

Judges: DENIS R. HURLEY, U.S.D.J.

Opinion by: DENIS R. HURLEY

Opinion

[*127] **MEMORANDUM AND ORDER**

HURLEY, District Judge

By notice of motion dated January 15, 1999, defendants Grinnell Lithographic Co., Inc. ("Grinnell") and Oliver Munson ("Munson"), seek the following relief:

1. an order pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#):

(a) dismissing all claims of Philip Morris, Incorporated ("plaintiff") for failure to prove that it suffered an injury as a result of defendants' conduct, or, alternatively;

(b) dismissing plaintiff's treble damages claim under Section 2(c) of the Robinson-Patman Act, [15 U.S.C. § 13](#) [**2] ([c](#)) ("§ 2(c)"), given the absence of proof of "antitrust injury" as required by Section 4 of the Clayton Act, [15 U.S.C. § 15](#) ("§ 4");

(c) dismissing plaintiff's claim under [Section 180.03](#) of the New York State Penal Law ("[§ 180.03](#)") on the ground that the statute does not create a private cause of action; and

[*128] (d) dismissing plaintiff's claims against Munson on the ground there is no evidence to indicate his authorization or awareness of payments made by Les Sutorius ("Sutorius") to Louis Cappelli ("Cappelli").

2. an order, pursuant to [Federal Rules of Evidence 104, 401, 403](#) and/or [702](#), declaring the report of plaintiff's expert (the "Rapp Report") to be inadmissible as "irrelevant and unreliable"; and

3. in the event plaintiff's federal claim -- i.e., the purported violation of the Robinson-Patman Act -- is dismissed, declining to exercise supplemental jurisdiction over the state claims asserted.

As explained below, the relief sought in paragraphs 1(a)(b) and (d) above are denied; the relief sought in paragraph 1(c) -- pertaining to the cause of action predicated on [§ 180.03](#) -- is granted; the relief sought in paragraph 2 -- pertaining to the Rapp [**3] Report -- is granted to the extent a hearing will be held before me immediately prior to jury selection to determine whether the Rapp Report and corresponding testimony of its author passes muster under relevant provisions of the Federal Rules of Evidence, consistent with the holding in [Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 \(1999\)](#); and the relief sought in paragraph 3 is denied as moot in view of the above determinations.

BACKGROUND

The complaint in this action arises from a bribery scheme participated in by Cappelli, the former Graphics Purchasing Manager of plaintiff's Marketing Services Purchasing Department, and Grinnell, a vendor which provided lithographic printing services to plaintiff.

Munson was and is the President, Chair of the Board, and a shareholder of Grinnell. Sutorius was a salesperson for Grinnell. For more than ten years, Sutorius, acting for Grinnell, made weekly bribe payments to Cappelli. The weekly sums began at \$ 100 per week in or about 1979, increasing over time to \$ 400 a week for the mid-1988 to 1990 period. In addition, Cappelli was provided with golf vacations, and other gratuities, by Grinnell during [**4] the 1980s.

It is alleged in the complaint that "in excess of \$ 150,000 in illegal bribes, kickbacks and gratuities" were paid to Cappelli in return for his manipulating the purchasing process for lithographic printing services to favor Grinnell. (Amended Compl. P 1.) During the time frame involved, plaintiff awarded Grinnell contracts in excess of \$ 54 million. The resulting injury to plaintiff was that "it paid substantially inflated prices" for the services received. *Id.*

On February 21, 1995, plaintiff filed the present action, alleging a federal claim based on the Robinson-Patman Act, as well as state law claims for fraud, commercial bribery and breach of fiduciary duty.

Extensive pre-trial proceedings occurred thereafter, with the case being placed on the ready trial calendar on October 15, 1998. A week later, defendants successfully sought permission to file a belated summary judgment motion.

DISCUSSION

A. Format

The items of relief requested by defendants ¹ shall be discussed *seriatim* consistent with the sequence set forth in the notice of motion, beginning with the multiple requests for summary judgment. Before doing so, however, the standards for **[**5]** determining a motion for summary judgment will be reviewed.

B. Standards for Summary Judgment

HN1 [↑] A motion for summary judgment may be granted only when it is shown "that there **[*129]** 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)*; see also **HN2** [↑] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir. 1987).

The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion" and identifying which materials "it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323; see also *Trebor Sportswear Co. v. The Ltd. Stores, Inc.*, 865 F.2d 506, 511 (2d Cir. 1989). **[**6]** The substantive law governing the case will identify those facts that are material, and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." **HN3** [↑] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Once the moving party has come forward with support demonstrating that no genuine issue of material fact remains to be tried, including pleadings, depositions, interrogatory answers, and affidavits, the burden shifts to the non-moving party to provide similar support setting forth specific facts about which a genuine triable issue remains. See *Fed. R. Civ. P. 56(e)*; *Anderson*, 477 U.S. at 250; *Borthwick v. First Georgetown Sec., Inc.*, 892 F.2d 178, 181 (2d Cir. 1989); *Donahue*, 834 F.2d at 57. The Court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. See *Donahue*, 834 F.2d at 57. Moreover, the Court's role on a motion for summary judgment "in short, is confined . . . to issue-finding; it does not extend to issue-resolution." *Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1224 (2d Cir. 1994); **[**7]** see also **HN4** [↑] *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572 (2d Cir. 1993).

"The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48 (emphases omitted). Moreover, "conclusory allegations will not suffice to create a genuine issue. There must be more than a 'scintilla of evidence,' and more than 'some metaphysical doubt as to the material facts.'" *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) (quoting *Anderson*, 477 U.S. at 252, and *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 *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991). "The non-movant cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, . . . or defeat the motion through mere speculation or conjecture." *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990) **[**8]** (citations and internal quotations omitted).

C. Purported Absence of Proof of Injury

¹ For the sake of simplicity, the *moving* defendants -- Grinnell and Munson -- will be referred to herein as the "defendants," although there is a third, and non-moving defendant, *viz.*, Sutorius.

Defendants' initial argument is that *all* of plaintiff's claims should be dismissed because it has not suffered any injury as a result of defendants' conduct.

Plaintiff intends to call Richard T. Rapp, Ph.D. ("Rapp"), an economist and president of an economics consulting firm, to testify as an expert that "Philip Morris paid an average of approximately 22 percent more for products when purchased from Grinnell than in comparable transactions from other vendors, resulting in approximately \$ 11.5 million in damages to Philip Morris." (See Rapp Affidavit, sworn to Feb. 5, 1999 ("Rapp Aff."), at P 3.) But, as noted, defendants have moved to preclude such testimony being offered at trial, and therefore, have asked the Court to focus solely on the "undisputed **[*130]** factual (*i.e.*, non-expert) evidence" in deciding this issue. (See Defs.' Mem. at 20.)

Based on the submissions of counsel, it appears - as defendants assert - that neither Cappelli nor any other individual who provided information during the discovery phase of the case, was able to identify a specific transaction in which a **[**9]** product supplied by Grinnell could have been furnished to plaintiff by another vendor at a lower price. That circumstance, however, is not fatal to plaintiff's case. To the contrary -- and not considering the proffered testimony of Rapp as requested by defendants -- **HN5**[↑] there is a legal presumption that, at a minimum, the prices paid by plaintiff to Grinnell were inflated by the amount of the bribes and, accordingly, the bribe amounts are recoverable as damages. *Grace v. E.J. Kozin Co.*, 538 F.2d 170, 173-74 (7th Cir. 1976); *Continental Mgmt. Inc. v. United States*, 208 Ct. Cl. 501, 527 F.2d 613, 618 (Ct. Cl. 1975) ("It is enough to show the fact and amount of the bribes -- nothing further need be alleged or proved by way of specific or direct injury."); *Novartis Corp. v. Luppino (In re Luppino)*, 221 B.R. 693, 703 n.4 (Bankr. S.D.N.Y. 1998); see also *Donemar, Inc. v. Molloy*, 252 N.Y. 360, 365, 169 N.E. 610 (1930); *City of New York v. Liberman*, 232 A.D.2d 42, 660 N.Y.S.2d 872, 875 (1st Dep't 1997).

In sum, there is a material issue of fact whether plaintiff sustained an injury as a result of the bribes paid to Cappelli even if the damages delineated **[**10]** by Rapp are culled from the discussion. That being the case, defendants' omnibus request for summary judgment is rejected, thereby necessitating a discussion of their alternative, more limited summary judgment applications. The first of these, seeking a dismissal of plaintiff's treble damages claim based on a violation of § 2(c) of the Robinson-Patman Act, is the subject of the next section of this Memorandum Opinion, section "D."

D. Motion to Dismiss Robinson-Patman Act Claim for Purported Failure to Satisfy Antitrust Injury Requirement

(1) Commercial Bribery Falls Within the Ambit of § 2(c) of the Robinson-Patman Act

Plaintiff's first cause of action is based on a charged violation of § 2(c) of the Robinson-Patman Act² which provides:

Payment or acceptance of commission, brokerage, or other compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either **[**11]** to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

HN6[↑] [15 U.S.C. § 13\(c\)](#).

Section 2(c) was enacted primarily to prevent large buyers from obtaining indirect price discrimination by demanding that the suppliers pay fees to bogus brokers, which fees would then be returned to the buyers. [Federal](#)

²The Robinson-Patman Act amended the Clayton Act. As a result, § 2(c) is sometimes referred to as § 2(c) of the Clayton Act, and sometimes as § 2(c) of the Robinson-Patman Act. Here, it will be referred to as § 2(c) of the Robinson-Patman Act.

Trade Comm'n v. Henry Broch & Co., 363 U.S. 166, 174, 4 L. Ed. 2d 1124, 80 S. Ct. 1158 (1960); *Hansel 'N Gretel Brand, Inc. v. Savitsky*, 1997 U.S. Dist. LEXIS 13324, 94 CV 4027, 1997 WL 543088, at *7 (S.D.N.Y. Sept. 3, 1997); [**12] *Roosevelt Savings Bank v. Eveready Maint. Supply Co.*, 1987 U.S. Dist. LEXIS 13397, 85 CV 245, 1987 WL 30194, at *1 (E.D.N.Y. Dec. 2, 1987). But it has also been construed "to [*131] cover cases of commercial bribery involving a breach of a fiduciary duty by the buyer's agent," a situation akin to the one at bar. *Roosevelt Savings Bank*, 1987 WL 30194, at *1, and cases cited therein; see also *Hansel 'N Gretel*, 1997 WL 543088, at *7, and cases cited therein including *Broch*, 363 U.S. at 169 n.6.

(2) Defendants Have Violated § 2(c)

HN7 For plaintiff's cause of action predicated on § 2(c) to survive defendants' motion for summary judgment, it must first appear that there is a factual basis to maintain that the conduct alleged constitutes "commercial bribery" within the purview of the statute. That requirement clearly has been satisfied here, nor do defendants contend otherwise for present purposes. Indeed, if plaintiff's proof regarding Grinnell's conduct parallels the allegations in the complaint, it would have been entitled to injunctive or declaratory relief if the conduct was ongoing, even in the absence of evidence of concomitant antitrust or competitive [**13] injury. See, e.g., *Federal Trade Comm'n v. Simplicity Pattern Co.*, 360 U.S. 55, 64-66, 3 L. Ed. 2d 1079, 79 S. Ct. 1005 (1959); *The Grand Union Co. v. Federal Trade Comm'n*, 300 F.2d 92, 99 (2d Cir. 1962); *Biddle Purch. Co. v. Federal Trade Comm'n*, 96 F.2d 687, 691 (2d Cir. 1938); *Federal Paper Board Co. v. Amata*, 693 F. Supp. 1376, 1385-86 (D. Conn. 1988).

(3) Parties' Positions as to Whether Defendants' Violation of § 2(c), Standing Alone, is Sufficient to Support Plaintiff's Claim for Treble Damages Under its First Cause of Action

Plaintiff, however, is not asking for declaratory or injunctive relief. Instead, it seeks treble damages under § 4.³ As to that claim, is the violation of § 2(c) by Grinnell sufficient to defeat defendants' motion for summary judgment? What, if anything, beyond the violation of that Section is required to vest plaintiff with a private right of action to sue for damages under the Clayton Act?

[**14] In defendants' view, considerably more is required. Citing such cases as *Amata*, 693 F. Supp. 1376; *Hansel 'N Gretel*, 1997 WL 543088; *Miyano Machinery USA, Inc. v. Zonar*, 1993 U.S. Dist. LEXIS 963, 1993 WL 23758, *7 (N.D. Ill. Jan. 29, 1993); *NL Industries, Inc. v. Golden Western Industries*, 650 F. Supp. 1115 (D. Kan. 1986); and *Haff Jewelmont Corp.*, 594 F. Supp. 1468, 1471-79 (N.D. Cal. 1984), defendants make reference to § 4, and urge that a violation of § 2(c) must be supplemented by proof of "antitrust injury" to permit an award for damages. (Defs.' Mem. at 22.) And it is urged that plaintiff "cannot prove any set of facts sufficient to show that *it suffered as a competitor*: there is no evidence of collusion, no evidence that Grinnell interfered with other bids, and no evidence that Philip Morris was injured as against other cigarette manufacturers or other purchases of lithographic displays." (*Id. at 27* (emphases added).) It should be noted from the above underscoring that defendants equate "antitrust injury" with "competitive injury."

Plaintiff begins its counter-argument by correctly noting that commercial [*15] bribery is included within the scope of § 2(c), (Pl.'s Mem. at 14), and then arguing that in order to curb that abuse, "courts have expanded the scope of standing under Section 2(c) to include plaintiffs who demonstrate injury in the form of overcharges attributable to commercial bribe payments . . ." (*Id. at 16*.) Competitive injury, in plaintiff's view, is simply not an element of its cause of action for damages. In support of this position, the Court's attention is directed to *Grace v. E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976); *Edison Elec. Institute v. Henwood*, 832 F. Supp. 413, 418-19 (D.D.C. 1993); *Roosevelt Savings Bank v. Eveready Maintenance Supply Co.*, 1987 U.S. Dist. LEXIS 13397, No. 85 CV 245, 1987 WL 30194 (E.D.N.Y. 1987); *Gregoris Motors v. Nissan Motor Corp.*, 630 F. Supp. 902, 910 [*132] (E.D.N.Y. 1986); and *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 639-40 (D. Alaska 1982).

Plaintiff, like defendants, treats "antitrust injury" and "competitive injury" as synonymous. (See, e.g., Pl.'s Mem. at 14 ("Defendants contend that Philip Morris must prove it suffered 'antitrust injury' [*16] as a result of the

³ The text of § 4 of the Clayton Act is provided *infra* at 16.

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commercial bribery -- i.e., *competitive injury* attributable to something the antitrust laws were designed to prevent, see *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981) -- in order to prevail on its claim under Section 2(c) of the Robinson-Patman Act." (emphases added).) But, as shall be discussed, [HN8](#)¹⁸ *infra*, the terms "antitrust injury" and "competitive injury" are *not* interchangeable, or synonymous, for purposes of a private antitrust claim for treble damages based on a substantive violation of § 2(c).

(4) *Unsettled State of Law re Elements of a Private Cause of Action for Treble Damages Based on a Violation of § 2(c)*

Neither the Supreme Court nor the Second Circuit has delineated the elements which a private litigant must establish to recover treble damages for a violation of § 2(c),⁴ and decisions from district courts and other circuits reflect varied approaches to the issue, producing divergent, often unreconcilable results.

[**17] Indeed, some courts have held that § 2(c) is essentially a self-contained antitrust statute, the violation of which may properly serve as a predicate for a monetary award. See *Calnetics Corp. v. Volkswagen of Am. Inc.*, 532 F.2d 674, 696 (9th Cir. 1976) ("We hold that, if distributor is able on remand to prove that [defendants] indeed committed acts of commercial bribery in violation of § 2(c), then the [distributor] ought to be allowed any damages proximately caused by that violation."); *Roosevelt Savings*, 1987 WL 30194, at *1; *Gregoris Motors*, 630 F. Supp. at 910.

In *Roosevelt Savings*, the terms "antitrust injury" and "competitive injury" are used interchangeably. See 1987 WL 30194, at *2 ("Whether antitrust injury must be shown is a closer question A plain reading of § 2(c) . . . convinces me that a § 2(c) claim need not include a showing of anticompetitive injury."). The court in *Gregoris Motors* speaks solely of "anticompetitive effect" and concludes, based on "plain language" of § 2(c), that such injury need not be proven by plaintiff. [630 F. Supp. at 910](#).

Cases such as [**18] *Calnetics Corp.*, *Roosevelt Savings* and *Gregoris Motors* reflect a literal reading of § 2(c), absent any reference to the requirements of § 4.

Other courts have concluded that a violation of § 2(c) is insufficient to warrant an award of damages, unless coupled with proof of competitive injury. See *Hansel 'N Gretel*, 1997 WL 543088, at *8-10; *Miyano*, 1993 WL 23758, at *7-8; *Amata*, 693 F. Supp. at 1386-87; *NL Industries*, 650 F. Supp. at 1123 ("The absence of competitive injury is fatal to an antitrust claim.").

And finally, there is a third school of judicial thought. Its proponents are of the view that a party seeking treble damages as a result of commercial bribery must only establish a violation of § 2(c) and an "antitrust injury," which injury need not include proof of competitive injury. *Edison* [*133] *Elec. Inst. v. Henwood*, 832 F. Supp. 413, 418-19 (D.C. 1993); *Municipality of Anchorage*, 547 F. Supp. 633. Cf. *Fitch v. Kentucky-Tennessee Light and Power*, 136 F.2d 12, 16 (6th Cir. 1943).

The differing positions urged by the present parties as to the elements [**19] of plaintiff's cause of action for treble damages - as well as the divergent results reached by courts grappling with the same issue in other cases - seem to be traceable to how the following threshold questions are answered:

- (i) is "antitrust injury" an element of a cause of action aimed at recovering treble damages for a violation of § 2(c) ("Question 1"); and

⁴The issue, of course, is not whether an aggrieved party may recover damages as a result of a defendant's conduct, but instead whether such a recovery may be premised on the purported federal antitrust character of that conduct. Cf. *Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1297 (2d Cir. 1971) ("Our decision [dismissing plaintiff's claim for treble damages under § 4 of the Clayton Act] does not leave the plaintiff here without a remedy. Assuming plaintiff's claims to be meritorious, it is not precluded from recovering single damages from UATC in a state court suit for breach of terms of the lease . . .").

(ii) if so, does plaintiff's obligation to establish "antitrust injury" necessarily require *proof* that defendants' conduct caused it competitive harm in the marketplace ("Question 2")?

These questions will be addressed *seriatim*.

(5) *"Antitrust Injury" Is an Element of Plaintiff's Cause of Action for Treble Damages (Question 1)*

Preliminarily, it should be noted [HN9](#)^[↑] that § 2(c) simply defines that certain conduct is illegal. To pursue a private claim for treble damages requires reference to § 4 which expressly creates the right.⁵ See, e.g., [Genesco Inc. v. T. Kakiuchi and Co.](#), 815 F.2d 840, 853 (2d Cir. 1987) (§ 2(c) makes certain business practices "unlawful" . . . while § 4 of the Clayton Act . . . provides for an express private right of action for treble damages to any [\[*20\]](#) person injured in his business or property as a result of any antitrust violation."); [Amata](#), 693 F. Supp. at 1386-88. Cf. [J. Truett Payne](#), 451 U.S. at 561-62 (discussing relationship between § 2(a) and § 4 of the Clayton Act); [Brunswick Corp. v. Pueblo-O-Mat, Inc.](#), 429 U.S. 477, 484-87, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) (discussing relationship between § 7 and § 4 of the Act)).

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 [\[*21\]](#) 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.

[HN10](#)^[↑] [15 U.S.C. § 15\(a\).](#)

Section 4, by its terms, authorizes damage awards to those private antitrust litigants which demonstrate injury to their "business or property," caused "by reason of" a violation of the antitrust laws.

[HN11](#)^[↑] Although the expansive language of § 4 -- particularly the phrase "by reason of" -- would appear to authorize treble damages to any aggrieved party that was able to establish a nexus between an injury sustained and a defendant's violation of an **antitrust law** provision, the statute has not been so broadly construed. [Brunswick](#), 429 U.S. at 489 ("To recover treble damages . . . [plaintiff] must prove *more than* injury causally linked to an illegal presence in the market." (emphasis added)); [Atlantic Richfield Co. v. USA Petro. Co.](#), 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990); [Local Beauty v. LaMaur](#), 787 F.2d 1197, 1200-01 (7th Cir. 1986).

Indeed, [\[*22\]](#) § 4 has been judicially circumscribed to include only claims of "antitrust injury." That term has been defined by the Supreme Court to mean "actual injury [\[*134\]](#) attributable to something the antitrust laws were designed to prevent." [J. Truett Payne](#), 451 U.S. at 557. But -- prescinding for the moment from the question of whether antitrust injury may exist absent proof of competitive injury -- that limiting definition does not appear to be an impediment to plaintiff. The injury to its business -- in an amount at least equal to the bribes paid -- was the direct result of commercial bribery, an activity outlawed by § 2(c) thereby satisfying the *J. Truett Payne* definition. Moreover, the damage incurred clearly dovetails with the statutory language of § 4, that is, an injury caused "by reason of [something] forbidden in the antitrust laws."

In sum, [HN12](#)^[↑] antitrust injury is an element of a cause of action seeking treble damages, which plaintiff seemingly has met. Defendants note, however, that the complaint speaks solely of plaintiff having paid inflated sums for goods and services purchased from Grinnell, devoid of any suggestion that the increased prices affected its ability [\[*23\]](#) to function in the marketplace. Is that a fatal flaw in plaintiff's first cause of action? In other words, may antitrust injury be established by plaintiff without a showing of competitive injury?

⁵ Plaintiff does not argue that § 4 is wholly irrelevant to its first cause of action. Indeed, it would be hard pressed to do so, since the sole statutory authority for the treble damages sought is found in that Section. But it vigorously contests defendants' claim that § 4 requires plaintiff to establish "antitrust injury," which, again, it incorrectly construes as requiring proof of "competitive injury."

(6) *Absence of Demonstrable Competitive Injury Does not Preclude Plaintiff From Recovering Treble Damages Based on Defendants' Violation of § 2(c) (Question 2)*

This subdivision of the opinion will be divided into two major parts for analytical purposes.

The first part consists of a review of a settled area of **antitrust law**, viz., that Congress, in enacting the Robinson-Patman Act, determined, as recognized by the courts, that certain business practices -- such as those covered by § 2(c) -- are unlawful per se, while others -- such as discriminatory pricing under § 2(a) -- are not necessarily unlawful, i.e., are non per se in character. The recognized difference between the two is that **HN13** a per se unlawful practice under the Robinson-Patman Act is inherently anticompetitive, thus obviating the need to prove anticompetitive injury when the relief sought is injunctive or declaratory in nature; for a non per se practice, such injury is not implicit and, thus, more than the **[**24]** mere commission of the act must be shown in order to establish a substantive violation of the statute.

After reviewing that settled area of the law, and with the corresponding principles in mind, attention will be turned to the pivotal, and unsettled issue regarding plaintiff's first cause of action, that being whether its burden of proof in seeking treble damages under § 4 requires a showing that defendants' conduct caused competitive injury. Or, given the per se character of commercial bribery, may the required antitrust element of the § 4 claim be satisfied without such proof?

a) *Whether Competitive Injury Must be Shown to Establish a Substantive Violation of the Robinson-Patman Act Depends on the Antitrust Provision Involved.*

HN14 The Clayton Act, including the Robinson-Patman Act, the Sherman Act, and certain parts of a federal tariff act, constitute the federal antitrust laws. (1050 PLI/Corp. 811, 819 (1998), citing [15 U.S.C. § 12](#).) Their shared goal is to protect competition and, in the case of the Robinson-Patman Act, to protect competitors as well. *Chroma Lighting v. GTE Prods. Corp.*, [111 F.3d 653, 657-58 \(9th Cir. 1997\)](#); *Monahan's Marine, Inc. v. Boston Whaler*, [866 F.2d 525, 528 \(1st Cir. 1989\)](#) **[**25]** ("Unlike the Sherman Act which protects 'competition, not competitors,' *Brown Shoe Co. v. United States*, [370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502](#) . . . (1962), the Robinson-Patman Act extends its protection to competitors.") From that, however, it may not be inferred that *proof* of an effect on competition, or competitive injury, is a *sine qua non* to a charged Robinson-Patman Act violation. **[*135]** Such may, or may not be the case depending on the statutory provision involved.

As to a substantive violation of the Robinson-Patman Act -- as distinct from & concomitant private claim for damages under § 4, which will be discussed shortly -- the Supreme Court underscored the above point in *F.T.C. v. Simplicity Pattern Co.*, thusly:

HN15 Section 2(a) makes unlawful price discriminations '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'

This price discrimination provision is hedged with qualifications. An exception is made for price differentials 'which make only due allowance for differences in the cost of manufacture, sale, or delivery.' Care was taken **[**26]** that price changes are not outlawed where made in response to changing market conditions. Finally, § 2(a) codifies the rule of *United States v. Colgate & Co.*, [1919, 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992](#), protecting the right of a person in commerce to select his 'own customers in bona fide transactions and not in restraint of trade.' **HN16**

Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations.

In terms, the proscriptions of these three subsections are absolute. Unlike § 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition.

In *Simplicity*, the Supreme Court reversed a circuit decision which had set aside a cease and desist order issued by the Federal Trade Commission. That cease and desist order, based on a violation of § 2(e),⁶ prohibited Simplicity Pattern from continuing its practice of providing services and facilities to its larger customers which were not afforded to competing smaller customers on a proportionally [**27] equal basis.

Given that Congress has concluded that § 2(e), along with § 2(c) and § 2(d) involve per se violations, (i.e., "the proscriptions of these three subsections are absolute"; *id.*), the Court held that neither the absence of proven competitive injury nor the presence of cost justification was relevant to the charged violation. In other words, if the act was committed, the substantive violation occurred.

HN17[] With respect to per se violations of the Robinson-Patman Act, it is not that [**28] the targeted practices do not effect competition. Were that the case, the antitrust laws would not be implicated. Instead, Congress decided that such practices are necessarily anticompetitive and, thus, no proof to that effect is required to establish a violation. See, e.g., *Grand Union*, 300 F.2d at 99 ("In making same, but not all, of the practices outlawed by the Robinson-Patman Act illegal per se, Congress indicated that those selected for per se treatment always led to the undesired effects in competition." (emphasis added)); *Fitch v. Kentucky-Tennessee Light & Power*, 136 F.2d 12, 16 (6th Cir. 1943) ("Plainly, the payment of the secret commissions to Fitch was an unfair labor practice, and obviously resulted in lessening competition in the sale of coal to the Power Company."). Cf. *Simplicity*, 360 U.S. at 63 n.5 ("Simplicity argues that the [*136] Examiner 'affirmatively found an absence of competitive injury.' This view was apparently adopted by the Court of Appeals. . . . We do not so read the record, however. What the Examiner said was that 'there is no showing of competitive injury' (emphasis added)).").

In **HN18**[] sum, it is well [**29] established that certain practices are per se unlawful under the Robinson-Patman Act as inherently anticompetitive, while others are not. Commercial bribery falls within the former category.

b) *Plaintiff's Proof of Antitrust Injury Under § 4 Need Not Include Proof of Competitive Injury.*

Does the distinction between per se and non per se violations of the Robinson-Patman Act carry over to corresponding damage claims under § 4 to the extent an aggrieved party who has established (1) a substantive violation of § 2(c) and (2) "antitrust injury" need not also prove anticompetitive effect?

Plaintiff, as discussed previously, has framed the issue under discussion somewhat differently than above. But in urging that competitive injury is not an element of its cause of action for treble damages, considerable stock has been placed in *Roosevelt Savings Bank v. Eveready Maintenance Supply Co.*, and *Gregoris Motors v. Nissan Motors Corp.*, the two decisions from this district addressing that question. Both concluded that such proof is not required for the victim of commercial bribery to recover damages. Although I agree with the results reached in both *Roosevelt Savings Bank* [**30] and *Gregoris Motors*, defendants are correct in noting that the analytical process in each of those cases is perhaps overly cryptic in that no reference is made to § 4, nor to the requirement -- as explained in *J. Truett Payne* -- that one seeking treble damages must establish antitrust injury. See also *Edison Elec. Inst. v. Henwood*, 832 F. Supp. 413, 418 (D.D.C. 1993) (court relied on per se illegality of commercial bribery in concluding that competitive injury need not be established; however, like *Roosevelt Savings* and *Gregoris Motors*, no mention is made of § 4).

However, among the many other decisions cited by plaintiff in support of its position, I found *Municipality of Anchorage*, 547 F. Supp. at 640, to be particularly helpful for present purposes. *Fitch*, 136 F.2d 12, also warrants brief mention.

⁶ Section 2(e) of the Robinson-Patman Act provides that "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."

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In *Municipality of Anchorage*, the municipality brought an action under, *inter alia*, § 2(c) for damages caused by defendants' bribery of two municipal employees in a bid-rigging scheme.

Defendant Hitachi sought the dismissal of the § 2(c) claim, arguing along the following lines as synopsized by the district [**31] court:

The Municipality lacks standing to sue. Hitachi suggests that when a seller bribes a buyer's agent, only competitors of the seller suffer competitive injury and have standing to sue. Furthermore, since the Utility is a regulated monopoly and has no competitors, it cannot suffer a competitive injury.

547 F. Supp. at 637.

After recognizing the unsettled state of the law as to whether proof of an adverse effect on competition is necessary to establish liability under § 2(c) and § 4, the district court found that it was not, reasoning:

HN19[[↑]] Any examination of a plaintiff's right to sue under a statute must begin with the language of the statute itself. I find nothing in the language of section 2(c) to justify imposing a competitive injury requirement on potential plaintiffs. Unlike section 2(a) which outlaws price discrimination whose effect 'may be substantially to lessen competition or tend to create a monopoly', sections 2(c), (d), and (e) prohibit business practices other than price discrimination. *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 65, 79 S. Ct. 1005, 1011, 3 L. Ed. 2d 1079 (1959). None of these latter sections [**32] [*137] "requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition." *Id.*

....

HN20[[↑]] Suits for damages by private plaintiffs "injured in . . . business or property" are authorized by section 4 of the Clayton Act, *15 U.S.C. § 15*. . . . Section 4 has long been read to include a requirement that any potential plaintiff under the antitrust laws be within the so-called 'target area' of the antitrust violations. . . . Although the exact boundaries of the target area may be the subject of much dispute, the purpose of this requirement is to limit recovery under **antitrust law** to those entities whom the laws were meant to protect. *Blue Shield of Virginia v. McCready*, [457 U.S. 465,] 102 S. Ct. [2540], 2548, [73 L. Ed. 2d 149] [1982]; *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977).

....

I conclude that, **HN21**[[↑]] when commercial bribes are paid to a company's employees to obtain contracts for the sale of goods, the company has standing to bring an action for damages under section 2(c) of the Robinson-Patman [**33] Act. *15 U.S.C. § 13(c)* I reject the analysis [in those decisions which have reached a contrary result], believing that those cases adopt too narrow a view of the intent and purpose of section 2(c).

547 F. Supp. at 639-40.

Anchorage is instructive for, *inter alia*, its focus on the statutory language of § 2(c) and that section's per se character, as well as its explanation of the standing requirements for a § 4 claim which dovetails nicely with the definition of "antitrust injury" given in *J. Truett Payne*.

In *Fitch*, the utility's former president, Fitch, accepted bribes in return for awarding purchase contracts to the Nashville Coal Company. As a result, he, the coal company and its president were sued by the utility, which obtained a judgment for treble damages against defendants based on violations of § 2(c).

On appeal, appellant argued that § 2(c) "is concerned only with price discriminations extended by sellers to different buyers; and that there is no proof that the seller in this case so discriminated." *136 F.2d at 15*.

Fitch predates the decisions which articulated the dichotomy between the primary purpose [**34] for enacting § 2(c) (i.e., to curtail price discrimination accomplished through sham brokers) and the additional goal of curbing commercial bribery in the purchase or sale of goods. Thus, in rejecting appellant's argument that the subject conduct was beyond the ambit of § 2(c), the Court did not employ the later developed term of "commercial bribery." Yet, *Fitch* -- in affirming the treble damages award to the victimized utility -- is significant for present purposes in that it speaks of "secret commissions" being an "unfair trade practice [which] obviously result[s] in lessening competition." *Id. at 16.*

Plaintiff, at least as to the result urged, I believe has the better side of the argument. Commercial bribery by its very nature is anticompetitive. Indeed, the sole purpose of the practice is to circumvent competitive forces in obtaining a contract. Congress, as explained by the Supreme Court in *Simplicity*, recognized that fact in drafting § 2(c). [HN22](#) [↑] While price discrimination may, or may not be violative of § 2(a), commercial bribery is always violative of § 2(c) and is never in the public interest.

There is no reason that the per se character [**35] of such conduct should not be recognized in private suits for damages under § 4. To the contrary, such private suits will serve to curtail such purely pernicious business practices in the marketplace, consistent with the purpose of § 4 as tellingly explained by the Supreme Court in *Blue Shield of Virginia v. McCready*:

[*138] The lack of restrictive language [in the treble damages provision of § 4] reflects Congress' 'expansive remedial purpose' in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.

[457 U.S. 465, 472, 102 S. Ct. 2540, 73 L. Ed. 2d 149 \(1982\)](#) (citations omitted); see also [Calderone Enters., 454 F.2d at 1295](#).

In sum, plaintiff was a victim of a violation of § 2(c) on the undisputed facts, and sustained an injury consistent with both the statutory requirements of § 4 as written by Congress and the definition of "antitrust injury" set forth in *J. Truett Payne*. Antitrust injury need not entail proof of competitive injury, given that commercial bribery under § 2(c) is [**36] the type of per se violation which presupposes an anticompetitive effect.⁷

In reaching this conclusion, I declined to follow such cases as *Hansel 'N Gretel*, 1997 WL 543088, [Amata, 693 F. Supp. 1376](#), and [NL Industries 650 F. Supp. 1115](#), which hold that the absence of proof of competitive injury is fatal to a cause of action for treble damages. Common to those three decisions -- all of which are relied upon by defendants -- is what I perceive to be a failure to draw the critical distinction [**37] between non per se antitrust violations, and per se Robinson-Patman Act violations, for purposes of private damages claims under § 4.

By way of example, consider *Hansel 'N Gretel*. There, Savitsky, while an officer of Hansel 'N Gretel, conducted a kickback scheme whereby various suppliers overcharged the company and divided the excess with him. 1997 WL 543088, at *1. The company sued for, *inter alia*, treble damages under §§ 2(c) and 4 of the Clayton Act, naming Savitsky, and two participating suppliers as defendants.

Defendants moved to dismiss the company's Robinson-Patman Act cause of action on the ground that it failed to allege "competitive injury." The district court accepted that argument,⁸ based on the following rationale:

⁷ While commercial bribery under § 2(c) of the Robinson-Patman Act is, by its very nature and purpose, anticompetitive, the same may not be said of all per se antitrust violations. See [Atlantic Richfield Co. v. USA Petro., 495 U.S. 328, 342, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#) ("Actions per se unlawful under the antitrust laws [such as low prices produced by non predatory price fixing in violation of § 1 of the Sherman Antitrust Act] may nonetheless have some procompetitive effects.")

⁸ Parenthetically, although the district court in *Hansel 'N Gretel Brand Inc. v. Savitsky*, 1997 WL 543088, adopted the position that antitrust injury required proof of anticompetitive harm to permit damages under § 4 for a violation of § 2(c), it found that plaintiff's complaint satisfied that standard. *Id. at 10.*

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When a § 2(a) claim is brought by a buyer who has allegedly been discriminated against directly by the seller, it "must first prove that, as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) at the time of the price differential." . . . Although the present case concerns § 2(c), the same principle must apply. Absent such discrimination against parties engaged in actual competition, I [**38] discern no anticompetitive effect arising out of the kickbacks at issue which harmed plaintiff.

Id. at *10.

The relevant excerpt from *Amata* reads:

To recover damages under section 4, the Court [in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)] held that the petitioner had to do more than prove that the defendant violated section 7. . . . In addition to proving a violation of the substantive **antitrust law**, "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' [*139] acts unlawful. The injury should reflect the anticompetitive [**39] effect either of the violation or of anticompetitive acts made possible by the violation." . . .

The *Brunswick* analysis has been applied to violations of the Robinson-Patman Act, and it governs Federal's claim for treble damages. In *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981), the petitioner alleged a violation of section 2(a) of the Robinson-Patman Act. In its analysis of the petitioner's claim, the Court noted that "our decision here is virtually governed by our reasoning in [*Brunswick*]." *Id.* at 562, 101 S. Ct. at 1927. The petitioner had to prove more than just a violation of section 2(a), "since such proof establishes only that injury may result." *Id.* (quoting *Brunswick*, 429 U.S. at 486, 97 S. Ct. at 696). "To recover treble damages . . . a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *Id.* Although *J. Truett Payne* involved section 2(a) of the Robinson-Patman Act, there is no reason why its analysis should not also apply to claims arising out of section 2(c) since in both [**40] instances the right to treble damages is granted by section 4 of the Clayton Act.

[693 F. Supp. at 1387-88.](#)

And finally, the district court in *NL Industries* held that a private antitrust claim for damages based on a violation of § 2(c) is not viable in the absence of competitive injury, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977), 650 F. Supp. at 1123. But *Brunswick* involved a violation of § 7 of the Clayton Act. That section proscribes mergers whose effect "may be substantially to lessen competition . . ." 15 U.S.C. § 18 (emphasis added). Obviously, given the statutory language involved, a private litigant may not rely simply on a violation of § 7 in seeking damages under § 4. Instead, such a party must prove actual as distinct from potential harm, which harm must pertain to competition, again, given the language of § 7. And to have standing under § 4, or "antitrust injury" as explained in *J. Truett Payne*, the competitive harm must have been to that party.

In sum, *Hansel 'N Gretel* relied in large measure on § 2(a) decisions to decide a § 2(c) case; *Amata* [**41] used both § 2(a) and § 7 decisions, while *NL Industries* relied on *Brunswick*, a § 7 case, for the same purpose, i.e., to decide a § 2(c) case.

For the reasons given, [HN23](#) the holdings in antitrust cases involving non per se violations are not interchangeable with those involving per se unlawful business practices under the Robinson-Patman Act, such as commercial bribery under § 2(c). That statement is beyond cavil for substantive violations. Based on the statutory language of § 2(c) and § (4), the purpose sought to be advanced by each of the statutes, and what I believe to be the better reasoned cases, (particularly *Municipality of Anchorage*), I conclude that the per se character of § 2(c) violations is equally applicable to claims under § 4 in the sense that an aggrieved party -- while required to establish both a substantive violation and an antitrust injury -- is not obligated to also prove that such injury caused competitive harm.

I have also reviewed the other cases cited by defendants and find them unpersuasive as well.

For the reasons indicated above, defendants' motion for summary judgment on plaintiff's first cause of action is denied.

E. [**42] *Private Right of Action Under Penal Law § 180.03*

Plaintiff's second claim against defendants is for commercial bribery in violation of Penal Law [§ 180.03](#). (See Compl. PP 37-40.) Plaintiff asserts that by defendants' violation of the Penal Law, it "has been injured in its business" and its damages include "the payment of inflated [*140] prices for goods and services." (See *id. P 39*.) Plaintiff further contends that by virtue of the willful conduct of defendants, punitive damages should be awarded. (*Id. P 40*.) Defendants, however, contend that plaintiff's second claim should be dismissed because "there is no private right of action for a violation of [section 180.03](#) of the penal code." (Defs.' Mem. at 33.)

HN24 [↑] [Section 180.03](#) of the New York State Penal Law provides:

A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs . . .

[N.Y. Penal Law § 180.03](#). As a threshold matter, the Court notes that **HN25** [↑] the statute does not [**43] itself create a private right of action. As Judge McKenna explained in [Philip Morris, Inc. v. Heinrich, 1996 U.S. Dist. LEXIS 9156, No. 95 CIV. 0328, 1996 WL 363156](#), at *18 (S.D.N.Y. June 28, 1996), that does not end the inquiry; "absent such a directive, the courts are to determine themselves, considering such factors as legislative history, consistency with the overall legislative scheme for creating the private right and whether the plaintiff is one of the class for whose special benefit the statute was enacted." *Id.* The court in *Philip Morris* concluded that it was unnecessary to create a private right of action under the Penal Law as recovery could be had under common law theories of fraud and breach of fiduciary duty for such conduct. *Id. at *17*.

It appears that every federal court considering the issue has concluded that the commercial bribery sections of the Penal Law do not create a private right of action. See, e.g., *id. at *18* (declining to find private right of action under Penal Law [§ 180.03](#) (citing [Kinley Corp. v. Integrated Resources Equity Corp. \(In re Integrated Resources, Inc.\), 851 F. Supp. 556, 563 \(S.D.N.Y. 1994\)](#) (holding that there is no [**44] private right of action under Texas commercial bribery statute)); [Sierra Rutile Ltd. v. Katz, 1996 U.S. Dist. LEXIS 14366, *14](#), No. 90 Civ. 4913, 1996 WL 556963, at *4 (S.D.N.Y., Oct. 1, 1996) (no private right of action under Penal Law § 180.08); [Texwood Ltd. v. Gerber, 621 F. Supp. 585, 589 \(S.D.N.Y. 1985\)](#) (noting that plaintiffs cited no authority for the proposition that a private right of action exists under Penal Law [§ 180.03](#), but explaining that under New York law an employer may recover from his employee bribes taken in violation of § 180.08 and limiting plaintiffs' recovery to the amount of the bribes).⁹

[**45] Aside from the case law distinguished by Judge McKenna in *Philip Morris* and a more recent case, [City of New York v. Liberman, 232 A.D.2d 42, 660 N.Y.S.2d 872](#) (1st Dep't 1997), plaintiff cites no authority to support its view that a private cause of action under the Penal Law exists. *Liberman*, moreover, does not compel the conclusion urged by plaintiff. Indeed, *Liberman* is not applicable because the claim pursued by plaintiff in that case was not based upon the commercial bribery section of the New York Penal Law. Rather, the Court in *Liberman* simply held that the purchaser was entitled to recover any bribe monies paid by a vendor to its agent.¹⁰ That

⁹ In [Benedict v. Amaducci, 1995 U.S. Dist. LEXIS 17684, 92](#) Civ. 5239, 1995 WL 702444, at *8 (S.D.N.Y., Nov. 28, 1995), cited by plaintiff, the court held that because the complaint failed to allege that benefits were conferred without the consent of the employer, the complaint did not properly allege commercial bribery under Penal Law [§ 180.03](#) as a RICO predicate act. The court did not address whether a private right of action under Penal Law [§ 180.03](#) existed.

¹⁰ Also, as the bribery in *Liberman* involved a public official, the Court explained that a more stringent rule should be applied. See [232 A.D.2d at 49](#). Specifically, "vendors that corrupt public officials forfeit their right to all payments due under the tainted transaction." *Id.* The *Liberman* Court noted that, while the plaintiff did not seek such relief there, "the policy . . . that those who

holding dovetails with [*141] the well-settled principle of New York law that an employer whose agent has received commercial bribes is entitled to recovery of such bribes. See, e.g., *Donemar*, 252 N.Y. at 365 ("If . . . a vendor bribes purchaser's agent, it must be assumed that the purchase money is loaded by the amount of the bribe. The vendor has had and received money which belongs to the purchaser to the extent of the bribe, which neither the vendor nor the unfaithful agent may in good conscience and good [**46] morals retain."); *British Am. & E. Co. v. Wirth Ltd.*, 592 F.2d 75, 79 (2d Cir. 1979) ("Where there is an agency relationship, the principal is entitled to recover any monies paid as commercial bribes to his agent."); *Sierra*, 1996 WL 556963, at *4 (same).¹¹

[**47] Based on the foregoing, the Court agrees with the other federal courts that have refused to recognize a private right of action based on a violation of *New York Penal Law § 180.03*. Accordingly, plaintiff's second claim is dismissed.

F. Defendants' Motion to Dismiss all of Plaintiff's Claims Against Defendant Oliver Munson Is Denied

It should be noted that Munson was during the time frame alleged in the complaint, and apparently still is, the President, Chair of the Board, and a shareholder of Grinnell. Now that discovery has been completed, defendants' counsel moves to dismiss all claims against Munson on the ground that there is no proof that he either authorized or was aware of the bribes Sutorius paid to plaintiff's purchasing agent Cappelli.

Although the bulk of the bribes to Cappelli consisted of weekly cash payments (see "Stipulated Facts," Ex. A to Not. of Mot., at 9), the bribes also were furnished in other forms. By way of example, plaintiff alleges in its complaint that, as part of the "Bribery Scheme," "Grinnell, Munson and Sutorius also arranged for or paid for Cappelli's golf vacations on at least four occasions. . . ." (Am. Compl. "The Bribery Scheme" [*48] P 23 at 7.) That such "all expenses paid" golf vacations were provided to Cappelli, with the "knowledge and consent of Munson," is conceded in the stipulation of facts entered into between plaintiff and defendants. (Stipulation of Facts, Ex. A to Not. of Mot., P 22 at 10.) Conceivably, defendants will posit that the free golf vacations at distant locales were not bribes, contrary to the position taken by plaintiff in its complaint and now. However, at the very least, the present scenario raises a material issue of fact which precludes defendants' request for summary judgment as to the claims asserted against Munson. Whether Munson may also be held accountable for other bribes paid to Cappelli based on, e.g., his review of the expense reports of Sutorius which were inflated by the bribe payments, need not be addressed in view of the foregoing.

In sum, for the reasons indicated, defendants' motion to dismiss all claims against defendant Munson is denied.

G. Defendants' Application to Preclude the Admission Into Evidence of the Rapp Report as Being Irrelevant and Unreliable Is Granted to the Extent That a Hearing Will be Held Prior to Trial

Rapp was retained by plaintiff [*49] to testify as an expert regarding the damages it sustained as a result of defendants' commercial bribery. In performing his analysis, Rapp examined "4,067 product contracts set forth on purchase orders prepared and issued by Philip Morris for [*142] lithographic products of the type Grinnell supplied from 1979 to 1991." (Rapp Aff. P 13.) Utilizing that data, he created "268 product categories, each containing products of a similar nature." *Id.* The purpose of this process was to "standardize" the various non-Grinnell and Grinnell products involved by endeavoring to account for numerous factors which could produce price differentials other than preferential treatment afforded to Grinnell. At the conclusion of this highly detailed undertaking, Rapp opined that plaintiff paid approximately 22% more for products it purchased from Grinnell than for similar products purchased from other vendors, resulting in a damage estimate of \$ 11.5 million. (*Id.* at P 6.)

Following Grinnell's receipt of the Rapp Report, it hired G. Hossein Borhani, Ph.D. ("Borhani"). Borhani focused on the obvious linch pin of the Rapp Report, to wit, the determination as to which non-Grinnell products were

engage in corrupt acts with public officials are subject to serious civil consequences, provides an independent basis for the awarding, at an absolute minimum, of damages equal to the amount of the bribe." See *id.*

¹¹ Defendants do not take issue with plaintiff's argument that it should recover the amount of the bribes; in fact, defendants have offered a tender of judgment in that amount, pursuant to *Federal Rule of Civil Procedure 68*. (See Defs.' Reply Mem. at 24.)

sufficiently [**50] similar to the products purchased from Grinnell to permit meaningful comparisons. (See Mar. 17, 1998 Borhani Report at 3.) Upon analyzing the Rapp Report, Borhani identified two purported problems:

1. Product category or codes so narrowly defined that many Grinnell products have been assigned a product code for which there are no corresponding products supplied by other vendors; and
2. That even when products are supplied by both Grinnell and other vendors, Rapp's methodology fails to appropriately account for a number of factors -- such as, e.g., number of colors in the lithographic materials supplied -- which may affect the contract price. (See *id.* at 5-6.)

The Rapp Report, viewed in isolation, suggests that its introduction would be of assistance to the jury in determining plaintiff's damages, and that the methodology employed is sufficiently reliable to warrant its introduction consistent with my "gatekeeper" role under [Rule 104\(a\)](#) and [Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 \(1999\)](#). But, of course, the Rapp Report may not be reviewed in isolation. Rather the comments of Borhani must be taken into account. Those comments [**51] go directly to the reliability of the methodology employed.

Under the circumstances, a hearing will be scheduled immediately prior to trial to provide me with an opportunity to hear Rapp's and Borhani's testimony concerning their respective positions and the factual predicates for those positions, subject to questioning by the Court and to cross-examination by opposing counsel.

CONCLUSION

The relief sought by defendants in the motion are denied except (1) plaintiff's claim under [§ 180.03](#) of the New York State Penal Law is dismissed and (2) defendants' application to preclude Rapp's testimony and the Rapp Report is granted to the extent that a hearing will be held immediately prior to jury selection to determine their admissibility.

SO ORDERED.

Dated: Hauppauge, New York

September 28, 1999

DENIS R. HURLEY, U.S.D.J.

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Bayou Fleet, Inc. v. Alexander

United States District Court for the Eastern District of Louisiana

September 29, 1999, Decided ; September 29, 1999, Filed; September 30, 1999, Entered

CIVIL ACTION NO. 97-2205 SECTION "I" (1)

Reporter

68 F. Supp. 2d 734 *; 1999 U.S. Dist. LEXIS 15540 **; 1999-2 Trade Cas. (CCH) P72,709

BAYOU FLEET, INC. VERSUS ELLIS A. ALEXANDER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ST. CHARLES PARISH COUNCIL, ET AL.

Disposition: **[**1]** Judgment entered in favor of defendants Neal Clulee, Mary Clulee, Homeplace Batture Leasing, Inc., and N/C Materials, Inc. and against plaintiff Bayou Fleet, Inc., dismissing plaintiff's claims with prejudice, plaintiff to bear costs.

Core Terms

sand, Levee, sand pit, pits, non-conforming, dredging, minutes, ordinance, permit application, phone call, antitrust, lawsuit, conspiracy, permits, attend, notice, letters, River, audit, telephone, zoning, color of state law, Sherman Act, violations, meetings, rights, front, voted, no evidence, constituents

LexisNexis® Headnotes

Evidence > Types of Evidence > Testimony > General Overview

[HN1](#) [down arrow] Types of Evidence, Testimony

The Fifth Circuit describes the adverse witness rule as an archaism for which there is no longer any justification, particularly where the witness could have been called by either party, as in the present case. In any event, the adverse witness rule is discretionary.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Sherman Act > General Overview

[HN2](#) [down arrow] Exemptions & Immunities, Noerr-Pennington Doctrine

The essence of the Noerr-Pennington doctrine is that parties who petition the government for government action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

HN3 **Fundamental Freedoms, Freedom of Speech**

[U.S. Const. amend. I](#) protects attempts to influence the passage or enforcement of laws, no matter how harmful their incidental impact may be.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN4 **Antitrust & Trade Law, Exemptions & Immunities**

The sham exception to the Noerr-Pennington Doctrine applies when a defendant uses the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Governments > State & Territorial Governments > Employees & Officials

Civil Rights Law > Protection of Rights > Section 1983 Actions > General Overview

HN5 **Elements, Color of State Law**

In a [42 U.S.C.S. § 1983](#) action the plaintiff must establish two essential elements: (1) that the conduct in question deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States; and (2) that the conduct complained of was committed by a person acting under color of state law.

Governments > State & Territorial Governments > Employees & Officials

HN6 **State & Territorial Governments, Employees & Officials**

A private person may be considered a state actor under color of state law if the individual is engaged in a conspiracy or willfully engages in joint activity with one or more parties acting under color of state law, even if the state agent is immune to liability.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Governments > State & Territorial Governments > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN7 **Conspiracy, Elements**

68 F. Supp. 2d 734, *734LÁ999 U.S. Dist. LEXIS 15540, **1

A civil conspiracy under [42 U.S.C.S. § 1983](#) is an agreement between private and public actors to violate the plaintiff's constitutional rights. A conspiracy may be proven by circumstantial evidence; however, the acts of the alleged conspirators must show a unity of purpose, common design, and understanding, or meeting of the minds in an unlawful arrangement.

Governments > State & Territorial Governments > Employees & Officials

[**HN8**](#) [] **State & Territorial Governments, Employees & Officials**

The joint action inquiry focuses on whether the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity. A private party does not act under color of state law when he merely elicits but does not join in an exercise of official authority. It is not sufficient to allege that the private and state defendants merely acted in concert or with a common goal. There must be allegations that the defendants had directed themselves towards an unconstitutional action by virtue of a mutual understanding. Even were such allegations to be made, they must further be supported by some factual allegations suggesting such a meeting of the minds.

Governments > State & Territorial Governments > Employees & Officials

[**HN9**](#) [] **State & Territorial Governments, Employees & Officials**

Under [42 U.S.C.S. §1983](#) there can be no liability, much less a conspiracy between individuals that had no personal involvement in the allegedly wrongful conduct.

Governments > State & Territorial Governments > Employees & Officials

[**HN10**](#) [] **State & Territorial Governments, Employees & Officials**

Individual liability under [42 U.S.C.S. § 1983](#) must rest on facts reflecting the defendant's personal participation or involvement in the alleged wrong.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

[**HN11**](#) [] **Sherman Act, Claims**

A violation of [section 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#) is established when the plaintiff shows that the asserted violator: (1) has antitrust standing; (2) possesses or intends to possess monopoly power in the relevant market and (3) acquired or maintained that power or intends to do the same in a wilful manner.

Counsel: For BAYOU FLEET INC, plaintiff: J. Mac Morgan, Law Office of J. Mac Morgan, New Orleans, LA.

For ELLIS A ALEXANDER, defendant: Bernard L. Charbonnet, Jr., Attorney at Law, New Orleans, LA.

For HOME PLACE BATTURE LEASING, INC., NEAL - CLULEE, MARY CLULEE, N C MATERIALS INC, defendants: Joel Thomas Chaisson, Chaisson & Chaisson, Destrehan, LA.

For HOME PLACE BATTURE LEASING, INC., NEAL - CLULEE, MARY CLULEE, N C MATERIALS INC, defendants: Jack Martin Capella, David James Motter, Capella Law Firm, Metairie, LA.

Judges: Henry A. Mentz, Jr., UNITED STATES DISTRICT JUDGE.

Opinion by: Henry A. Mentz, Jr.

Opinion

[*735] MEMORANDUM OPINION

Plaintiff Bayou Fleet, Inc. filed this action for monetary, injunctive, and declaratory relief alleging civil rights violations under [42 U.S.C. § 1983](#), antitrust violations under the Sherman Act, [15 U.S.C. §§ 1 and 2](#), and state law violations of the Louisiana Unfair Trade Practices [**2] Act, [La. Rev. Stat. ann. § 15:1401, et seq.](#). Bayou [*736] Fleet named as defendants, Ellis Alexander, individually and as a member of the St. Charles Parish Council, St. Charles Parish, Coregis Insurance Company, Neal Clulee ("Clulee") and his wife Mary Clulee (referred to herein jointly as "the Clulees"), and two companies owned by the Clulees, Homeplace Batture Leasing, Inc. ("Homeplace") and N/C Materials, Inc.¹

Bayou Fleet claims that Alexander and the Clulee defendants acted jointly and in conspiracy to put Bayou Fleet out of business through a series of arbitrary and capricious zoning challenges, permit challenges, and a sales tax audit which render them liable under [section 1983](#) for violation of its rights to due process and equal protection of the law under the [Fourteenth Amendment](#), and under the Sherman Act for conspiring and attempting to restrain trade and [**3] monopolize the river sand business. Bayou also claims that after it filed the present lawsuit, Alexander and the Clulee defendants continued to act jointly and in conspiracy to put Bayou Fleet out of business by adopting a criminal ordinance referred to herein as the "Levee Law," and the adoption of a resolution to appoint a "Special Legal Counsel" to determine whether Bayou Fleet had lost the non-conforming status of its property in violation of the same constitutional and statutory provisions above, as well as its [First Amendment](#) right of access to the courts. Bayou Fleet claims damages for loss of income due to delays in the permitting process allegedly caused by the conspirators, treble damages, attorney fees, and punitive damages.

After a trial on the merits of Bayou Fleet's request for a preliminary and permanent injunction, this court declared the Levee Law ordinance and the resolution to appoint Special Legal Counsel unconstitutional. See [Bayou Fleet, Inc. v. Alexander, 1997 U.S. Dist. LEXIS 15567, 1997 WL 625492](#) (E.D. La. Oct. 7, 1997). The Parish Council subsequently voted to rescind the ordinance and resolution. Shortly before trial of the defendants' liability, Bayou Fleet settled [**4] its dispute with Alexander, St. Charles Parish, and Coregis Insurance Company. The remaining issues before the court are the liability of the Clulee defendants for the alleged violations of antitrust, civil rights, and state unfair trade practice laws and damages, if any.

FACTS

Plaintiff Bayou Fleet owns and operates sand pits located on the batture along the right descending bank of the Mississippi River in Hahnville, Louisiana, in St. Charles Parish. Bayou Fleet is a family-owned company represented at trial by one of the family members, Robin Durant.

Defendants Homeplace and N/C Materials are also family-owned companies in the sand pit business. Neal and Mary Clulee are the owners of Homeplace and N/C Materials. Homeplace owns a sand pit on the batture just down

¹ Neal Clulee, Mary Clulee, Homeplace Batture Leasing, Inc. and N/C Materials, Inc. are referred to herein, *in globo*, as the "Clulee defendants."

river from Bayou Fleet. Homeplace leases in part to N/C Materials, which handles the sales and trucking of the sand.

In 1981, Bayou Fleet's sand pit and the sand pit now owned by Homeplace were zoned B-1, which did not permit the operation of sand pits. Because both sand pits were in operation prior to the creation of that zoning classification, the sand pits were grandfathered to allow continued operations as [**5] a non-conforming use, provided that the sand pit activities were not suspended for a period of six months.

Bayou Fleet and the Clulee defendants are competitors in the sand business. They are the only active sand pit businesses in the greater Hahnville area. In between Bayou Fleet's and Homeplace's sand pits is a non-operating sand pit owned by the Giambelluca family. The sand pits are adjacent to residential areas of Hahnville. Two other sand pit businesses [*737] operate in the same market, but in the nearby town of Waggaman, Louisiana.

The Durants and the Clulees have a history of litigation over the years, as described below. The present controversy began in 1997 when Ronald Adams Contractors, Inc. ("RAC") obtained a Louisiana road construction contract which required a source of approximately 750,000 cubic yards of river sand for the job. The following is a chronology of the facts of what occurred when RAC undertook to acquire the sand.

RAC wanted to source its own sand by dredging the Mississippi River and stockpiling it in a sand pit. RAC sought quotes from Clulee and Durant to use their sand pits to stockpile the sand and haul out as needed for the project. RAC ultimately decided [**6] to use the Durant/Bayou Fleet sand pits.

In order to dredge sand from the Mississippi River, RAC had to obtain a permit from the U.S. Army Department Corps of Engineers. A permit is also needed from the Lafourche Basin Levee District Board of Commissioners (hereinafter "Levee Board") to operate a sand pit, meaning pumping, stockpiling, and hauling sand across the levee. A permit to operate Bayou Fleet's sand pit was held by a company called Vulcan, which offered to name RAC as licensee. RAC declined because it wanted all permits in its own name. If the Levee Board denies a permit to operate, the Corps of Engineers is required by regulation to deny a permit to dredge.

RAC started the permitting process in March, 1997. By resolution adopted April 3, 1997, the Levee Board issued a permit to RAC to make improvements to the levee crossing to Bayou Fleet's sand pits. On April 4, 1997, RAC submitted an application to the Corps of Engineers for a permit to dredge the Mississippi River. About this same time, it became apparent that there were neighborhood concerns about the project. The Corps of Engineers' file shows a flurry of complaints during this period from residents opposing the RAC [**7] permit. The evidence established that sand pit operations in general can cause public health problems from air pollution and safety risks, as well as nuisances to neighbors.

Andrew Courreges, RAC's operations manager, and Durant met with Alexander at Durant's office to assure him that they would make a good effort to abate potential problems for the community. Durant told Alexander that his pit was in operation and permitted. Alexander indicated that he would support the project.

Telephone records show a one-minute phone call from Clulee's home to Alexander's home on April 28, 1997.² Clulee recalls speaking with Alexander during this period about the status of Bayou Fleet's non-conforming use and the RAC permits. On approximately the same date, Alexander telephoned the Director of the Department of Planning & Zoning ("P & Z"), Earl Matherne, to advise him of his constituents' objection to the operation of Bayou Fleet's sand pits. He also advised Matherne that the residents were willing to testify that Bayou Fleet's sand pits had lost their non-conforming use because they had been shut-down for more than six months.

[**8] In response, Matherne advised RAC that it might have zoning problems with using Bayou Fleet's sand pits. On May 5, 1997, Matherne requested a legal opinion from Randy Lewis, Parish Attorney, regarding whether Bayou Fleet had lost its non-conforming use by abandonment. Lewis investigated the issue, including reviewing

² The court finds that none of the one-minute phone calls in this case involved any conversation, but show only that a call was made where an answering machine picked up.

documents voluntarily produced by Bayou Fleet, such as sales records and affidavits from truck haulers. If Bayou Fleet had lost its non-conforming use, RAC would either have to use a different sand pit, or Bayou Fleet would have to try to get Bayou Fleet's property re-zoned.

[*738] On May 17, 1997, Courreges set up a meeting between himself, another RAC employee, and Clulee, to discuss purchasing sand from Homeplace's pit. They discussed the particulars of Clulee's bid. Courreges mentioned that he had received a letter in which Clulee questioned the project. Clulee explained that his only problem with the project was RAC's proposed dredging in front of his property. Courreges felt that Clulee seemed to have a lot of knowledge about the progress of RAC's permit applications. Clulee told Courreges that if RAC used his sand "he could keep local authorities 'satisfied' (sheriff's [**9] dept., weigh units, etc.) and "left the 'rest' unsaid if [RAC did] not use him."³ RAC decided to stick with Bayou Fleet.

On May 21, 1997, the Parish Attorney issued his opinion letter that Bayou Fleet had not lost its non-conforming use. Alexander disagreed with that opinion.

The St. Charles Parish Coastal Zone Advisory Committee (hereinafter "CZAC"), an eight-member committee that makes recommendations to the Parish Council on wetlands and environmentally-related permit applications within the Parish, had on its May 29, 1997 agenda, *inter alia*, the RAC permit application before the Corps of Engineers. The CZAC was to decide whether to recommend to the Parish Council that it submit a letter of objection or no objection to the Corps. Alexander prepared and mailed to everyone in the immediate area of the Bayou Fleet sand pits a notice of that meeting. The CZAC published an official notice [**10] as well.

Bayou Fleet received a copy of Alexander's notice. Durant was surprised by it because his prior meeting with Alexander led him to believe that Alexander would support the RAC project.

Alexander asked Clulee to attend the CZAC hearing, but he could not attend, so Clulee had his attorney Joel T. Chaisson (a retired state district court judge), attend on behalf of Homeplace. Alexander, Chaisson, and seven members of the public spoke in opposition to the project, their main concerns being dust, noise, increased industrial traffic on a substandard roadway, and the sand pits' alleged loss of its non-conforming use. The citizens also presented a petition with forty signatures against "the reopening of sand pits in Hahnville." There is nothing unusual about members of the public or Parish Council members presenting their views at a CZAC meeting. CZAC meetings are televised. Durant did not attend the hearing.

Phone records establish that on the day of the CZAC hearing, there were two phone calls from Clulee's home to Alexander's home -- one for eight minutes and another for 12 minutes.

On May 30, 1997, the CZAC issued a recommendation to the Parish Council that a letter of no objection [**11] be issued to all concerned agencies.

On the same date, Mary Clulee wrote a letter on behalf of Homeplace to the Corps of Engineers objecting to RAC's permit application "on the basis that their proposed dredging area extended the entire length of our property." She further stated: "I feel that there is enough dredging area in the immediate area frontage fill of their site."

At the regularly scheduled June 2, 1997 meeting of the Parish Council, Alexander introduced a resolution calling for the Parish to issue a letter of objection to the Corps of Engineers based on concerns of air pollution and its effects on persons with medical problems such as asthma and emphysema, industrial congestion, noise, and dangers to children playing in the unfenced [*739] sand pits.⁴ Alternatively, the resolution requested the Corps. to stipulate conditions for issuance of the permit that would ease neighborhood concerns.⁵ One of the alternative conditions

³ The quoted language is from a summary of the conversation made by Courreges on an RAC "Standard Conversation Form."

⁴ A child had been killed at Bayou Fleet's property while tunneling into sand piles.

⁵ Such as: limiting operations to daylight hours, requiring level truck loads and covered truck beds, limiting the height of the stockpiles to the height of the levee, wetting ramps three times a day, fencing the stockpile, installing asphalt ramps over the

was for the trucks to drive behind the levee and exit at Homeplace's ramp to avoid driving along the river road near the residential areas. Because no such road existed, Durant believed that this condition was a subterfuge to block the deal with RAC. This [**12] resolution in effect would reject the recommendation of the CZAC that the Parish issue a letter of no objection. The Parish Council voted with one dissent to adopt Alexander's resolution of objection. Durant attended this meeting; the Clulees did not.

After the May 29 CZAC meeting and prior to the June 2 Parish Council meeting, there were four phone calls from the Clulee's home to Alexander's home -- two for one minute each, one for nine minutes, and one for seven minutes -- for a total talk time of 16 minutes.

[**13] By letters dated June 4, 1997, Alexander forwarded the Parish Council's objection to Senators Mary Landrieu and John Breaux asking for their support of the citizens' opposition to the RAC permit application before the Corps of Engineers. Both Senators responded by asking the Corps of Engineers to provide them with information about the project.

By letters dated June 5 and 6, 1997, Alexander requested P & Z and Chris Tregre, the Parish President, to advise him of the status of Bayou Fleet's non-conforming use.

By letters dated June 5 and 6, 1997, Alexander informed the Levee Board of the Parish Council's resolution to object. Alexander requested the Levee Board to rescind its prior permit for RAC to make improvements to Bayou Fleet's levee crossing and to deny RAC's pending operations permit application based on the harmful impact of the proposed operations on the residential community.

After considering the opposition Alexander presented, the Levee Board voted on June 5, 1997, to deny RAC an operations permit -- (a permit to pump, stockpile, load, and haul sand over the levee).⁶ Alexander promptly informed the Corps of Engineers of the Levee Board's decision. Because the Levee [**14] Board's denial meant automatic denial of a dredging permit from the Corps of Engineers, RAC requested the Corps to postpone decision on his application until he had a chance to defend his permit application before the Levee Board.

In the meantime, Durant had a friend, who was a fraternity brother of U.S. Congressman Robert Livingston, write to the Congressman to help expedite the Corps of Engineers' permit process. Livingston did write a letter to the Corps on June 24, 1997, but later in September, 1997 (after the Corps had granted the permit) withdrew his letter as he realized that the matter was not within his district, but the district of Congressman William J. Tauzin.

RAC wrote to Homeplace/Mary Clulee on June 27, 1997, assuring her that it did not intend to dredge in front of Homeplace's property.

On July 1, 1997, RAC and Durant attended a second meeting of the Levee Board and obtained a reversal of its decision [**15] to deny the operation permit. Alexander was also present. After the meeting, Alexander and Durant had a heated exchange. Durant informed Alexander [*740] that he did not have any immunity for his actions before the Levee Board; Alexander replied: "I'm going to get you." The Clulees did not attend this meeting.

After the June 2, 1997 meeting of the Parish Council and prior to the July 1, 1997 meeting of the Levee Board, there were two phone calls from the Clulee's home to Alexander's home -- one for one minute and one for six minutes -- for a total talk time of six minutes.

On July 3, 1997, Mary Clulee wrote a second letter on behalf of Homeplace to the Corps of Engineers asking that RAC amend the drawings of its proposed dredging area in accordance with its letter to her that it would not dredge the area next to her property.

levee, lowering the speed limit to 25 mph, installation of truck crossing signs, requiring sand hauling trucks to access the pits by traveling behind the levee.

⁶This operations permit was the same kind held by Vulcan which RAC chose not to operate under.

At the July 7, 1997 meeting of the Parish Council, Alexander proposed a resolution to have a sales tax audit performed on Bayou Fleet. The resolution was rejected.

Two days before that Parish Council meeting there was a six minute phone call from the Clulee's home to Alexander's home.

Bayou Fleet filed the present lawsuit on July 14, 1997.

Despite the Parish Council's **[**16]** rejection of Alexander's proposed sales tax audit resolution, Alexander spoke to the head of the St. Charles Parish Tax Collection Department, R.J. Lorio, about Bayou Fleet's payment of sales taxes. On July 30, 1997, Lorio issued notice of a sales and use tax audit to Bayou Fleet. Bayou Fleet cooperated with the audit, which did not result in any citations for failure to pay taxes.

After the July 7, 1997 meeting of the Parish Council and before the July 30, 1997 tax audit notice, there were two one-minute phone calls from the Clulee's home to Alexander's home.

The Corps of Engineers issued a dredging permit to RAC on July 21, 1997, under four months from the date of application. This would have been the last permit RAC needed to begin operations at Bayou Fleet, but P & Z in discussions with the Parish President, who was historically opposed to sand pit operations, raised questions about and ultimately determined that RAC would have to apply for a "Change of Occupancy" permit for the Bayou Fleet site. No one challenged this permit, which was issued on September 22, 1997. No more permits were required in order for RAC to begin operations.

There is no evidence that the Clulee defendants **[**17]** or Alexander played any role in P & Z's decision to require this permit or in the length of time it took to obtain the permit. The evidence that on August 15, 1997, an unsigned, form affidavit was telefaxed between the Chaisson and Chaisson law firm and Alexander's home does not show that the Clulee defendants or Alexander were involved in the Change of Occupancy permit. The affidavit related to the issue of Bayou Fleet's non-conforming use and was to be used by residents in the immediate area of the sand pits who believed that Bayou Fleet's sand pits had ceased operations for a period of time. No one ever signed the affidavit, nor is there any evidence that Alexander or the Clulee defendants ever attempted to have any one sign the affidavit.⁷

[18]** Alexander introduced the Levee Law ordinance and the Special Legal Counsel resolution at the September 8, 1997 meeting of the Parish Council. The Levee Law would have made it a criminal offense for any person to cross over the levee without written permission of the Parish Council. The resolution acknowledged the opinion of the Parish Attorney that Bayou Fleet **[*741]** had maintained its non-conforming use, yet concluded without explanation that "it is in the best interest of the Parish Council and residents of St. Charles Parish to employ Special Legal Counsel to conduct a thorough investigation" of "whether or not Bayou Fleet has had a sand pit operation continuously for the past twelve months on property located on the Mississippi batture in Hahnville." The resolution empowered the Special Legal Counsel to "subpoena the business records of Bayou Fleet." Alexander requested that Joel Chaisson, counsel for Homeplace, be selected to serve as Special Legal Counsel.

Notice of these proposed acts was published in the local newspaper. The notice of the Special Legal Counsel resolution did not mention that it was directed at Bayou Fleet. Bayou Fleet did not have adequate notice of the proposed **[**19]** resolution. Neither Bayou Fleet, nor the Clulee defendants attended the September 8, 1997 Parish Council meeting.

The Parish Council voted to adopt both the ordinance and the resolution, but the decision as to whom to appoint as Special Legal Counsel was deferred pending receipt of a contract.

⁷ The affidavit was the second page of the fax transmission. Alexander was not able to produce the first page of the fax in discovery. Typically, the first page of a telefax is a cover sheet with only the name of the sender, the sender's fax number, and the number of pages telefaxed. For this reason and because the affidavit was never used, the court rejects Bayou Fleet's argument that the absence of the first page should create an adverse inference against the Clulee defendants.

Parish President Chris Tregre vetoed both measures on September 11, 1997 because he believed the Parish Council had acted beyond its authority. On September 27, 1997, the Parish Council voted to override the vetoes, however, the acts never became law. After this court declared the acts unconstitutional, the Parish Council voted to rescind them.

After the July 30 tax audit letter and prior to the September 8, 1997 meeting of the Parish Council, there were 5 phone calls from the Clulees' home to Alexander's home -- 4 one-minute calls and one 18 minute call -- for a total talk time of 18 minutes. Between September 8, 1997 and the September 22, 1997 override vote, there were three phone calls from the Clulees' home to Alexander's home -- each for one minute.

RAC wanted to place a small 6 by 6 foot guard house on the property, which required a permit. The pendency of this permit application did **[**20]** not prevent RAC from dredging and stockpiling sand. There is no evidence that anyone challenged the issuance of this permit; however, P & Z did request an opinion from the Parish Attorney as to whether the shack would present an expansion of the non-conforming use. There is no evidence that the Clulee defendants or Alexander played any role in this permit process. Once the Parish Attorney issued his opinion that it would have no effect on their non-conforming use, and the Fire Marshall approved the structure, P & Z issued RAC a permit on October 16, 1997 to install the guard shack.

RAC completed its project on time. The evidence establishes that it took RAC approximately 110 days to obtain the Corps of Engineers' permit, and approximately six months to obtain all permits necessary to commence operations. In comparison, when Homeplace applied for the same kind of dredging permit from the Corps of Engineers in January, 1998, it took over ten months to obtain the permit, notwithstanding that the Parish Council unanimously adopted a resolution to issue a letter of no objection.⁸ Even considering the evidence that for two to three months the Clulees delayed the process by failing to take **[**21]** any action on their permit application, RAC's dredging permit application was approved in far less time.

Neal Clulee made a total of 46 telephone calls from his home to Alexander's home in 1997. The 1997 phone calls commenced on April 28, 1997, admittedly because of RAC's permit applications before the Corps of Engineers and the Levee Board, and continued until December 30, 1997. Twenty-eight of the 46 calls were one-minute calls with no conversation. Prior **[*742]** to this lawsuit being filed, the records show seven phone conversations totaling 58 minutes between Clulee and Alexander.

Clulee did not recall specific phone conversations. He admitted discussing the RAC permits and his belief that Bayou Fleet had lost its non-conforming use. He explained that several calls were unrelated to Bayou Fleet and involved matters such as resident complaints about his business operations, a diversion project in St. Charles Parish, and the asphalt ramp the Parish required him to install. Clulee **[**22]** recalled speaking with Alexander on other occasions about the sand pit business in general. Alexander was trying to educate himself about the operations and the permitting process. Clulee thinks most of the phone calls were made as a result of the lawsuit being filed against him and Alexander. Indeed, there were only 15 phone calls totaling 58 minutes prior to the lawsuit being filed; whereas there were 31 phone calls totaling three hours and five minutes after the lawsuit was filed. Some of the calls Clulee made were to return calls initiated by Alexander to Clulee's beeper.

In addition to these permit and legislative processes, the court considers the parties' following history of litigation as relevant to the claims herein.

In the 1984, one of the Durant family companies sued Clulee personally to collect a debt and obtained a judgment in excess of \$ 100,000. Durant's company filed a lien on Clulee's property and the sheriff foreclosed on Clulee's home. Durant's company purchased Clulee's home at the sale.

Also, in 1984, a dispute arose regarding the non-conforming use of the Clulees' sand pit. Both Chris Tregre, a Parish Council member at the time and now Parish President, and **[**23]** the Durant family, tried to stop the pit operations on the ground that the non-conforming use had been abandoned for five years. Tregre was acting

⁸ Alexander abstained from voting.

pursuant to his constituents' opposition. Tregre attended hearings to voice his opposition and spoke to the parish president about it. No legislative acts such as the resolutions and ordinance at issue here were proposed.

Another sand pit feud began in 1989 between the Clulees and the Giambellucas, who owned the pit in between Bayou Fleet and Homeplace. The court takes judicial notice of the facts of that dispute as set forth in [Giambelluca v. Parish of St. Charles, 687 So. 2d 423 \(La. App. 5th Cir. 1996\)](#). Briefly, the dispute centered around the use of a levee ramp that was the only access to the Giambelluca property. After two lawsuits, one of which was presided over by Joel Chaisson (now Homeplace's attorney), who ruled in favor of the Clulees, a Parish ordinance sponsored at the request of Clulee by Alexander, and destruction of the ramp by Clulee, the Giambelluca property was left without road access and was forced out of business. The Giambelluca sand pit has been out of business ever since Clulee had the ramp torn [**24] up, leaving Homeplace and Bayou Fleet as the only sand pits operating in Hahnville.

Another sand pit lawsuit was brought by one of the Durant family companies, LA Materials, to have the Clulee sand pit closed based on loss of non-conforming use. LA Materials withdrew the suit when the operating company, Westside Sand, claimed that LA Materials was trying to monopolize the sand business.

Bayou Fleet urges the court to impose an adverse inference against the defendants because Mary Clulee, a will call witness for the defense, did not testify. [HN1\[!\[\]\(ead0345f5afa2342c66bc595dae43b97_img.jpg\)\]](#) The Fifth Circuit has described the adverse witness rule as an "archaism" for which there is no longer any justification, particularly where the witness could have been called by either party, as in the present case. See [Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044, 1048-49 \(5th Cir. 1990\)](#). In any event, the adverse witness rule is discretionary. See [Evangeline Refining Co. v. Charles N. Wooten, Ltd., 890 F.2d 1312, 1320 \(5th Cir. 1989\)](#). The court finds [*743] that Mary Clulee's testimony would have offered no information that the court did not already have before it. Her testimony likely would have been cumulative [**25] to her husband's testimony. Moreover, the evidence from all the witnesses failed to show that she was personally involved in any of the alleged violations. See *id.* (quoting II J. Chadbourne, *Wigmore on Evidence* § 287). Mary Clulee was present during the entire trial, and Bayou Fleet could have called her as a witness. Finally, the court notes that Bayou Fleet did not raise this issue at trial. Under the circumstances of this case, the court declines to invoke the adverse witness rule.

ANALYSIS

A. Noerr-Pennington Doctrine

The Clulee defendants contend that they are immune from liability pursuant to the Noerr-Pennington doctrine.⁹ See [Eastern R.R. 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 \(1965\)](#). The doctrine, which was developed by the Supreme Court in the context of [antitrust law](#), has its underpinnings in [First Amendment](#) principles that the right to petition the government legislatively, judicially, or administratively is constitutionally protected speech regardless of its motivation. [**26] [HN2\[!\[\]\(0f4e50d9b19e08576f803dcd71608371_img.jpg\)\]](#) [Noerr, 365 U.S. at 138, 81 S. Ct. at](#)

⁹ The court may consider the Noerr-Pennington doctrine with respect to the liability of the Clulee defendants even though they did not assert the doctrine in their answer. The court raised the issue *sua sponte* a few weeks prior to trial and ordered the parties to brief the issue. The Clulee defendants then included the issue in the pre-trial order, over Bayou Fleet's objection. It has been held that the Noerr-Pennington doctrine is not an affirmative defense in the sense that it is the plaintiff's burden to prove the substantive violation claimed, which cannot be done where the defendant's allegedly wrongful conduct consists of petitioning the government. See [PrimeTime 24 Joint Venture v. National Broadcasting Co., Inc., 21 F. Supp. 2d 350, 355 \(S.D.N.Y. 1998\)](#)(citing 1 Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#) § 207c (rev. ed. 1997)); see also [McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1558 n. 9 \(11th Cir. 1992\)](#)(citing Areeda and H. Hovenkamp). Certainly, there would be no justification for the court to reject application of the doctrine on a procedural error, where to do so would abridge the defendant's [First Amendment](#) rights. Here, where Bayou Fleet was given adequate advance notice of the court's intent to consider the issue, and where the doctrine was asserted in the pre-trial order, it is appropriate to consider the Noerr-Pennington doctrine as it may apply in this case.

530; Pennington, 381 U.S. at 669-70, 85 S. Ct. at 1593. "The essence of the doctrine is that parties who petition the government for government action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent." Video Int'l Production v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1082 (5th Cir. 1988), cert. denied, 491 U.S. 906, 109 S. Ct. 3189, 105 L. Ed. 2d 697 (1989).

[**27] Although the Noerr-Pennington doctrine was originally applied in the antitrust context, it has been applied to protect First Amendment petitioning of the government from claims brought under federal and state laws, including section 1983. 858 F.2d at 1084. See e.g., Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 615 (8th Cir. 1980)(section 1983) (landowners' secret meetings with city officials and petitioning for enactment of city ordinance to rezone plaintiff's property) (citing Sawmill Products, Inc. v. Town of Cicero, 477 F. Supp. 636, 642 (N.D.Ill. 1979) (section 1983) (protesting presence of plaintiff's sawmill which was then shut down by town ordinance); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803, 816-18 (S.D.N.Y. 1979) (section 1983) (lobbying town officials and filing groundless judicial and administrative complaints to oppose zoning permit); Aknin v. Phillips, 404 F. Supp. 1150, 1153 (S.D.N.Y. 1975), aff'd, 538 F.2d 307 (2d Cir. 1976) (section 1983) (urging officials to enforce unconstitutionally vague noise ordinance against plaintiff's discotheque); [*744] Sierra Club v. Butz, 349 F. Supp. 934, 938-39 (N.D.Cal. 1972) [**28] (contractual interference) (filing lawsuit and administrative appeals to halt plaintiff's logging operation; filings constitutionally privileged even if motivated by malice)). Bayou Fleet's claims under section 1983 and the LUTPA are all based on the same events as the antitrust claims.

Bayou Fleet has accused the Clulee defendants of lobbying and influencing state and federal officials in private meetings, telephone calls, letters, and public hearings to deny permits, revoke Bayou Fleet's non-conforming use, and enact ordinances and resolutions, all designed to put Bayou Fleet out of business. Pursuit of that goal using the administrative and legislative channels and procedures that the Clulee defendants did was within their First Amendment rights. Their actions are nothing more than protected First Amendment activity to procure favorable government actions. They have the right to advance their opinions to government officials about Bayou Fleet's or RAC's business, whatever the underlying motive. Indeed, Bayou Fleet and other Durant family companies have pursued similar actions against the Clulees such as filing objections to permits and a lawsuit to declare a loss of non-conforming [**29] use. Bayou Fleet made lobbying efforts of its own. Bayou Fleet had private meetings with Alexander to get his support for the project; it garnered support from a United States Congressman. This is traditional political activity. HN3[¹⁰] The First Amendment protects "attempts to influence the passage or enforcement of laws," no matter how harmful their incidental impact may be. Noerr, 365 U.S. at 135, 81 S. Ct. at 528.

The sham exception to the Noerr-Pennington doctrine does not apply in this case. HN4[¹⁰] That exception applies when a defendant uses "the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon." City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 380, 111 S. Ct. 1344, 1354, 113 L. Ed. 2d 382 (1991). Here, the Clulee defendants genuinely sought to achieve the governmental measures for which they lobbied. The sham exception does not apply to them because their actions were designed to achieve the outcome of the processes they used.¹⁰ Therefore, the petitioning of Alexander, the Parish Council, the CZAC, and the Corps of Engineers was not a sham. See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 n.4, 108 S. Ct. 1931, 1937 n. 4, 100 L. Ed. 2d 497 (1988). [**30] Accordingly, the court finds that the Clulee

¹⁰ Bayou Fleet alleged but did not prove that the Clulee defendants abused the legislative process by bribing Alexander. There was some testimony that council members heard rumors that Clulee had bribed Alexander, but none of the witnesses were able to recall any specific details such as from whom they had heard the rumor. Because of the unreliability and prejudicial nature of this hearsay evidence, the court denied Bayou Fleet's motion to introduce this evidence under Federal Rule of Evidence 807. The court did allow the evidence as a proffer. Even if the court were to have admitted the evidence, the court finds that it would not carry any probative value because of its vagueness and unreliability. Furthermore, to the extent that Bayou Fleet contends that a corrupt or illegal conspiracy existed, the Noerr-Pennington doctrine does not recognize a conspiracy exception. See City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. at 382-83, 111 S. Ct. at 1355-56.

defendants have no liability under the antitrust laws, [section 1983](#), or the LUTPA because they are protected by the Noerr-Pennington doctrine.

[**31] As alternative reasons for absolving the Clulee defendants of any liability in this case, the court finds that the evidence fails to establish essential elements of the [section 1983](#) and antitrust claims.

B. [Section 1983](#)

HN5 [↑] In a [section 1983](#) action the plaintiff must establish two essential elements: (1) that the conduct in question deprived a person of rights, privileges, or immunities [*745] secured by the Constitution or laws of the United States; and (2) that the conduct complained of was committed by a person acting under color of state law. See [42 U.S.C. § 1983; Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 \(1980\)](#).

The Clulee defendants are private persons who do not occupy positions that can be considered actors "under color of state law." **HN6** [↑] A private person may be considered a state actor under color of state law if the individual is engaged in a conspiracy or willfully engages in joint activity with one or more parties acting under color of state law, even if the state agent is immune to liability. [Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 1605, 26 L. Ed. 2d 142 \(1970\); Cinel v. Connick, 15 F.3d 1338, 1343 \(5th Cir. 1994\)](#), [**32] cert. denied, 513 U.S. 868, 115 S. Ct. 189, 130 L. Ed. 2d 122 (1994). In this case, the state official whose actions are implicated is Alexander. The parties stipulated that all of Alexander's actions were under color of state law.

HN7 [↑] A civil conspiracy under [section 1983](#) is an agreement between private and public actors to violate the plaintiff's constitutional rights. [Cinel, 15 F.3d at 1343](#). A conspiracy may be proven by circumstantial evidence, [Mack v. Newton, 737 F.2d 1343 \(5th Cir. 1984\)](#); however, the acts of the alleged conspirators must show a "unity of purpose, common design, and understanding, or meeting of the minds in an unlawful arrangement." [Hale v. Townley, 19 F.3d 1068, 1075 \(5th Cir. 1994\)](#)(citing [American Tobacco Co. v. U.S., 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 \(1946\)](#)).

HN8 [↑] "The joint action inquiry focuses on whether the state has 'so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity ...'" [Gorenc v. Salt River Project Agric. Improvement and Power Dist., 869 F.2d 503, 507 \(9th Cir. 1989\)](#) [**33] (quoting [Burton v. Wilmington Parking Auth., 365 U.S. 715, 725, 81 S. Ct. 856, 862, 6 L. Ed. 2d 45 \(1961\)](#)). "A private party does not act under color of state law when [he] merely elicits but does not join in an exercise of official authority." [Auster Oil & Gas. Inc. v. Stream, 764 F.2d 381, 388 \(5th Cir. 1985\)](#), cert. denied, 488 U.S. 848, 109 S. Ct. 129, 102 L. Ed. 2d 102 (1988). "It is not sufficient to allege that the [private and state] defendants merely acted in concert or with a common goal. There must be allegations that the defendants had directed themselves towards an unconstitutional action by virtue of a mutual understanding. Even were such allegations to be made, they must further be supported by some factual allegations suggesting such a 'meeting of the minds'." See [Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1206 \(7th Cir. 1980\)](#).

Initially, it must be noted that there is scant evidence of personal involvement on the part of Mary Clulee, Homeplace, and N/C Materials. **HN9** [↑] Under [section 1983](#) there can be no liability, much less a conspiracy between individuals that had no personal involvement [**34] in the allegedly wrongful conduct. See [Murphy v. Kellar, 950 F.2d 290, 292 \(5th Cir. 1992\); Jacquez v. Procunier, 801 F.2d 789, 793 \(5th Cir. 1986\)](#). **HN10** [↑] Individual liability under [section 1983](#) must rest on facts reflecting the defendant's personal participation or involvement in the alleged wrong. The only evidence regarding Mary Clulee is two letters she wrote on behalf of Homeplace to the Corps of Engineers objecting to the permit because of proposed dredging in front of her property. Her letters show that she was not trying to prevent issuance of a permit insofar as dredging in front of Bayou Fleet's property, but only dredging that might occur in front of her property. This evidence does not come close to establishing a conspiracy or joint action between her and Alexander. The only other evidence specifically regarding Homeplace is its appearance at the CZAC meeting through an attorney to voice its objection [*746] to RAC's Corps of Engineers' permit. As for N/C Materials, the only evidence of action taken directly by it is the quote for sand it gave to RAC. This evidence is simply insufficient to establish a conspiracy between Homeplace and/or N/C

Materials [**35] and Alexander. See also *Scutieri v. Estate of Revitz*, 683 F. Supp. 795, 800-01 (S.D. Fla. 1988) (a private corporation is not vicariously liable under § 1983 unless a policy-making individual takes action constituting "official policy" of the corporation).

Both Alexander and Clulee specifically denied the existence of a conspiracy. Alexander indicated repeatedly at hearings and in his letters that his motives were to represent his constituents who had health and safety concerns about the sand pit operations. The evidence established that there are legitimate community concerns about sand pit operations.¹¹ Based on those concerns, the council members are historically opposed to sand pit operations. Clulee admitted that he was motivated by a belief that Bayou Fleet had lost its non-conforming use and by concern that there might be dredging in front of his property, both obviously matters of self-interest rather than community concerns. The fact that Alexander and Clulee wanted the same objective, that is, to prevent sand pit operations at Bayou Fleet, does not establish an agreement or joint action to put Bayou Fleet out of business by unconstitutional means.

[**36] Bayou Fleet places great emphasis on the telephone communications between Clulee and Alexander. As discussed above, private communications between a political representative and his constituent are legitimate. The *First Amendment* envisions interactions between political representatives and their constituents. There are no limits on how many times one can telephone a public official. Even so, in the court's opinion, the evidence does not show an unusual number or length of telephone conversations, considering that Alexander and Clulee were in legitimate cooperation with each other regarding RAC's permit applications, that Clulee had information about the technical permit process that would be helpful to Alexander, and that they had other legitimate matters to discuss, such as this lawsuit.

The evidence fails to establish that the Clulee defendants had any involvement in the Parish Attorney's investigation of the status of Bayou Fleet's non-conforming use, in the letter writing campaign that Alexander undertook to various political representatives and agencies, in the sales tax audit, the Levee Law ordinance, the Special Legal Counsel resolution, the requirement of a Change of Occupancy [**37] permit, the requirement of a permit to install the guard shack, or any delays associated with those two permits.

Having found insufficient evidence of a conspiracy or joint action to equate the Clulee defendants' conduct with state action, any conduct of Alexander that violated Bayou Fleet's constitutional rights is not actionable under § 1983 as to the Clulee defendants.¹² See *Scott v. Greenville County*, 716 F.2d 1409, 1424 (4th Cir. 1983) (recognizing that "even overtly biased citizens who write letters, speak up at public [*747] meetings, or even express their prejudices in private meetings with public officials without formulating a joint plan of action are not 'conspiring' with those officials in a way that subjects them to § 1983 liability").

[**38] C. Sherman Act, [Sections 1](#) and [2](#)

Bayou Fleet's antitrust claims are based on [sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1](#) and [2](#). In order to state a claim for violation of [§ 1](#) of the Sherman Act, a plaintiff must allege (1) concerted action by two or more persons, (2) that unreasonably restrains interstate or foreign trade or commerce.

¹¹ In the prior opinion rendered by this court, the court noted that there was no evidence presented at the hearing on the permanent injunction that Bayou Fleet's or any other sand pit's operations caused problems in the community. See *Bayou Fleet*, 1997 WL 625492 *8. Such evidence was presented at the trial on the merits of plaintiff's claims.

¹² In the prior opinion rendered by this court, it was stated: "Robin Durant's uncontradicted testimony establishes that the resolution was part of a scheme to eliminate Bayou Fleet's business so that Home Place would be the only sand pit in town." See *id.* Neither the Clulees nor Alexander testified at that prior hearing. Furthermore, the court's conclusion herein, that there is no evidence of a conspiracy or joint action between the Clulee defendants and Alexander to put Bayou Fleet out of business by a unconstitutional means is not inconsistent with the court's prior statement.

The evidence failed to show an unreasonable restraint of interstate trade. The permits RAC needed to begin its pit operations were issued without any delays beyond those normally encountered in the process. Even assuming that there were delays, there is no evidence that the delay impacted interstate trade.

HN11[] A violation of [section 2](#) of the Sherman Act is established when the plaintiff shows that the asserted violator: (1) has antitrust standing; (2) possesses or intends to possess monopoly power in the relevant market and (3) acquired or maintained that power or intends to do the same in a wilful manner. [Aspen Skiing Co. v. Aspen Highlands, 472 U.S. 585, 105 S. Ct. 2847, 2859, 86 L. Ed. 2d 467 \(1985\)](#); [United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 \(1966\)](#). [**39]

The evidence failed to show that Bayou Fleet suffered an antitrust injury, which is a component of antitrust standing. See [Bell v. Dow Chemical Co., 847 F.2d 1179, 1182 \(5th Cir. 1988\)](#). Bayou Fleet did not prove that the conduct of the Clulee defendants had any anticompetitive effect. RAC obtained all of the permits it sought. The evidence showed that the alleged delay in the permit process was not any longer than with other applications. And, even if there had been an unreasonable delay, there is no evidence that the delay had an anticompetitive effect. Even assuming that the Clulee defendants played a wrongful role in passage of the Levee Law ordinance and the Special Legal Counsel resolution, (a fact which the evidence failed to prove), those acts were declared unconstitutional and rescinded before they took effect.

Accordingly,

IT IS ORDERED that judgment be entered in favor of defendants Neal Clulee, Mary Clulee, Homeplace Batture Leasing, Inc., and N/C Materials, Inc. and against plaintiff Bayou Fleet, Inc., dismissing plaintiff's claims with prejudice, plaintiff to bear costs.

New Orleans, Louisiana this 29th day of September, 1999.

Henry A. Mentz, **[**40]** Jr.

UNITED STATES DISTRICT JUDGE

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Albany Specialties v. Bd. of Educ.

United States District Court for the Northern District of New York

October 1, 1999, Decided ; October 1, 1999, Filed

99-CV-1462(TJM)

Reporter

1999 U.S. Dist. LEXIS 21040 *; 162 L.R.R.M. 3071

Albany Specialties, Inc., Plaintiff, -against- Board of Education of the South Glens Falls School District, Turner Construction Company, Glens Falls Building and Trades Council, Teamsters Local 294 and Sprinkler Fitters Local Union 669, Defendants.

Disposition: [*1] Vacated and supplanted by this Memorandum Decision & Order.

Core Terms

construction industry, Proviso, collective bargaining, subcontracting, contractors, bidding, terms, bargaining, preliminary injunction, employees, jobsite, exempt, declaratory judgment, labor agreement, negotiated, relations, Harbor, documents, Falls, construction project, successful bidder, Antitrust, merits, contracts, prehire, entity, hired

LexisNexis® Headnotes

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN1[] **Union Violations, Union Refusal to Bargain**

See [29 U.S.C.S. § 158.](#)

Civil Procedure > ... > Justiciability > Ripeness > General Overview

HN2[] **Justiciability, Ripeness**

Ripeness is a constitutional prerequisite to jurisdiction.

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

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3 Case & Controversy Requirements, Actual Controversy

In the declaratory judgment/ preliminary injunction context, to determine justiciability, a court considers (1) the fitness of the issues for judicial review, and (2) the injury or hardship to the parties of withholding judicial consideration. The determination of whether particular facts are sufficiently immediate and real to make an actual controversy must be determined on a case-by-case basis.

Civil Procedure > ... > Justiciability > Ripeness > General Overview

HN4 Justiciability, Ripeness

A case may be ripe even though future contingencies will determine whether a controversy actually becomes real.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5 Injunctions, Preliminary & Temporary Injunctions

To obtain a preliminary injunction the movant must show (1) irreparable harm; (2) a likelihood of success on the merits or a serious question regarding the merits; and (3) a balance of hardships tipping decidedly in favor of the movant. Where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim.

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > General Overview

HN6 Labor Arbitration, Judicial Review

A subcontracting agreement negotiated within the context of a collective bargaining relationship, but applying to more than one jobsite, was protected by the Construction Industry Proviso, [29 U.S.C.S. § 158](#). Thus, the Construction Industry Proviso does not exempt subcontracting agreements that were not sought or obtained in the context of a collective-bargaining relationship.

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > General Overview

HN7 Labor Arbitration, Judicial Review

The mere existence of a labor agreement that was entered into before employees were hired and before the union had demonstrated that it represented a majority of the workforce (a prehire agreement), demonstrates a sufficient collective bargaining relationship to invoke the protection of the Construction Industry Proviso, [29 U.S.C.S. § 158](#).

Governments > Legislation > Interpretation

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > General Overview

[**HN8**](#) Legislation, Interpretation

The term "employer" is construed broadly by both the National Labor Relations Board and Federal Courts. In determining whether an entity is an employer under the Construction Industry Proviso, [29 U.S.C.S. § 158](#), courts look to the degree of control over the construction-site labor relations it elects to retain.

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employers

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > General Overview

[**HN9**](#) At Will Employment, Definition of Employers

An employer, within the meaning of the National Labor Relations Act, is someone who, among other things, has a substantial degree of control over the jobsite and labor relations.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employers

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

[**HN10**](#) Contract Interpretation, Ambiguities & Contra Proferentem

It is generally recognized that when a court is faced with competing interpretations of contractual language, the court first looks to the plain language of the contract. If there is still ambiguity, the court can look to extrinsic evidence to determine the meaning. In completing this exercise, the court should avoid interpreting a contract in such a way that provisions are rendered meaningless.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Employment Issues > Collective Bargaining & Labor Unions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

[**HN11**](#) Antitrust & Trade Law, Sherman Act

The fact that an agreement falls within the Construction Industry Exception, [29 U.S.C.S. § 158](#), is not alone sufficient to shelter the agreement from the Federal Antitrust laws. Instead, Courts have held that the Construction Industry Proviso (and the related nonstatutory exemption to Federal [Antitrust Law](#)) fails to act as a shield when such clauses are not the product of bona fide arms length bargaining, and instead are the product of an illegal

relationship. Accordingly, if a clause is the product of collective bargaining, it cannot serve as the basis for an antitrust claim.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > General Overview

HN12 [blue icon] **Labor, Nonstatutory Exemptions**

In determining whether an agreement falls within the nonstatutory Construction Industry exemption, a court should look to whether the product is the subject of collective bargaining before examining whether the agreement furthers the goals protected by national labor law, is within the scope of traditionally mandatory subjects of collective bargaining, and does not impose a direct restraint on the business market that has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN13 [blue icon] **Judgments, Declaratory Judgments**

A court may render a declaratory judgment (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

Counsel: Joel M. Howard, Esq., James J. Barriere, Esq., Couch White, LLP, Albany, NY, for Plaintiff.

John B. Hogan, Esq., Hogan & Sazynski, LLC, Binghamton, NY, for Board of Education of South Glens Falls School District, Defendant.

Gregory R. Begg, Esq., Peckar & Abramson, P.C., River Edge, NJ, for Turner Construction Company, Defendant.

Gerard M. Waites, Esq., Nicholas R. Femia, Esq., O'Donaghue & O'Donoghue, Washington, DC, for Glens Falls Building and Construction Trades Council, Defendant.

Richard P. Walsh, Esq., Paul Davenport, Esq., Lombardi, Reinhard, Walsh & Harrison, P.C., Albany, NY, for Glens Falls Building and Construction Trades Council, Defendant.

William W. Osborne, Esq., Osborne Law Offices, Washington, D.C. for Sprinkler Fitters Local 209, Defendant.

Ross P. Andrews, Esq., Satter & Andrews, LLP, Syracuse, NY, for Sprinkler Fitters Local 209, Defendant.

Judges: Hon. Thomas J. McAvoy, Chief U.S. District Judge.

Opinion by: Thomas J. McAvoy

Opinion

Memorandum - Decision & Order**McAvoy, Chief Judge:****I. BACKGROUND**

Albany Specialties, Inc. is a corporation engaged in the [*2] construction industry, typically performing work on heating, ventilation, and air condition ("HVAC") contracts. Albany Specialties is a "merit shop firm" whose current employees have elected not to be represented by organized labor unions. Albany Specialties recently received and reviewed contract and bid documents regarding a construction project at the South Glens Falls Senior High School (the "Project"). The Project is financed by taxpayers, who passed a \$ 35,950,000 Bond Referendum on July 1, 1998. See PLA Art. 2.

The Project documents reviewed by Albany Specialties during the bidding process included a Project Labor Agreement ("PLA"), which binds successful bidders and contractors to its terms. See PLA Art. III, Section 4(b). The PLA has not been formally executed; however, its inclusion in the bidding documents precludes changing of certain terms, including some relating to the site contractors. See Def. Trade Council's Mem. of Law at 5 n.5. Turner Construction Company ("Turner Construction"), on behalf of the Board of Education of the South Glen Falls School District (the "School District"), negotiated the PLA with The Building and Construction Trades Council of [*3] Glen Falls (the "Trades Council") and other Defendants. See Waites Aff. P 3.

Prior to negotiating the PLA, Turner construction conducted a study to determine the most economic and efficient manner for completing the expansion and renovation of Glen Falls Senior High School. See Waites Aff. P 4. Due to overcrowding of the school, the Project's timing is of utmost importance. Turner's study indicated that any delay would have serious financial and educational impact, that a PLA was the most effective way to avoid delay or disruption of labor on the Project, and that a PLA would ensure that qualified craft workers were available. See Waites Aff. P 4. The PLA applies only to this project.

Plaintiff moves for a preliminary injunction, or alternatively, a declaratory judgment on the grounds that the PLA is an unlawful contract under the National Labor Relations Act ("NLRA"). 29 U.S.C. § 141, et. seq. HN1↑ Specifically, Plaintiff argues that the PLA violates Section 8(e) of the NLRA, 29 U.S.C. § 158 ("Section 8(e)'), which reads, in pertinent part:

It shall be an unfair labor practice for any labor organization to enter into [*4] any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or heretoafter containing such an agreement shall be to such extent unenforceable.

It is undisputed that provisions of the PLA, requiring contractors to assent to the terms of the agreement, regulate labor relations of third party employers and fall within Section 8(e). Defendants argue, however, that the agreement is not unlawful, because it is exempt under the "Construction Industry Proviso" in Section 8 (e). This proviso reads:

Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting work to be done at the site of the construction. . . .

Plaintiff, on the other hand, contends that neither Turner Construction or the School District is a "construction industry employer" within the meaning of the Construction [*5] Industry Proviso, and thus, the PLA is not exempt from Section 8(e).

Turner Construction, The Building and Construction Trades Council, AFL-CIO, the Trades Council, Teamsters Local Union 294, and Sprinkler Fitters Local Union 669 are parties to the PLA. The School District is not a party to the

agreement; however, the School District is bound by the agreement because Turner Construction, its agent, is a party. There is a Construction Management Agreement in place between Turner Construction and the School District which provides, *inter alia*, that Turner Construction maintains day to day control of the Project and will play a part in the selection of subcontractors. See Lynch Aff. Ex. A; Waites Aff. P 8. This agreement also provides that contracts between subcontractors will be with the School District, not Turner Construction.

The Project is of the type that Albany Specialties would normally bid on. See Colloton Aff. PP 15, 18. Bids for the HVAC portion of the Project were due on September 16, 1999. Id. P 18. Albany Specialties, however, did not submit a bid because it did not want to be bound to the PLA, which requires recognition of the Unions¹ and use of Union [*6] Employees.² See PLA, Art. V, Sec. 3. The terms of the PLA also require contractors who have been awarded work on the Project to "accept and be bound by the terms and conditions of this Agreement." PLA Article III, Sec. 4(a). Instead, of bidding, and taking the chance it would be bound by the PLA, Albany Specialties, who did not have unionized employees, applied to this Court for relief.

II. Discussion

Plaintiff moves, by order to [*7] show cause, for a preliminary injunction, or in the alternative, a declaratory judgment declaring the PLA unlawful. Plaintiff argues that the PLA violates Section 8(e) of the NLRA, [29 U.S.C. § 158](#), and Section 1 of the Sherman Antitrust Act, [15 U.S.C. § 1](#). Defendants, on the other hand, contend that the PLA is not unlawful because it fits within the Construction Industry Proviso and that the PLA does not violate the Sherman Act.³

A. Justiciability

Defendant Turner Construction Company first argues that Plaintiff's claims should be dismissed on ripeness grounds because Defendants have not executed the PLA. Plaintiffs, however, believed the PLA was executed. [*8] Moreover, it was provided to the Plaintiff as one of the bidding documents, thus certain terms cannot be altered. See Def. Trade Council's Mem. of Law at 5 n.5.

HN2[] Ripeness is a constitutional prerequisite to jurisdiction. See [Nutritional Health Alliance v. Shalala](#), [144 F.3d 220, 225](#) (2d Cir.), cert. denied, [525 U.S. 1040](#), 119 S. Ct. 589, 142 L. Ed. 2d 532 (1998). **HN3**[] In the declaratory judgment/ preliminary injunction context, to determine justiciability, a Court should consider (1) the "fitness of the issues for judicial review, and (2) the injury or hardship to the parties of withholding judicial consideration." Id. (internal citations omitted). The determination of whether particular facts are sufficiently immediate and real to make an actual controversy must be determined on a case-by-case basis. See [Hendrix v. Poonai](#), [662 F.2d 719, 721-22 \(11th Cir. 1981\)](#) (per curiam) (citing [Mobil Oil Corp. v. Oil Chem. & Atomic Workers Int'l Union](#), [483 F.2d 603, 607](#) (5th Cir. 1973)); see also [Sheet Metal Div. of Capitol Dist. Sheet Metal, Roofing & Air Conditioning Contractors Assoc. Inc. v. Local Union 38 of the Sheet Metal Workers Int'l Assoc.](#), [45 F. Supp. 2d 195, 200 \(N.D.N.Y. 1999\)](#) [*9] (internal citations omitted). **HN4**[] A case may be ripe even though future contingencies will determine whether a controversy actually becomes real. See [GTE Directories Publishing Corp. v. Trimen America, Inc.](#), [67 F.3d 1563, 1569 \(11th Cir. 1995\)](#) (internal citation omitted).

¹ Article V, Section 1 of the PLA reads "the Contractor recognizes the Unions as the sole and exclusive bargaining representatives of all craft employees working on the Project within the scope of this Agreement."

² Article V, Section 3 (a) of the PLA reads, in pertinent part "the Contractor will hire, per craft, one (1) journeyperson employee referred by the affected trade or craft, and may then hire (1) core employee who is employed by that Contractor and shall repeat the process, one and one, until the crew requirements for that craft are met. . . ."

³ Plaintiff filed a Reply Memorandum of Law and accompanying affidavit on September 27, 1999. Under the Local Rules, Reply papers in Order to Show Cause actions may only be filed upon leave of the Court. N.D.N.Y.L.R. 7.1(b)(2), 7.1(E). Leave was not granted so the Reply papers were not considered.

In this case, Plaintiff was presented with a packet of bidding documents, including the PLA, relevant to a construction project. The PLA requires all successful bidders to comply with the terms set forth therein, including the provisions objected to by Plaintiff, some of which require union recognition and one to one hiring of union and non-union employees. See PLA Art. V, Sec. 3. Indeed, the PLA was included in the bidding documents and by its terms, is binding on all successful bidders. Thus, it was reasonable for Plaintiff, as a potential bidder, to believe that it was bound by the terms of the PLA though it was not a formally executed document. Significantly, the terms to which Plaintiff objects relate to "site contractors," at least some of which cannot be altered because the PLA was included in the bidding documents. In this case, the practical likelihood that an actual controversy exists supports [*10] a finding of justiciability. See Nat'l Basketball Assoc. v. SDC Basketball Club, Inc., 815 F.2d 562 (9th Cir.) cert. dismissed, 484 U.S. 960 (1987).

Additionally, because Plaintiff raises antitrust claims in addition to labor claims at the outset, he may seek declaratory and injunctive relief related to those claims in federal court rather than before the National Labor Relations Board ("NLRB"). See Connell Const. Co., Inc., v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 626, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975); Sheet Metal, 45 F. Supp. 2d at 202 (citing cases). Accordingly, Plaintiff's claims are ripe for review and appropriately before this Court.

B. Standard for Preliminary Injunction

HN5 To obtain a preliminary injunction, on the other hand, the movant must show (1) irreparable harm; (2) a likelihood of success on the merits or a serious question regarding the merits; and (3) a balance of hardships "tipping decidedly in favor of the movant." Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 33 (2d Cir. 1995). Where the moving party "seeks to stay governmental [*11] action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous. . .standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." Plaza Health Lab., Inc., v. Perales, 878 F.2d 577, 580 (2d Cir. 1989). The Court will now address Plaintiff's claim for a preliminary injunction.

C. Labor Claims

1. Section 8(e)

Plaintiff claims that the PLA violates Section 8(e) of the National Labor Relations Act. Section 8(e) prohibits employers from entering into contracts where, among other things, the employer "ceases or refrains from doing business with any other person." Article Five of the PLA requires that successful bidders recognize the Union as the "sole and exclusive bargaining representatives of all craft employees working on the Project," and hire at least one union worker for every non-union worker employed. Article Three, Section Four, requires all successful bidders to "accept and be bound by the terms of this agreement." According to the Plaintiff, the PLA constitutes an [*12] unlawful subcontracting agreement. Plaintiff further claims that the PLA is not exempt from Section 8(e) under the Construction Industry Proviso, which states that nothing in the Section "shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction." 29 U.S.C. § 158(e).

The Supreme Court interpreted Section 8(e) and the Construction Industry Proviso in Connell, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830. In that case, the union sought a subcontracting agreement from Connell, a general contractor. When attempts to obtain the agreement failed, the union picketed Connell and caused a massive walkout on the jobsite. See Donald Schriver, Inc. v. NLRB, 204 U.S. App. D.C. 4, 635 F.2d 859, 871 (DC Cir. 1980), cert. denied, 451 U.S. 976, 68 L. Ed. 2d 357, 101 S. Ct. 2058 (1981). Connell did not employ any workers in the union's jurisdiction at the time of the picketing and the union had never represented, and had no intent to represent, any of Connell's employee. Connell, 421 U.S. at 619-21. [*13] The Union, therefore, was effectively engaging in "top down" organization, obtaining representation without negotiation for unit employees. Moreover, the

subcontracting clause at issue was designed to organize nonunion subcontractors rather than reduce jobsite friction. The Court ruled that, although the agreement was within the broad reach of the Construction Industry Proviso's language, the subcontracting clause was illegal. In coming to this conclusion, the Court stated that "Section 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment." *Id.* at 628. The Court recognized that Congress limited the scope of the Proviso, "allowing subcontracting agreements only in relation to work done on a jobsite." *Id.* at 630. This limitation indicates that the Construction Industry Proviso was intended to alleviate friction between union and nonunion laborers at jobsites. The Connell Court also noted that Congress did not intend to allow unions to "use subcontracting agreements as a broad organizational weapon" and that the amendments to the NLRA were meant to limit "top-down" organizational campaigns. *Id.* at 630, 632. [*14] The Connell Court concluded that the Construction Industry Proviso "extends only to agreements in the context of collective bargaining and . . . possibly to common situs relationship on particular jobsites as well." *Id.* at 633.

The Court subsequently addressed Section 8(e) and the Connell ruling, in *Woeke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 653, 72 L. Ed. 2d 398, 102 S. Ct. 2071 (1982). HN6[¹⁵] In Woeke, the Court found that a subcontracting agreement negotiated within the context of a collective bargaining relationship, but applying to more than one jobsite, was protected by the Construction Industry Proviso. Thus, the Construction Industry Proviso does not "exempt subcontracting agreements that were not sought or obtained in the context of a collective-bargaining relationship." *Id.* at 666. The Woeke Court recognized that subcontracting agreements create some top-down organizing pressure, but found that Congress intended to tolerate such pressure where an agreement was obtained "in the context of a collective-bargaining relationship." *Id.* at 664. Moreover, the Woeke Court's discussion [*15] of Section 8(e)'s legislative history indicated that the provision was intended to preserve the present state of the law, which allowed subcontracting agreements between unions and employers in the construction industry; reflected concerns about jobsite friction; and emphasized the "close community of interests present at jobsites." *Id.* at 656-57, 661.

1. Was the PLA the product of Collective Bargaining?

Plaintiff claims that the PLA at issue is not protected by the Construction Industry Proviso because it was not the result of collective bargaining, as required by Connell and Woeke. HN7[¹⁶] Although the Woeke Court did not rule on what constitutes a collective bargaining relationship, subsequent rulings by the NLRB and Federal Courts have found that the mere existence of a labor agreement that was entered into before employees were hired and before the union had demonstrated that it represented a majority of the workforce (a prehire agreement),⁴ [*18] demonstrates a sufficient collective bargaining relationship to invoke the protection of the Construction Industry Proviso under Connell.⁵ See *Bldg. & Const. Trades Council of the Metro. Dist. v. Assoc. Builders and Contractors*

⁴ Section 8(f) of the NLRA, *29 U.S.C. § 158(f)* "authorizes construction industry employers and unions to enter into so-called 'prehire' agreements setting the terms and conditions of employment for workers hired by the signatory employer without the union's majority status first having been established under § 9 of the Act." *McNeff, Inc. v. Todd*, 461 U.S. 260, 75 L. Ed. 2d 830, 103 S. Ct. 1753 (1983). The conditions under which labor agreements may be considered valid prehire agreements under Section 8(f) are: (1) the employer must be engaged primarily in the building or construction industry; (2) the labor organization must have members who are building and construction employees; and (3) the agreement must cover employees engaged (or who, upon their employment, will be engaged) in the building and construction industry. The parties in this case did not address the specific question of whether the PLA is a valid Section 8(f) agreement; however, the PLA, on its face, meets Section 8(f)'s requirements. Congress indicated similar concerns in enacting Section 8(f) as it did in enacting Section 8(e). Thus, Congress recognized that "construction industry unions often would not be able to establish majority support with respect to many bargaining units" prior to employment and Congress was "cognizant of the construction industry employer's need to 'know his labor costs before making the estimate upon which his bid will be based' and that 'the employer must be able to have available a supply of skilled craftsmen for quick referral.'" *Id.* at 266 (internal citations omitted). The PLA in this case was negotiated to further substantially similar goals. See PLA Art. II. Agreements that fall within the ambit of Section 8(f) are collective bargaining agreements within the meaning of Connell, and thus, are protected by the Construction Industry Proviso. See *Donald Shriver*, 635 F.2d at 872-76.

of Massachusetts Rhode Island, Inc., 507 U.S. 218, 229, 122 L. Ed. 2d 565, 113 S. Ct. 1190 (1993) [*16] [hereinafter Boston Harbor] (finding prehire agreements are collective bargaining agreements providing for union recognition prior to the hiring of any employees); A.L. Adams Const. Co. v. Georgia Power Co., 733 F.2d 853, 856 (11th Cir.) ("[These agreements provide] the very means by which unions and employers typically initiate a bargaining relationship in the construction industry.") (quoting Donald Shriver, 635 F.2d at 872-76), reh'g denied, 751 F.2d 394 (1984), cert. denied, 471 U.S. 1075, 85 L. Ed. 2d 511, 105 S. Ct. 2155 (1985); Bldg. & Const. Trades Council of San Mateo County, et al. v. Alberici/Denver, Inc., 1985 WL 56729, *3 (Apr. 22, 1985, N.D. Cal.) ("[The] language in Woeke indicated that the requirement that the subcontracting clause be negotiated within the context of a collective bargaining relationship is both necessary and sufficient to protect the agreement."). The Second Circuit, moreover, has held that prehire agreements are valid when they bind non-signatory parties to their terms "even when the employees in the bargaining unit have not yet designated the union [*17]" as their representative." Local 210, Laborers' Int'l Union of N. Am. v. Labor Relations Div. Assoc. Gen. Contractors of Am., 844 F.2d 69, 73 (2d Cir. 1987) (Citing Woeke, 456 U.S. at 663-64, 72 L. Ed. 2d 398, 102 S. Ct. 2071).

Plaintiff does not allege any facts to support its claim that the PLA was not the product of collective bargaining, whereas, Defendants indicate that the agreement was negotiated by Turner Construction, and on the initiative of Turner Construction and the School District. Moreover, the rationale behind the PLA in this case suggests that the PLA was a product of collective bargaining. There are no alleged or apparent facts which suggest that the PLA is an attempt by the Union to engage in top-down organizing. In fact, the evidence before the Court indicates that Turner Construction, the Construction Manager, at the direction [*19] of the School District, organized a feasibility study to determine how a PLA would effect the Project. See Def. Trades Council Mem. of Law at Ex. 12; Waites Aff. P 4. The results of this study indicated that a PLA would save significant costs, minimize work stoppages, and increase labor productivity. See id. On the basis of this study, the School District concluded that the PLA would be the most effective means of avoiding delay and disruption of the Project. See Waites Aff. P 4. It appears that the School District and Turner Construction initiated the bargaining process, not the union. Therefore, the Connell Court's concern that a broad reading of Section 8(e) would permit unions to use subcontracting agreements as an organizational weapon is not present here. Moreover, in this case the union seeks to represent employees who are, or will be, employed on the Project. In Connell, the union had no desire to represent the workers. Instead, they wanted to ensure that only subcontractors who had signed collective bargaining agreements would be awarded bids. Additionally, the PLA in this case is limited to on-site work on this Project, thus it furthers the permissible [*20] goal of reducing on-site friction. The factual distinctions between this case and Connell indicate the Supreme Court's concern, that the "careful limits established by Congress to restrain the ability of unions to organize from the top-down would be undermined seriously if the proviso to § 8(e) was construed to allow unions to seek subcontracting agreements from contractors with which it had no bargaining relationships," is not relevant in this case. Donald Schriver, 635 F.2d at 873. Moreover, these facts indicate that the PLA was the product of collective bargaining.

In the context of a motion for Preliminary Injunction, where the moving party bears the burden of proving to this Court that they are likely to succeed on the merits of the action, Plaintiff's bare allegation that the PLA was not the product of collective bargaining is not enough to overcome the evidence presented that the PLA, is a valid Section 8(f) Agreement, and thus was the product of collective bargaining. See, e.g., Ivy Mar Co. v. C.R. Seasons Ltd., 907 F. Supp. 547, 561 (E.D.N.Y. 1995) (stating that bare allegations are not enough to support a motion for preliminary injunction). [*21]

2. Are Turner Construction and/or the School District "employers in the construction industry?"

Plaintiff next argues that the PLA is not exempt from Section 8(e) because the School District and Turner Construction are not "employers in the construction industry." HN8[] The term "employer" has been construed

⁵ Note that exceptions to this rule exist. Prehire agreements must be consistent with the goals of the NLRA. For example, a Union cannot enter into a prehire agreement for the purpose of restricting the subcontractors to which it may subcontract work rather than for the purpose of representing a subcontractors employees. See, e.g., Ironworkers District Council of Pacific Northwest, 292 N.L.R.B. 562, enf'd, 913 F.2d 1470 (9th Cir. 1990).

broadly by both the NLRB and Federal Courts. See, e.g., Milwaukee & Southeast Wisconsin Dist. Council of Carpenters v. Rowley-Schlimgen, 2 F.3d 765, 768 (7th Cir. 1993). In determining whether an entity is an employer under the Construction Industry Proviso, courts have looked to the "degree of control over the construction-site labor relations it elects to retain." Rowley-Schlimgen, 2 F.3d 765, 768 (7th Cir. 1993) (quoting Carpenters Local (Longs Drugs), 278 N.L.R.B. 440, 442 (N.L.R.B. Jan. 31, 1986)). Turner, a company whose primary business is construction, was hired by the School District to manage the Project. In its management capacity, Turner participates in the selection of contractors; is required to ensure that these contractors comply with the terms of the PLA; and has been given day to day control over the Project. [*22] See PLA Article III, Section 4; ⁶ Owner Construction Manager Contract Article 7. The fact that Turner is employed in a managerial capacity and will not employ its own workers on the Project does not remove it from the category of "construction employer." See Rowley-Schlimgen, 2 F.3d at 766; A.L. Adams Constr. Co., 733 F.2d 853.

Plaintiff claims that the plain language of the PLA precludes Turner Construction from fitting within the definition of "employer." To support this claim, Plaintiff cites to Article III, Section 6 of the PLA, which reads in relevant part, "this Agreement shall only be binding on the signatory parties hereto. . . . Neither the District, nor any of its agencies, is an employer within [*23] the construction industry. . . ." This language, however, does not support Plaintiff's contention that Turner is not an employer in the construction industry. HNg[↑] An employer, within the meaning of the NLRA, is someone who, among other things, has a substantial degree of control over the jobsite and labor relations. See Rowley-Schlimgen, 2 F.3d 765, 768 (7th Cir. 1993) (quoting Carpenters Local (Longs Drugs), 278 N.L.R.B. 440, 442 (N.L.R.B. Jan. 31, 1986)). Terms of the PLA, including those cited above, give Turner Construction control over both the day to day workings of the jobsite and over labor relations. Thus, the practical import of accepting Plaintiff's reading of this clause, such that neither Turner or the School District is an "employer" in the construction industry, would contradict later terms in the PLA, see PLA Article 3, Section 4, and eradicate all possible employers on this Project. If neither the School District, the Project Owner, or Turner, the Project Manager, is an "employer," within the meaning of the NLRA, who is? HN10[↑] It is generally recognized that when a court is faced with competing interpretations of contractual language, the [*24] court first looks to the plain language of the contract. See State-Wide Capital Corp. v. Superior Bank FSB, 1999 U.S. Dist. LEXIS 6159, 1999 WL 258268 (S.D.N.Y. Apr. 29, 1999). If there is still ambiguity (which here, arguably there is not if Section 6 is read as a whole), the court can look to extrinsic evidence to determine the meaning. See Starter Corp. v. Converse, Inc., 170 F.3d 286, 295 (2d. Cir 1999). In completing this exercise, the court should avoid interpreting a contract in such a way that provisions are rendered meaningless. See, e.g., Sure-Trip, Inc., v. Westinghouse Eng'g, 47 F.3d 526, 533 (2d Cir. 1995). Interpreting the PLA in the manner suggested by Plaintiff would create internal contradiction and contradict the plain meaning of Article III, Section 6. Thus, the language of the PLA does not prevent this Court from finding that Turner Construction is an "employer in the construction industry."

Even if Turner Construction was not an "employer in the construction industry," however, the Defendants could take advantage of this exemption. The fact that the School District is exempt from the definition of employer through the contractual language [*25] of the PLA does not mean that the School District, an entity of the state,⁷ is unable to take advantage of the Construction Industry Proviso when acting as a purchaser in the marketplace. See Boston

⁶ Article III Section 4 (a) of the PLA reads, in pertinent part, "the District, the Construction Manager, and/or Contractors, as appropriate, have the absolute right to select any qualified contractor for the award of contracts or subcontracts on this Project. . . ."

⁷ New York Courts have found that School Districts and School Boards are entities of the State. See, e.g., City of New York v. State of New York, 86 N.Y.2d 286, 289, 631 N.Y.S.2d 553, 655 N.E.2d 649 (1995) (Municipal corporate bodies--counties, towns and school districts--are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents."); Herman v. Board of Education of Union School Dist. No. 8, Town of Arcadia, Wayne County, 234 N.Y. 196, 202, 137 N.E. 24 (1922) ("The school district is a civil division of the state. It may act only through its officers and agents. Its power of individual corporate action is limited to the choice of agents, who act in a representative capacity. Its members are the residents of the district. The board of education is the agency to which the state delegates the power and duty of controlling the schools in the district. Under such circumstances the position of the board is the same as that of any other agent of the state similarly situated.").

Harbor, 507 U.S. at 231. In Boston Harbor, the Supreme Court found that a state entity could implement a project labor agreement on a state funded construction project. In that case, the Massachusetts Water Resource Authority ("MWRA") was ordered by the Court to construct a waste water facility to clean up harbor pollution. The MWRA, operating under mandatory timetables - delay would lead to continued environmental exposure and financial penalties - decided that a project labor agreement would allow it to predict long range costs and minimize the potential for work stoppages. Thus, the MWRA issued a bid specification that required successful bidders to abide by the project labor agreement, which was negotiated by the Authority's project manager and the Boston Building and Trades Council. The agreement, by its terms, required signatory contractors to recognize the United Building and Trades Council of Camden County and Vicinity ("BCTC") and its affiliated craft unions [*26] as the exclusive collective bargaining representatives of their employees, to secure their work forces through the unions referral systems, and to adopt the wages and other conditions of employment contained in the collective bargaining agreements between the applicable trade union and the local contractors' association. *Id.*

[*27] The Boston Harbor Court found that because the MWRA was acting as an owner and manager of its own property, rather than as a regulator, in the context of the construction project the project labor agreement fit within the Construction Industry Proviso. The Court explained that "permitting the States to participate freely in the marketplace is not only consistent with NLRA preemption principles generally, but also, in this case, promotes the legislative goals of the §§ 8(e) and 8(f) exceptions for the construction industry." [113 S. Ct. at 1197](#). The goals of these sections, according to the Court, include "the short-term nature of employment, . . . the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry." [Id. at 1198](#). The Court recognized that allowing prehire agreements forced contractors who do not normally enter PLAs, but wished to bid on the project, to make a choice - "they may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement." [See id., 507 U.S. at 231.](#) [*28]

This case is similar to the Boston Harbor case. Significantly, in both cases, the project labor agreements were negotiated by a party other than the state entity. Thus, the fact that the state entity was not engaged in the actual bargaining process did not bar legal enforcement. In this case, like the MWRA in Boston Harbor, the School District is the owner of a construction project, the timely completion of which has serious public impact -- both financial and educational. The Project is financed by taxpayers, and delay will increase the cost of the project. [See Feasibility Study, Def. Trades Council Mem. of Law Ex. 12.](#) Therefore, the underlying goals of Section 8(e) outlined in Boston Harbor are impacted in this case, and the PLA furthers these goals. Like the MWRA, the School District is acting as an owner of a construction project, or a purchaser in the marketplace. Therefore, despite the fact that it is not an "employer," it is covered by the Construction Industry Proviso.

For the reasons detailed above, this Court finds that the PLA is covered by the Construction Industry Proviso and, therefore, does not violate Section 8(e) of the NLRA.

D. Antitrust Claims

[*29] [HN11](#) [↑] The fact that the PLA falls within the Construction Industry Exception is not alone sufficient to shelter the agreement from the Federal Antitrust laws.⁸ [See Connell, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830.](#) Instead, Courts have held that the Construction Industry Proviso (and the related nonstatutory exemption to Federal Antitrust Law) fails to act as a shield when such clauses are not the product of bona fide arms length bargaining, and instead are the product of an illegal relationship. Accordingly, if a clause is the product of collective bargaining, it cannot serve as the basis for an antitrust claim. [See Local 210, 844 F.2d at 79](#) (internal quotations

⁸ Courts recognize two labor law exemptions to antitrust scrutiny- one statutory and one nonstatutory. [See Local 210, 844 F.2d at 79](#). The statutory exemption is inapplicable here because it does not reach activity between a union and non-labor party, such as an employer. [See Local 210, 844 F.2d at 79](#). Therefore, this discussion is relevant only to the non-statutory exemption.

and citations omitted); see also, Sun-Land Nurseries, Inc. v. S. California Dist. Council of Laborers, 793 F.2d 1110, 1112 (9th Cir. 1986) (en banc), cert. denied, 479 U.S. 1090, 94 L. Ed. 2d 155, 107 S. Ct. 1299 (1987).

[*30] In determining whether an agreement falls within this nonstatutory exemption, a court should look to whether the product is the subject of collective bargaining before examining whether the agreement furthers the goals protected by national labor law, is within the scope of traditionally mandatory subjects of collective bargaining, and does not impose a "direct restraint on the business market [that] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." See Local 210, 844 F.2d at 79 (internal citations omitted). Because Plaintiff has not provided evidence to support allegations that the PLA in this case is not a valid collective bargaining agreement and the factual circumstances indicate the PLA was the product of collective bargaining; the PLA furthers the goals of labor policy; and the PLA falls within the ambit of the Construction Industry Proviso, it is subject to the nonstatutory exemption from the federal antitrust laws.

Accordingly, upon the proof submitted by Plaintiff, this Court cannot find a violation of the Sherman Act or the NLRA. [*31] Because the Court's decision rests on the clear import of the statutory language at issue in the PLA, Plaintiff's motion for a preliminary injunction is denied under both the likelihood of success on the merits standard, and the less rigorous, sufficiently serious question for litigation standard used to determine whether a preliminary injunction should be granted. Therefore, Plaintiff's motion for a preliminary injunction is denied.

E. Declaratory Judgment

Plaintiff Albany Specialties requests a declaratory judgment declaring the PLA unlawful. HN13 A court may render a declaratory judgment "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." See Broadview Chemical Corp. v. Loctite Corp., 417 F.2d 998, 1000-01 (2d Cir. 1969), cert. denied, 397 U.S. 1064, 25 L. Ed. 2d 686, 90 S. Ct. 1502 (1970). Plaintiff failed to prove that the sections of the PLA requiring Contractors to recognize Unions and employ Union workers violate the NLRA or the Sherman Act. Accordingly, [*32] this Court will not issue a declaratory judgment.

III. Conclusion

Because Plaintiff has failed to show a fair chance of success on the merits, the motion for preliminary injunction is denied. The Court declines to enter a declaratory judgment. The decision rendered from the bench on September 28, 1999 is hereby vacated and supplanted by this Memorandum Decision & Order.

IT IS SO ORDERED

October 1, 1999

Binghamton, New York

Hon. Thomas J. McAvoy

Chief U.S. District Judge

Toscano v. PGA Tour, Inc.

United States District Court for the Eastern District of California

October 12, 1999, Decided ; October 12, 1999, Filed

CIV-S-97-1238 DFL PAN

Reporter

70 F. Supp. 2d 1109 *; 1999 U.S. Dist. LEXIS 15818 **; 1999-2 Trade Cas. (CCH) P72,702

HARRY TOSCANO, Plaintiff, v. PGA TOUR, INC., et al., Defendants.

Disposition: [**1] Sponsor defendants' motion for summary judgment GRANTED.

Core Terms

sponsors, tournament, players, Regulations, concerted action, distributors, manufacturer, Senior, golf, conspiracy, independent action, advertising, commented, terms, organizations, contracts, summary judgment, participates, Television, complaints, qualifying, top

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

The Sherman Act, [15 U.S.C.S. § 1](#), prohibits every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce. This phrase has been interpreted to require concerted action of more than a single entity.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

Before a plaintiff can establish concerted action between a manufacturer and its distributors under [15 U.S.C.S. § 1](#) of the Sherman Act, there must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. In particular, the plaintiff must advance 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.

Antitrust & Trade Law > Sherman Act > General Overview

70 F. Supp. 2d 1109, *1109 (1999 U.S. Dist. LEXIS 15818, **1

HN3 [down arrow] Antitrust & Trade Law, Sherman Act

Whether a contract alone gives rise to an inference of concerted action under the Sherman Act, [15 U.S.C.S. § 1](#), depends upon the nature of the anticompetitive conduct alleged by plaintiff.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Antitrust & Trade Law > Sherman Act > General Overview

HN4 [down arrow] Sherman Act, Defenses

Where the conduct challenged by plaintiff under the Sherman Act, [15 U.S.C.S. § 1](#), is subject to Rule of Reason analysis, the existence of a contract between a party who announces his terms and a party who acquiesces in them does not, without more, give rise to an inference of concerted action under [§ 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

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

HN5 [down arrow] Antitrust & Trade Law, Sherman Act

To avoid summary judgment, plaintiff must present evidence showing that the hypothesis of collusive action is more plausible than that of individual action.

Antitrust & Trade Law > Sherman Act > General Overview

HN6 [down arrow] Antitrust & Trade Law, Sherman Act

Where the evidence is consistent with the hypothesis that the entity at the top of the vertical chain designed the challenged restrictions for its own purposes, an inference of conspiracy is inappropriate.

Counsel: For HARRY TOSCANO, plaintiff: Thomas August Casazza, Law Offices of Thomas Casazza, Sacramento, CA.

For JIM COLBERT, BRUCE DEVLIN, TERRY DILL, DALE DOUGLASS, RAYMOND FLOYD, GIBBY GILBERT, BOB GOALBY, MIKE HILL, KEN STILL, AMERICAN EXPRESS COMPANY, AMERITECH CORPORATION, BANKBOSTON CORPORATION, BANC ONE CORPORATION, BELL ATLANTIC CORPORATION, BOONE VALLEY, BRICKYARD CROSSING, BRUNO'S INC, BURNET, CHRYSLER CORPORATION, COUNTRY-WIDE CREDIT INDUSTRIES, INC, DINERS CLUB INTERNATIONAL, EVEREADY BATTERY CO, FIRST OF AMERICA, FHP HEALTH CARE, FORD MOTOR COMPANY, FRANKLIN QUEST CO, GENERAL MOTORS CORP, THE GILLETTE COMPANY, GTE CORPORATION, HYATT CORPORATION, THE KROGER COMPANY, LG GROUP, LIBERTY MUTUAL GROUP, MERCEDES-BENZ OF NORTH AMERICA, INC., NATIONWIDE INSURANCE ENTERPRISES, NYT MAGAZINE GROUP, PAINE WEBBER GROUP, INC, QUICKSILVER, R J REYNOLDS TOBACCO CORPORATION, RALEY'S, RALPH'S GROCERY COMPANY, ROYAL CARRIBEAN CRUISE LINE, SBC COMMUNICATIONS, INC, THE SCOTTS COMPANY, TOSHIBA CORPORATION, TOYOTA MOTOR CORPORATION, TRANSAMERICAN CORPORATION, TRUEGREEN-CHEMLAWN, WENDY'S INTERNATIONAL, INC, DAVE STOCKTON, DEANE R BEMAN, [\[**2\]](#) TIMOTHY W FINCHEM, OJAI GOLF CHARITIES, GOLD

RUSH CLASSICS, CENTINELA HOSPITAL MEDICAL CENTER, CLASSIC CHARITIES OF ORANGE COUNTY, GRAND SLAM CHARITIES, defendants: Cary M Adams, Murphy Austin Adams Schoenfeld LLP, Sacramento, CA.

For AMERICAN EXPRESS COMPANY, AMERITECH CORPORATION, defendants: William J Maledon, PRO HAC VICE, Diane M Johnson, PRO HAC VICE, Osborn Maledon, Phoenix, AZ.

For GENERAL MOTORS CORP, defendant: Will Barnett Fitton, Latham and Watkins, San Francisco, CA.

For GENERAL MOTORS CORP, defendant: William B Slowey, PRO HAC VICE, General Motors Corporation, Detroit, MI.

Judges: DAVID F. LEVI, United States District Judge.

Opinion by: DAVID F. LEVI

Opinion

[*1110] MEMORANDUM OF OPINION AND ORDER

Plaintiff Harry Toscano brings this action against the PGA Tour, Inc. ("the [*1111] Tour"), the individual officers and directors of the Tour, and various sponsors of the Tour's golf tournaments, alleging that they conspired to restrain trade in senior professional golf in violation of Section One of the Sherman Antitrust Act, [15 U.S.C. § 1](#). The sponsor defendants move for summary judgment.

I.

The Senior PGA Tour co-sponsors professional golf tournaments for players [*3] over the age of 50. (March 23, 1998 Mem. of Op. & Order at 1.) Toscano challenges the Tour's regulations governing (1) player eligibility, and (2) player participation in non-PGA events.

The Tour's Rules and Regulations provide for a 78-player field for each tournament. A player is exempt from having to compete in the qualifying rounds of the tournament if he has secured 75 or more victories in Senior PGA or PGA Tour events or is within any of the following categories: (1) the top 31 available players from the previous year's Tour Money List; (2) the top 31 available players from the All-Time Career Money List (which includes purses won both in Senior PGA Tour tournaments and in PGA tournaments); (3) the top eight players from the Tour's annual National Qualifying Tournament (in order of finishing); (4) players who have won a Tour tournament within the past 12 months; (5) the top four scorers in the qualifying round of play held before the tournament at issue; (6) four players designated by the tournament's local sponsor; and (7) on a space available basis, any otherwise non-exempt player who has won a Senior PGA Tour or PGA Tour tournament. (Moorhead Decl. P 9; Pl.'s App. 1 at 5-9.)

[*4] The Rules and Regulations also restrict the ability of Tour members to participate in non-Tour events. Under the "Conflicting Events" Rule, a player who qualifies to play in a Tour event generally may not enter a non-Tour tournament scheduled on the same date unless he first obtains a written release from the Tour Commissioner.¹ (Pl.'s App. 1 at 25.) The Commissioner has discretionary authority to grant a Tour member two releases annually, assuming he participates in 15 Tour events, and an additional release for every five Tour events in which he participates above 15. (*Id.* at 26.) The Commissioner may deny a Tour member's request for a waiver if he determines that it "would cause [the] Tour to be in violation of a contractual commitment to a tournament or would otherwise significantly or unreasonably harm [the] Tour and such tournament." (*Id.*) Moreover, under the "Television Release" or "Media Rights" Rule, Tour members must also seek the Commissioner's approval before participating

¹ A member may enter a conflicting tournament if it is cosponsored or approved by the PGA, a major tournament such as the Masters or U.S. Open, the Ryder Cup tournament, a Nike Tour event (if the member meets certain qualifications), or, if the member is a foreign national, a golf event on his home circuit. (Pl.'s App. 1 at 25.)

in a televised tournament that is not co-sponsored or approved by the Tour, irrespective of whether the tournament conflicts with a Tour event. (*Id.* at 27-28.)

[**5] The Rules and Regulations governing the Senior PGA Tour are controlled by the Tour's Division Board (the "Board"). (Pl.'s App. 1 at 48.) The Board is comprised of four Player Directors, the immediate past President of the PGA, and four Independent Directors, defined as "four public figures with a demonstrated interest in the game of golf." (*Id.* at 45.) Player Directors are elected by voting members of the Tour, and hold office for a period of two years. (*Id.*) Any amendment to the Rules and Regulations must be approved by a majority of the Board, including three Player Directors, unless a conflict of interest exists.² Amendments adopted by the [*1112] Board may be reversed by a two-thirds vote of all voting members of the Tour.

[**6] Although no representative of the sponsor defendants is or has been a member of the Board, (Moorhouse Decl. P 14), Toscano contends that the sponsor defendants conspired with the Tour to perpetuate and enforce the Rules and Regulations he challenges. Tour sponsors fall into two rough categories: "local sponsors" and "title sponsors." Local sponsors are nonprofit or charitable organizations that contract directly with the Tour. (*Id.* P 3.) Local sponsors serve as the principal organizers of Tour events, and are responsible for reserving a golf course that meets Tour specifications, hiring and paying staff for the tournament, amassing the tournament prize money, advertising and promoting the event, and arranging for the sale of concessions. (*Id.* P 4.) In order to cover the cost of organizing and operating the tournament, local sponsors in turn enter into agreements with title sponsors -- businesses who pay for the right to advertise in connection with the tournament. (Moorhouse Decl. P 5.) The local sponsor typically agrees to organize and conduct the tournament in accordance with PGA Rules and Regulations, incorporate the title sponsor's name into the Tournament title, display [**7] signage with the title sponsor's name at the tournament site, provide hospitality benefits at the tournament, and secure national television and print media advertising. (E.g., Defs.' App. 7, 9, 10.) In return, the title sponsor generally makes payments under a fixed schedule, or assumes financial responsibility for a significant portion of the Tournament purse and television and advertising costs.³ (*Id.* 7, 8, 9, 10, 11.)

[**8] The organization of the Ralphs Senior Classic tournament illustrates the relationships among local sponsors, title sponsors, and the Tour. The local sponsor, defendant Centinela Hospital Medical Center ("Centinela"), entered into a contract directly with the PGA to organize and run a golf tournament in Los Angeles, California. The agreement provides that "the general division of duties will be that [Centinela] will provide the course, the clubhouse, and all other facilities of every kind necessary or appropriate for professional golf competition, and PGA Tour, with the assistance of [Centinela], will conduct the competition." (Def.'s App. 3 at CH-00014.) Centinela in turn entered into a title sponsorship with Ralphs. In exchange for a series of payments to Centinela, Ralphs secured advertising and media rights in connection with the tournament, including the right to have its name included in the tournament's title (hence, "The Ralphs Senior Classic") and to use the tournament logo in its advertisements. (Def.'s App. 15 at RG-00054, 00060).

II.

HN1 Section One of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy in restraint [**9] of trade or commerce." 15 U.S.C. § 1. This phrase "has been interpreted to require

² If a Board member has a conflict of interest, a majority of the Board may vote to amend the Rules and Regulations "even if (i) such majority is comprised of no Player Directors, and/or (ii) the disinterested directors constitute less than a majority of the Board, and provided further that if any Player Directors do not vote on such change, such majority shall include at least 75 percent of the Player Directors voting thereon." (Pl.'s App. 1 at 48.)

³ Defendant Royal Caribbean Cruises, Ltd. served as both a local and title sponsor. (Def.'s App. 19.) Moreover, in addition to serving as a title sponsor for an individual tournament (the "Cadillac-NFL Golf Classic"), General Motors paid for "umbrella sponsorship" rights to a series of telecasts of Tour events on ESPN. (Fitton Decl. Exs. B, C; Finchem Depo. at 94:11-23; Moorhouse Depo. at 71:22-25, 73:21-74:13). As an umbrella sponsor, GM was entitled to have its name presented as the overall series sponsor, a status distinct from the title sponsor of the individual tournaments comprising the series. (Fitton Decl. Ex.C at GM00000011.)

concerted action of more than a single entity." *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988).

[*1113] The Sponsor defendants argue that there is no triable issue of fact as to whether they and the Tour engaged in concerted anticompetitive action in violation of § 1.⁴ Because the local sponsor defendants and title sponsor defendants have somewhat different relationships with the Tour, they are discussed separately below.

[**10] A. Local Sponsors

Defendants maintain that under the Supreme Court's decision in *Monsanto v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984), the local sponsors' dealings with the Tour do not rise to the level of concerted action within the meaning of § 1. The court agrees.

In *Monsanto*, the Court affirmed the right of a manufacturer to announce the terms under which it will deal with distributors and then refuse to deal with those unwilling to accept its terms. The Court explained that a conspiracy between a manufacturer and its distributors could not be inferred from mere compliance by the distributors with the manufacturer's sales restrictions, since manufacturers often have independent reasons for imposing such restrictions. See *id. at 762-63, 104 S. Ct. at 1470*. For example, a manufacturer may "want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free riders' do not interfere." *Id. at 762-63, 104 S. Ct. at 1470*. Accordingly, ^{HN2} before [**11] a plaintiff can establish concerted action between a manufacturer and its distributors under § 1, "there must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id. at 764, 104 S. Ct. at 1471*. In particular, the plaintiff must advance 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. at 764, 104 S. Ct. at 1471* (citation and internal quotations omitted) (emphasis added).

Defendants argue that *Monsanto* applies here because the relationship between the Tour and the local sponsors is analogous to that between a manufacturer and its distributors. According to defendants, the Tour unilaterally establishes its Rules and Regulations, and local sponsors merely acquiesce in those rules, much the same way a distributor acquiesces in terms announced by a manufacturer. Moreover, defendants point out that the interests of the Tour and the local sponsors do not necessarily coincide; even assuming that Toscano is correct in asserting that the Rules and Regulations [**12] are designed to qualify players with established PGA records and lock those players into the Tour, the Tour may have adopted this strategy to maximize the popularity of its tournaments, irrespective of the local sponsor's views about how the tournaments should be structured.

In response, Toscano contends that the following circumstantial evidence excludes the possibility of independent action by the Tour and the local sponsors: (1) contractual agreements between those parties; and (2) evidence that the local sponsors commented on the Tour's rules.

[*1114] 1. Local Sponsorship Contracts

Toscano points out that the local sponsorship contracts make express reference to the provisions challenged by Toscano. For example, the sponsorship agreement between the Tour and defendant Centinela Hospital states:

⁴ Defendants also maintain that summary judgment should be granted for title sponsors Franklin Covey Co. and Pacificare because Toscano was permitted to play in the tournaments sponsored by those defendants and therefore was not injured by them. To the extent, however, that a triable issue of fact exists as to whether Franklin Covey and Pacificare conspired with the Tour and the other sponsor defendants to maintain the rules challenged by Toscano, his claim continues as to these two defendants notwithstanding his participation in their tournaments. It is uncontested that the Rules and Regulations disqualified Toscano from participating in many other tournaments sponsored by the Tour.

Sponsor and PGA Tour agree . . . that PGA Tour will provide services for such competition in accordance with the provisions herein and with the Senior PGA Tour Tournament Regulations as they may from time to time apply, and which are incorporated herein by reference.

PGA Tour will fill the field of contestants in accordance with the SENIOR PGA TOUR Tournament Regulations. [**13]

Players eligible to apply to enter the Tournament shall be those prescribed in the Senior PGA Tour Tournament Regulations.

(Def.'s App. 3, at CH-00016, CH-00017, CH-00018.) This language does not, however, exclude the possibility of independent action or support a finding that the local sponsors and the Tour had a "conscious commitment" to a scheme to establish and perpetuate the Rules and Regulations. The agreements merely obligate the Tour to run its tournaments in accordance with its own rules; they in no way suggest that the local sponsors have any influence or exert any control over the rules themselves or did anything other than to accede to the Tour's natural desire to run its tournaments according to its rules.

Toscano counters that the mere existence of contracts between the Tour and its local sponsors suffices to satisfy the concerted action requirement of § 1. But HN3[¹] whether a contract alone gives rise to an inference of concerted action depends upon the nature of the anticompetitive conduct alleged by plaintiff. Cf. VII Philip E. Areeda, *Antitrust Law* P 1400 at 5 (1986) (observing that "if the reasons for prohibiting or controlling certain [**14] conduct are very strong, it makes sense to err on the side of overinclusiveness in determining the presence of an agreement"). Toscano's § 1 claim is based upon a vertical boycott theory. He alleges that the Tour conspired with certain of its officers, the Player Directors, and the sponsors to boycott Toscano and similarly situated players from participating in the market for senior professional golf. None of these categories of defendants competes with each other, and each plays a different role in the conspiracy theory advanced by Toscano.⁵ Because "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors," *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 119 S. Ct. 493, 498, 142 L. Ed. 2d 510 (1998), Toscano's claim must be analyzed under the Rule of Reason.

[**15] The Rule of Reason governs a wide array of conduct that requires cooperation and may be as likely to promote competition as it is to suppress it. See e.g., *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) (Easterbrook, J.) (observing that "joint ventures, mergers, systems of distribution -- all these and more require extensive cooperation, and all are assessed under a Rule of Reason"). Because contracts are often used to regulate relationships among cooperating entities, a rule equating the [*1115] mere existence of a contract with concerted action in Rule of Reason cases would create a significant risk of deterring procompetitive behavior. Cf. *Monsanto*, 465 U.S. at 763, 104 S. Ct. at 1470 (warning that inferring concerted action from conduct consistent with independent action "could deter or penalize perfectly legitimate conduct"). Accordingly, the courts have held that HN4[¹] where the conduct challenged by the plaintiff is subject to Rule of Reason analysis, the existence of a contract between a party who announces his terms and a party who acquiesces in them does not, without more, give rise to an inference of concerted action [**16] under § 1. See *Matrix Essentials v. Emporium Drug Mart, Inc.*, 988 F.2d 587, 594 (5th Cir. 1993) (rejecting the defendant's § 1 defense despite the existence of a contract between the plaintiff manufacturer and its distributors in which the plaintiff unilaterally established the non-price

⁵ As Toscano explains in his brief:

Every fact of the combination complained of has financial gain written all over it. The Tour wants to continue to build its empire of golf-related businesses. The Tour's members (including the Player Directors) want to keep earning money playing golf, making appearances, giving endorsements, and even designing golf courses. The local sponsors need to be able to sell sponsorship packages to the title sponsors in order to continue operating. . . . The title sponsors want to further relationships with their major clients, promote employee loyalty, and sell their products and services without having to compete with like-image products to reach their target markets.

restraint challenged by the defendant); [American Airlines v. Christensen, 967 F.2d 410, 413 \(10th Cir. 1992\)](#) (concluding that contracts between the defendant airline and members of its travel awards program raised no triable issue of fact as to concerted action where "no evidence in the record suggested that [the airline] did not independently set the terms under which it would offer its travel awards"); see also [Beutler Sheetmetal Works v. McMorgan & Co., 616 F. Supp. 453, 454-56 \(N.D. Cal. 1985\)](#) (finding no triable issue of fact as to whether the defendant lender and its borrowers engaged in concerted action where the borrowers acquiesced in terms announced by the lender and incorporated in the latter's commitment letters).⁶

[**17] If the contract between the Tour and the local sponsors sufficed to make the latter co-conspirators under § 1, any party, however small, would risk antitrust liability based upon the Tour's conduct simply by contracting with the Tour to do business at a typical Tour event run according to Tour rules. Antitrust liability would potentially extend to sidewalk vendors, limousine services, local businesses seeking advertising -- any business, however far removed from the market for professional golf, that happened to enter into such an agreement with the Tour. Because this result would be inconsistent with the purpose of the Sherman Act,⁷ Toscano [*1116] must, under *Monsanto*, come forward with additional evidence excluding the possibility of independent action and suggesting that the Tour and the local sponsors "had a conscious commitment to a common scheme designed to achieve an unlawful objective." [Monsanto, 465 U.S. at 764, 104 S. Ct. at 1471](#) (citation and internal quotations omitted).

[**18] 2. Notice and Comment Procedure

Toscano also points out that before the Tour's Board takes a final vote on amendments to the Rules and Regulations, it oversees a notice-and-comment procedure in which both local and title sponsors may participate. According to Toscano, the sponsors use this process to influence and shape the rules.

There is little support in the record for this contention. It is undisputed that no representative of the sponsor defendants has ever sat on the Board. The testimony of PGA Tour Commissioner Timothy Finchem, on which Toscano heavily relies, suggests that the decision to adopt or amend the Rules and Regulations rests ultimately

⁶Where the challenged conduct raises strong antitrust suspicions and is therefore per se illegal, a contract may satisfy the concerted action requirement even if one of the parties was coerced into the agreement. For example, a sales contract alone may give rise to an inference of concerted action under § 1 if the agreement was part of a tying arrangement. See [Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1427 \(9th Cir. 1995\)](#) (explaining that § 1's concerted action requirement "is satisfied in tie-in cases by the coerced sales contract for the tied item") (emphasis omitted); [Systemcare, Inc. v. Wang Labs. Corp., 117 F.3d 1137, 1142 \(10th Cir. 1997\)](#) (holding that "a contract between a buyer and seller satisfies the concerted action element of section 1 of the Sherman Act where the seller coerces a buyer's acquiescence in a tying agreement imposed by the seller"). In cases involving restraints that are per se illegal, it "makes sense to err on the side of over-inclusiveness in determining the presence of an agreement," VII Areeda, *supra*, P 1437 at 5, because the restraints "pose an unacceptable risk of stifling competition", [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9, 104 S. Ct. 1551, 1556, 80 L. Ed. 2d 2 \(1984\)](#); cf. [Nynex, 119 S. Ct. at 497](#) (observing that "certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstance"). As explained above, however, this case does not involve allegations of tying or other conduct subject to the per se rule.

⁷Defendants also cite to [Acquaire v. Canada Dry Bottling Co., 24 F.3d 401 \(2d Cir. 1994\)](#), [Precision Piping & Instruments, Inc. v. E.I. duPont de Nemours & Co., 951 F.2d 613 \(4th Cir. 1991\)](#), 49er [Chevrolet, Inc. v. General Motors Corp., 803 F.2d 1463 \(9th Cir. 1986\)](#), and [Smilecare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780 \(9th Cir. 1996\)](#). Each of these cases is distinguishable. Smilecare is a § 2 case, and the plaintiff alleged no agreement in restraint of trade. See [88 F.3d at 786](#) (holding that the plaintiff's "failure to allege the essential element of conspiracy between [the defendant] and any other parties precludes a group boycott claim"). While Acquaire involved an allegedly anticompetitive agreement between a manufacturer and distributor, the policy challenged by the plaintiff in that case was not set forth in a written agreement. See [24 F.3d at 407-08](#). The same is true of 49er [Chevrolet, 803 F.2d at 1467](#) (finding no agreement under § 1 between the defendant auto-manufacturer and its shippers where the alleged anticompetitive contracts made no reference to the challenged policies regarding dealer reimbursement for damaged cars), and [Precision Piping, 951 F.2d at 615-18](#) (finding no agreement within the meaning of § 1 where the alleged antitrust conspirators had no written agreement and there was no evidence that the defendants collaborated on the policy challenged by plaintiff).

with the Board. Finchem testified that there is "a period of time where the sponsors -- the tournaments can have impact and access to various members of the board to write memos stating their position or orally make their position known to players who are on the Player Advisory Council or player directors or independent directors or whatever." (Finchem Depo. at 78:1-8.) But he also made clear that "sometimes [the sponsor's] position is one that the board eventually agreed with and sometimes it doesn't." (*Id.* at 79:12-13.)

[**19] Evidence that the local sponsors sporadically participated in the Tour's notice and comment procedures does not reasonably exclude the possibility of independent action. In the analogous context of manufacturer-distributor relationships, the courts have uniformly held that concerted action between manufacturers and distributors may not be inferred from mere evidence that the manufacturer considered complaints from distributors before enforcing its sales rules against a wayward distributor. See [Monsanto, 465 U.S. at 763, 104 S. Ct. at 1470](#) (explaining that distributor complaints "arise in the normal course of business and do not indicate illegal concerted action") (citation and internal quotations omitted); [O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1468 \(9th Cir. 1986\)](#) (holding that "[dealer] complaints followed by termination are not enough to provide sufficient proof of an antitrust conspiracy"); [The Jeanery, 849 F.2d at 1157](#) ("Complaints by competitors, standing alone, are not sufficient to show a conspiracy."); [Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1162 \(7th Cir. 1987\)](#) (Posner, J.) ("Complaints [**20] to a supplier, made by competitors of a dealer who is cutting prices below suggested levels are not, standing alone, evidence of agreement"). Moreover, there is no evidence that any of the sponsor defendants commented on the particular rules challenged by Toscano.⁸ The mere possibility that a local sponsor could advocate for or against a rule is not sufficient by itself to support a finding that [*1117] the Tour and the local sponsors reached common objectives concerning eligibility requirements.

3. The Record as a Whole

HN5 To avoid summary judgment, Toscano must present evidence showing "that the hypothesis of collusive action is more plausible than that of individual action." [In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 785 \(7th Cir. 1999\)](#) [**21] (Posner, C.J.); see also [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 \(1986\)](#) (explaining that a plaintiff asserting a § 1 claim "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 [him]"). As noted above, however, the record lacks concrete evidence that the local sponsors held specific views about the Rules and Regulations targeted by Toscano, that those views, if any, were communicated to the Tour, and that the Tour relied on these putative views in adopting or amending its rules.⁹ It is equally if not more reasonable to infer from the record that the Tour and local sponsors acted independently with respect to the challenged rules.

⁸ Indeed, the evidence in the record suggests that many local sponsors never commented to the Tour about its Rules and Regulations. ((Centinela Hosp. Rep.) Peterson Depo. at 24:17-25:4; (Grand Slam Charities Rep.) Kramer Depo. at 67:22-68:11; ((Gold Rush Classics Rep.) Bell Depo. at 35:19-25.)

⁹ Toscano invokes [Volvo North Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55 \(2d Cir. 1988\)](#), but, as the defendants point out, that case is distinguishable. In *Volvo*, a former sponsor of a men's professional tennis tour brought a § 1 claim against the tour, asserting that it conspired with other sponsors and tournament operators (not named as defendants) to prevent the plaintiff from sponsoring future tour events. Although the decision dealt principally with the issue of antitrust standing, see [id. at 66-70](#), the court went on to hold that the plaintiff adequately alleged a conspiracy within the meaning of § 1, see [id. at 70-71](#). The court explained that "courts have consistently held that, since joint ventures -- including sports leagues and other such associations -- consist of multiple entities, they can violate § 1 of the Sherman Act." *Id.* In the court's view, the tour was no different from these defendants, since it consisted of "representatives of national tennis associations, tournament owners and directors, and professional tennis players." [Id. at 71](#).

Because no sponsors were sued in *Volvo*, the decision does not discuss the circumstances in which the sponsors of a sports league may be held liable under § 1 as co-conspirators of the league. Moreover, unlike the professional tennis tour at issue in *Volvo*, the Tour is not a joint venture, and the Tour's Board does not include representatives of sponsors hosting tournaments. See [id. at 58, 67, 71](#).

[**22] According to Toscano, the Tour's eligibility and participation requirements are intended to capture golfers who have met with previous success on the Tour "to the exclusion of equally or better qualified individuals." However, the local sponsors might very well be indifferent as to whether the Tour focuses on players with a history of winning or players with the best ability, so long as the Tour's events draw public attention sufficient to further the local sponsors' fundraising objectives. Nor are the local sponsors' interests clearly aligned with the Tour's interest in the Conflicting Event and Television Release rules. Toscano maintains that these rules are designed to prevent competing leagues from springing up. But the local sponsors could well benefit from a market with competing leagues in which they might be able to negotiate more favorable terms with the Tour and have greater choice.¹⁰

[**23] Because "the evidence is consistent with the hypothesis that the [entity] at the top of the vertical chain designed the [challenged] restrictions for its own purposes, an inference of conspiracy is inappropriate." [*1118] *Illinois Corp. Travel, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986) (Easterbrook, J.). Accordingly, the local sponsors are entitled to summary judgment.

B. Title Sponsors

Toscano's § 1 claim against the title sponsor defendants is even weaker than his claim against the local sponsors. Unlike the local sponsors, the title sponsors do not contract directly with the Tour.¹¹ And, as discussed above, Toscano has submitted no evidence showing that any of the sponsor defendants commented specifically on the rules he challenges.

[**24] Toscano correctly points out that a GM representative testified in his deposition that "the possibility that someone from General Motors commented on the regulations at one time in the nine-year history is likely." (Comb Depo. at 47:20-24.) In addition, Commissioner Finchem stated in his deposition that GM, like any sponsor, would be able to comment on the Rules and Regulations as part of the notice and comment period preceding a vote by the Tour's Board:

Question: If, in fact, you portend [sic] to make changes to the regulations, would Cadillac have the ability to comment upon same?

Answer: Yes, we would treat Cadillac in that context in the same way we would treat any of the title sponsors or the tournament organizations. We would ask for their comments.

(Finchem Depo. at 11-17.) As explained above, however, evidence that a sponsor commented on the Rules and Regulations is consistent with independent decision making by the Board, and does not alone give rise to a reasonable inference of concerted action.¹² Moreover, there is no evidence that GM or any other title sponsor directed any comments to the particular rules that Toscano attacks as anti-competitive. [**25]

¹⁰ The economic evidence advanced by Toscano is conclusory and unpersuasive. According to Toscano's expert, Dr. Tollison, "the economic theory explaining why the local tournament sponsors are involved in the anticompetitive combination in this case is simply that they contractually bind themselves to, and benefit from, the very aspects of the Senior PGA Tour's operation that are anticompetitive." (Tollison Decl. at 15.) Tollison's declaration fails to explain, however, why the local sponsors have an economic interest in the eligibility and participation rules challenged by Toscano.

HN6 [↑]

¹¹ Because Caribbean Cruise Lines acted as a local sponsor as well as a title sponsor, the analysis applicable to local sponsors applies equally to it. GM's situation differs from that of the other title sponsors because it contracted directly with the Tour to act as an umbrella sponsor for a series of tour events. However, neither of the two umbrella sponsorship agreements between the Tour and GM refers to the Tour's Rules and Regulations. (Fitton Decl. Ex. D; Fitton Decl. Ex. E.)

¹² Toscano also cites as specific circumstantial evidence of concerted action among the defendants the fact that officers of title sponsor Pacificare served on the board of a local sponsor, whose other directors in turn were representative of other sponsors. According to Toscano, one of Pacificare's officers was also President of the local sponsor, and "participated at an organizational board meeting where the topics of discussion included the agreements necessary to be entered into with the Tour." (Pls.' Am.

70 F. Supp. 2d 1109, *1118 (1999 U.S. Dist. LEXIS 15818, **25

Because Toscano has failed to present evidence "showing that the inference of conspiracy is reasonable in light of the competing inference[] of independent action," Matsushita, 475 U.S. at 588, 106 S. Ct. at 1356, the title sponsor defendants are entitled **[**26]** to summary judgment.

The sponsor defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Dated: *12 October 1999.*

DAVID F. LEVI

United States District Judge

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In re Cardizem CD Antitrust Litig.

United States District Court for the Eastern District of Michigan, Southern Division

October 14, 1999, Decided ; October 15, 1999, Filed

Master File No. 99-md-1278, MDL No. 1278

Reporter

90 F. Supp. 2d 819 *; 1999 U.S. Dist. LEXIS 20698 **

IN RE CARDIZEM CD ANTITRUST LITIGATION, THIS DOCUMENT RELATES TO: Case Nos. 99-73314 (Lowy), 99-73750 (Aetna), 99-73667 (Gabriel), 99-73345 (Sizemore), 99-73981 (Eirich), 99-74377 (Glover), 99-73845 (Sunshine), 99-73713 (D'Esposito), 99-73871 (Galloway)

Disposition: [**1] Plaintiffs' motions for remand GRANTED in part and DENIED in part.

Core Terms

unjust enrichment, disgorgement, Plaintiffs', aggregated, Defendants', injunctive relief, attorney's fees, federal question, removal, class member, restitution, damages, amount-in-controversy, federal law, alleges, cause of action, state law, cases, statutory damages, integrated, amount in controversy, diversity jurisdiction, injunction, dollars, benefits, undivided interest, tens of millions, district court, well-pleaded, overpayment

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Procedural Matters > General Overview

[HN1](#) Removal, Procedural Matters

Generally, a civil case brought in state court may be removed by a defendant to federal court if it could have been brought there originally. The burden of establishing federal jurisdiction rests clearly upon the defendants as the removing party. The court is required to look to the complaint as it existed at the time the petition for removal was filed to determine the matter of federal jurisdiction raised by the defendant's notice of removal. The federal courts strictly construe removal petitions in a manner that resolves all doubts against removal.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Governments > Courts > Judicial Precedent

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

[HN2](#) Removal, Specific Cases Removed

90 F. Supp. 2d 819, *819LÁ999 U.S. Dist. LEXIS 20698, **1

In multidistrict litigation, the binding precedent, if any, from the circuit in which the litigation has been consolidated should be examined and, if none exists, an evaluation of other circuit law should be undertaken in order to make a reasoned decision regarding removal.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

HN3 Diversity Jurisdiction, Amount in Controversy

Although state law will dictate the nature of the claim asserted and what amounts are actually at stake, federal law will determine whether the amounts exceed the statutory minimum necessary for diversity jurisdiction under [28 U.S.C.S. § 1332](#).

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

HN4 Amount in Controversy, Determination

The defendant's burden of proof regarding the amount in controversy varies depending on whether and how much the plaintiff seeks in damages. If the plaintiff's complaint specifies that she is seeking an unspecified amount in damages, then the preponderance of the evidence (more likely than not) test will apply, and the defendant must show, by a preponderance standard, that the plaintiff's allegations, if properly proved, will justify an award in excess of the jurisdictional minimum. If the plaintiff's complaint specifies that she is seeking an amount less than the amount required for diversity jurisdiction, then the defendant must show by a substantial likelihood or reasonable probability that the plaintiff's claims meet the amount-in-controversy requirement.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

HN5 Removal, Specific Cases Removed

If the defendant shows that the relevant state law does not limit the plaintiff's damages to the amount pled, removal may still be an option. If plaintiff's cause of action and the relief actually sought clearly involve a controversy in excess of the required amount, removal is not defeated by a monetary prayer for less than the amount. If the state court complaint alleges damages less than the jurisdictional amount, but state law does not limit the plaintiff to the amount pleaded, there is the specter of bad-faith pleading to avoid removal.

Civil Procedure > Special Proceedings > Class Actions > Class Action Fairness Act

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

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Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

[HN6](#) Class Actions, Class Action Fairness Act

Generally, to permit removal of a class action lawsuit under the diversity jurisdiction statute, [28 U.S.C.S. § 1332](#), a defendant must show that the jurisdictional amount is satisfied by each class member, and the class members' claims may not be aggregated. The general rule is that while separate and distinct claims may not be aggregated, aggregation is permissible when two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest. An identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased. Accordingly, a determination whether a plaintiff's claim may be aggregated or not requires examination of the nature of the right the plaintiff is asserting.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

[HN7](#) Amount in Controversy, Determination

Although plaintiffs' claims in class actions for statutory damages and attorneys' fees cannot be aggregated, the claims for injunctive relief can be aggregated and thus the amount-in-controversy requirement for diversity jurisdiction can be satisfied.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

[HN8](#) Amount in Controversy, Determination

In determining the amount in controversy threshold for diversity jurisdiction is met, the court evaluates the cost of an injunction from the viewpoint of either the plaintiff or the defendant, considers the costs of compliance defendants will incur if the injunctive relief plaintiffs in class actions request were granted, does not exclude lost benefits from agreements plaintiffs allege are unlawful, concludes the injunctive relief may be aggregated, and concludes that defendants have satisfied their jurisdictional burden by showing that, more likely than not, the costs of complying with the requested injunction will exceed the jurisdictional threshold.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

90 F. Supp. 2d 819, *819LÁ999 U.S. Dist. LEXIS 20698, **1

Constitutional Law > Supremacy Clause > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

HN9 [blue icon] **Subject Matter Jurisdiction, Federal Questions**

The inquiry whether federal question jurisdiction exists under [28 U.S.C.S. § 1331](#) is guided by the well-pleaded complaint rule, which states that federal jurisdiction exists only when a federal question is presented on the plaintiff's properly pleaded complaint. Since a defendant may remove a case only if the claim could have been brought in federal court, the question for removal jurisdiction must also be determined by reference to the well-pleaded complaint. Moreover, because federal preemption is ordinarily a defense and does not appear on the face of a well-pleaded complaint, it does not authorize removal to federal court. Removal and preemption are two distinct concepts, and the fact that plaintiffs' claim might ultimately prove to be preempted does not establish that it is removable to federal court.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Constitutional Law > Supremacy Clause > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

HN10 [blue icon] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Hatch-Waxman Act, [21 U.S.C.S. § 355\(i\)](#), does not provide a private right of action and thus cannot be the basis for removal jurisdiction under the complete preemption doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN11 [blue icon] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Because the Noerr-Pennington doctrine constitutes a defense, it cannot form the basis for federal question jurisdiction.

Counsel: For LOUISIANA WHOLESALE DRUG COMPANY, INCORPORATED, SIXTEENTH STREET COMMUNITY HEALTH CENTER, plaintiffs: Bruce E. Gerstein, Garwin, Bronzaft, New York, NY.

For BENTOR, INCORPORATED, plaintiff: Stephen Lowey, Lowey, Dannenberg, White Plains, NY.

For ALBERT EIRICH, plaintiff: Elwood S. Simon, Elwood S. Simon Assoc., Birmingham, MI.

For AETNA U.S. HEALTHCARE, AETNA U.S. HEALTHCARE OF CALIFORNIA, INCORPORATED, plaintiffs: Joseph J. Tabacco, Berman, DeValerio, San Francisco, CA.

For DUANE READE, INCORPORATED, plaintiff: Richard B. Drubel, Boies & Schiller, Hanover, NH.

For HOECHST AG, HOECHST AKTIENGESELLSCHAFT, defendants: Joe Rebein, Shook, Hardy, Kansas City, MO.

For HOECHST MARION ROUSELL, INCORPORATED, defendant: Craig L. John, Dykema Gossett, Bloomfield Hills, MI. Joe Rebein, Shook, Hardy, Kansas City, MO.

For ANDRX PHARMACEUTICALS, INCORPORATED, ANDRX CORPORATION, defendants: Louis M. Solomon, Solomon, Zauderer, New York, NY.

For EUGENIA WYNNE SAMS, defendant: Michael D. Hausfeld, Cohen, Milstein, Washington, DC.

For PHILIP NEAL, movant: Elwood S. Simon, Elwood **[**2]** S. Simon Assoc., Birmingham, MI. Stephen Lowey, Lowey Dannenberg, White Plains, NY. Angela K. Green, Niewald, Waldeck, Kansas City, MO. Richard W. Cohen, Lowey, Dannenberg, White Plains, NY.

Judges: Honorable Nancy G. Edmunds, United States District Judge.

Opinion by: Nancy G. Edmunds

Opinion

[*822] MEMORANDUM OPINION AND ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS' MOTIONS FOR REMAND

Plaintiffs in these consolidated cases brought class-action suits in state court against Defendants Hoechst Aktiengesellschaft, Hoechst Marion Roussel, Inc. ("Hoechst"), and Andrx Pharmaceuticals, Inc. ("Andrx") alleging that Defendants have violated various state antitrust and related laws, have conspired and entered into arrangements that have effectively prevented any lower-cost generic version of a prescription heart medication, known as Cardizem CD, from entering the United States marketplace, and have thus harmed Plaintiffs and the putative class members. Defendants removed the actions to federal court, and Plaintiffs' motions for remand are presently before this Court in the following nine matters:¹

Case No.	Case Name
99-cv-73314	Pearl Bence Lowy v. Hoechst, et al.
99-cv-73750	Aetna U.S. Healthcare, Inc. v. Hoechst, et al.
99-cv-73667	Jan Gabriel v. Hoechst, et al.
99-cv-73345	Larry S. Sizemore v. Hoechst, et al.
99-cv-73981	Albert Eirich v. Hoechst, et al.
99-cv-74377	Shirlean Glover v. Hoechst, et al.
99-cv-73845	Sunshine Pharmacy of NY, Inc. v. Hoechst, et al.
99-cv-73713	D'Esposito v. Hoechst, et al.
99-cv-73871	Galloway, Inc. v. Hoechst, et al.

[3]**

¹ The only remaining remand issue pending before the Court involves Lightner et al. v. Hoechst Aktiengesellschaft, et al., Middle District of Alabama Case No. CV-99-A-784-N. The remand in the Lightner case is not being considered at this time because the Court has not yet received the record from the transferor court, has not yet assigned the matter a case number, and Defendants have not yet had an opportunity to respond to the pending motion.

Each case is addressed individually. The discussion begins with the cases where Plaintiffs plainly allege unjust enrichment or admit that Plaintiff and the class are seeking restitution or disgorgement: Gabriel, Sunshine Pharmacy, Eirich and Glover. Next, the Court addresses the cases where the Plaintiffs complaint specifically pleads for less than the required jurisdictional threshold amount for diversity jurisdiction: Sizemore; and those where the Plaintiff's complaint does not clearly allege unjust enrichment or seek the equitable remedies of [**4] disgorgement or restitution: Galloway, Inc. and D'Esposito. Here, the Court addresses Defendants' arguments that aggregation is proper with regard to Plaintiffs' claims for injunctive relief, statutory damages, and attorneys fees. Finally, the Court addresses those cases where there is no diversity of citizenship and removal, if proper, must be based on the federal question grounds Defendants assert: Lowy and Aetna U.S. Healthcare, Inc.

Plaintiffs' motions for remand are DENIED in Gabriel, Sunshine Pharmacy, Eirich, Glover, Sizemore, Galloway, Inc., and D'Esposito because Plaintiffs' complaints present integrated claims which satisfy the amount-in-controversy requirement for diversity jurisdiction. Plaintiffs' motions for remand are GRANTED in Lowy, and Aetna U.S. Healthcare, Inc. because the Court finds no basis for federal question jurisdiction.

I. Standard of Review

"[HN1](#)[] Generally, a civil case brought in state court may be removed by a defendant to federal court if it could have been brought there originally." [Gafford v. General Elec. Co., 997 F.2d 150, 155 \(6th Cir. 1993\)](#). The burden of establishing federal jurisdiction [**5] rests "clearly upon the defendants as the removing party." [Alexander v. Electronic Data Systems Corp., 13 F.3d 940, 949 \(6th Cir. 1994\)](#). The court is required to "look to the complaint as it existed at the time the petition for removal was filed to determine' the matter of federal jurisdiction raised by the defendant's notice of removal." [Alexander, 13 F.3d at 949](#) (quoting [Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272, 1277 \(6th Cir. 1991\)](#)). The federal courts strictly construe removal petitions in a manner that resolves all doubts against removal. [Her Majesty The Queen v. City of Detroit, 874 F.2d 332, 339 \(6th Cir. 1989\)](#).

II. Analysis

A. Diversity Jurisdiction - Amount in Controversy Disputes

Defendants assert that removal is proper here because the parties are completely diverse, and the amount in controversy exceeds the \$ 75,000 statutory minimum under [28 U.S.C. § 1332](#). Other than in Lowy and Aetna U.S. Healthcare, Inc., which are discussed below under federal question jurisdiction, Plaintiffs do not dispute that the parties are completely diverse but [**6] move for a remand asserting that Defendants cannot satisfy their burden of proving that the amount-in-controversy requirement under [§ 1332](#) is satisfied.

1. General Principles

a. **Controlling Law.** [HN2](#)[] In multidistrict litigation such as this, "the binding precedent, if any, from the Sixth Circuit should be examined and, if none exists, an evaluation of other circuit law should be undertaken in order to make a reasoned decision. This multidistrict litigation, ..., deserves to have but one interpretation of federal law." [In re Air Crash at Detroit Metro. Airport, 791 F. Supp. 1204, 1213 \(E.D. Mich. 1992\)](#). [HN3](#)[] Although state law will dictate the nature of the claim asserted and what amounts are actually at stake, federal law will determine whether the amounts exceed the statutory minimum necessary for diversity jurisdiction under [28 U.S.C. § 1332](#). See 15 [Moore's Federal Practice, § 102.101](#) (Matthew Bender 3d ed).

b. **Burden of Proof.** [HN4](#)[] The defendant's burden of proof regarding the amount in controversy varies depending on whether and how much the plaintiff seeks in damages. See [Gafford, 997 F.2d 150](#). If the [**7]

plaintiff's complaint specifies that she is seeking an unspecified amount in damages, then the "preponderance of the evidence" ('more likely than not') test will apply, and the Defendant must show, by a preponderance standard, that the plaintiffs allegations, if properly proved, will justify an award in excess of the jurisdictional minimum. Gafford, 997 F.2d at 158. If the plaintiffs complaint specifies that she is seeking an amount less than the amount required for diversity jurisdiction, then the defendant must show by a "substantial likelihood" or "reasonable probability" that the plaintiffs claims meet the amount-in-controversy requirement. See Gafford, 997 F.2d at 157-58; Crosby v. America Online, Inc., 967 F. Supp. 257, 261 n. 2 (N.D. Ohio 1997).²

[8] [*824] c. Aggregation of Class Action Claims**

HN6[↑] Generally, to permit removal of a class action lawsuit under the diversity jurisdiction statute, 28 U.S.C. § 1332, a defendant must show that the jurisdictional amount is satisfied by each class member, and the class members' claims may not be aggregated. Zahn v. International Paper Co., 414 U.S. 291, 38 L. Ed. 2d 511, 94 S. Ct. 505 (1973). "The general rule is that while separate and distinct claims may not be aggregated, aggregation is permissible when 'two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest.'" Sellers v. O'Connell, 701 F.2d 575, 579 (6th Cir. 1983) (quoting Snyder v. Harris, 394 U.S. 332, 335, 22 L. Ed. 2d 319, 89 S. Ct. 1053 (1969)). The Sixth Circuit has observed that "an identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased." Sellers, 701 F.2d at 579. Accordingly, a determination whether a plaintiffs claim may be aggregated or not requires [**9] examination of the nature of the right the plaintiff is asserting.

d. Overview of the Parties Arguments

Defendants assert that removal is proper and diversity jurisdiction exists because the various Plaintiffs claims for unjust enrichment, injunctive relief, statutory damages, and attorneys' fees may be considered in the aggregate when determining whether the amount in controversy requirement is satisfied. Plaintiffs argue to the contrary.

² **HN5**[↑] If the Defendant shows that the relevant state law does not limit the plaintiffs damages to the amount pled, removal may still be an option. As observed by one commentator, "if plaintiffs cause of action and the relief actually sought clearly involve a controversy in excess of the required amount, removal is not defeated by a monetary prayer for less than the amount." 15 Moore's Federal Practice, § 102.107[3] at 102.186.1 (Matthew Bender 3d ed). "If the state court complaint alleges damages less than the jurisdictional amount, but state law does not limit the plaintiff to the amount pleaded, there is the specter of bad-faith pleading to avoid removal." Id.

The Court is aware of the split in the circuits as to the burden of proof a defendant must satisfy when a plaintiff pleads for less than the jurisdictional amount, but declines to follow the approach adopted by either the Eleventh or Fifth Circuits and instead follows the approach discussed in Gafford. The Eleventh Circuit has held that a plaintiffs allegations as to the jurisdictional amount are entitled to deference and a presumption of truth and therefore, to avoid a remand, the defendant must prove "to a legal certainty" that the plaintiffs claim must exceed the jurisdictional minimum. Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994).

The Fifth Circuit applies a different burden of proof standard. In De Aguilar v. Boeing Co., 47 F.3d 1404 (5th Cir. 1995), which involved the crash of a Mexican airliner, the plaintiffs' attorneys filed a state court complaint alleging that the amount in controversy was less than the jurisdictional minimum for diversity jurisdiction and attached an affidavit which stated that the plaintiffs had agreed on an irrevocable cap on the amount of damages. The Fifth Circuit, observing that Texas law does not limit a plaintiffs damages to the amount set forth in the complaint, determined that it was necessary to address the fact that these "rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages well below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to avoid federal jurisdiction by virtue of the pleading." Id. at 1410. To protect against such manipulation by plaintiffs, the Court set forth the following shifting burden of proof rule: "if a defendant can show that the amount in controversy actually exceeds the jurisdictional amount, the plaintiff must be able to show that, as a matter of law, it is certain that he will not be able to recover more than the damages for which he has prayed in the state court complaint." Id. at 1411. The defendant satisfies its initial burden under a preponderance standard. The burden then shifts to the plaintiff and becomes a "legal certainty" obligation; i.e., plaintiff can satisfy the burden by showing that state law prohibits recovery of a greater amount than that in the complaint, or, if there is no such law, plaintiffs can file "a binding stipulation or affidavit with their complaints." Id. at 1412.

2. Specific Amount-in-Controversy Disputes

a. Where Unjust Enrichment and/or Disgorgement Plainly Asserted: Gabriel, Sunshine Pharmacy, Eirich and Glover

In each of these four cases, there is no dispute that the parties are completely diverse for the purposes of [28 U.S.C. § 1332](#) and that the Defendants are not citizens of the forum state as required for removal jurisdiction under [28 U.S.C. § 1441\(b\)](#). Rather, the dispute centers on [*825] the question whether each of these actions involves an amount in controversy that exceeds the \$ 75,000 jurisdictional minimum necessary for diversity jurisdiction. In each, Plaintiff did not specify the amount of damages sought. Accordingly, [**10] Defendants need only show, by a preponderance of the evidence, that the amount in controversy exceeds the jurisdictional amount. [Gafford, 997 F.2d at 158](#).

Consistent with other consolidated cases in this multidistrict litigation, the parties likewise do not dispute "the general rule that each member of the plaintiff's class must independently satisfy the jurisdictional amount-in-controversy requirement to meet the elements of [28 U.S.C. § 1332](#)." [Aetna U.S. Healthcare, Inc. v. Hoechst, et al., 48 F. Supp. 2d 37, 40 \(D. D.C. 1999\)](#) (citing [Zahn v. Intern'l Paper Co., 414 U.S. 291, 294-95, 94 S. Ct. 505, 38 L. Ed. 2d 511 \(1973\)](#) and [Snyder v. Harris, 394 U.S. 332, 336, 22 L. Ed. 2d 319, 89 S. Ct. 1053 \(1969\)](#)). Rather, "both sides focus on what has been characterized as an exception to this general rule. As both [Zahn](#) and [Snyder](#) state, the value of the claims of the entire class can be considered collectively against the statutory threshold when the members of the class 'unite to enforce a single title or right in which they have a common and undivided interest.'" [Aetna U.S. Healthcare, 48 F. Supp. 2d at 40-41](#) [**11] (quoting [Snyder, 394 U.S. at 335; Zahn, 414 U.S. at 294](#)).

Thus, to allow aggregation, Plaintiffs must allege an integrated claim. The Sixth Circuit has observed that "an identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased." [Sellers v. O'Connell, 701 F.2d 575, 579 \(6th Cir. 1983\)](#).

Defendants argue that Plaintiffs here have asserted claims for unjust enrichment and demand that Defendants disgorge tens of millions of dollars to the class. They further argue that such claims are properly construed as "integrated claims" that satisfy the amount-in-controversy requirement. This Court agrees. The Gabriel, Sunshine Pharmacy, Eirich and Glover complaints allege claims for unjust enrichment or seek disgorgement of the tens of millions of dollars Defendant Hoechst allegedly paid to Andrx in connection with the Hoechst-Andrx Agreement, and thus assert "an integrated claim arising from a common right of the class that can be collectively used to satisfy the \$ 75,000 amount-in-controversy requirement." [Aetna U.S. Healthcare, 48 F. Supp. 2d at 39-40 \(D. D.C. 1999\)](#). [**12]

(1) Jan Gabriel v. Hoechst, Case No. 99-cv-73667

Paragraphs 103-108 of Plaintiff Gabriel's complaint allege a cause of action for unjust enrichment against all Defendants, allege that it would be inequitable for Defendants to be permitted to retain any of the proceeds of the Hoechst-Andrx Agreement, and demand Defendants' "disgorgement to the Class of all such monies acquired through defendants' illegal and inequitable conduct." Illinois law recognizes an independent cause of action based on a theory of unjust enrichment where a plaintiff alleges "that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." [Peddinghaus v. Peddinghaus, 295 Ill. App. 3d 943, 948, 692 N.E.2d 1221, 1225, 230 Ill. Dec. 55 \(Ill. App. 1998\)](#) (quoting [HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc., 131 Ill. 2d 145, 160, 545 N.E.2d 672, 137 Ill. Dec. 19 \(1989\)](#)).

As observed by this Court and the United States District Court for the District of Columbia in [Aetna U.S. Healthcare, Inc. v. Hoechst, et al., 48 F. Supp. 2d at 41](#), [**13] when examining a substantially similar unjust enrichment claim seeking disgorgement, the amount-in-controversy requirement is satisfied here because the claim asserted is an integrated one and "the disgorgement remedy would inure to [*826] the benefit of the class rather than vindicate any alleged violations of individual rights." [Id. at 41](#). As in the District of Columbia case, Plaintiffs allegation of disgorgement against Andrx here "does not depend, rely upon, or arise out of the vindication of individual rights of the putative class members. In the words of the complaint, disgorgement is appropriate because 'it would be

inequitable for Andrx to be permitted to retain any of the proceeds of the Hoechst-Andrx Agreement."³ *Id. at 42* (quoting Plaintiffs Complaint P 138).³ This Court agrees with the *Aetna* Court's conclusion that, pursuant to the allegations in Plaintiffs complaint, (1) Plaintiff is seeking, on behalf of the putative class as a whole, to disgorge the tens of millions of dollars paid to Andrx in connection with the Hoechst-Andrx Agreement on the ground that it was unjustly enriched by such payment; (2) this claim is in addition to and separate [**14] from individual claims for compensation for overpayments to Defendant Hoechst; (3) "the disgorgement remedy would inure to the benefit of the class rather than vindicate any alleged violations of individual rights," *Id. at 41*; and (4) "if any given plaintiff does not collect his, her, or its share, then it does not change the amount of profits of which defendants must be disgorged. Thus, according to the complaint, the plaintiff class has a collective right to a disgorgement in the amount of the unjust enrichment, and that amount does not depend upon the number of plaintiffs." *Id.* Plaintiff, as alleged in the complaint, seeks to compel Andrx to pay to the Class the full amount it has received in connection with the Hoechst-Andrx Agreement, regardless of the actual damages proved by each plaintiff and regardless of the number of plaintiffs in the purported class. The possible recovery on this claim is either all or nothing. It is therefore an integrated claim for an amount that easily satisfies the jurisdictional requirement for diversity jurisdiction. This Court made similar observations and reached the same result in *Zucarrini v. Hoechst, et al.*, Case No. [**15] 98-cv-74043.

(2) Sunshine Pharmacy

Plaintiffs complaint in this matter similarly alleges a claim of unjust enrichment and seeks disgorgement. Paragraphs 64-69 of the complaint allege a cause of action for unjust enrichment under New York common law against all Defendants, allege that it would be inequitable for Defendants to be permitted to retain any of the proceeds of the Hoechst-Andrx Agreement, and demand "that defendants disgorge all such monies acquired through defendants' illegal and inequitable conduct." Complaint P 69. As to this unjust enrichment cause of action, Plaintiff seeks the following relief: "that the jury find and that this Court adjudge and decree that all defendants have been unjustly enriched by their illegal deceptive, unfair and unconscionable acts of unfair competition and restraint of trade, and that such defendants be required to disgorge to plaintiff and the Class all amounts by which they have been unjustly [**16] enriched, plus interest and costs". Complaint, Prayer for Relief, P B (emphasis added). Under New York law, a cause of action for unjust enrichment "requires the court to determine whether it is against equity and good conscience to permit defendant to retain what is sought to be recovered." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Chipetine*, 221 A.D.2d 284, 286, 634 N.Y.S.2d 469, 471 (N.Y. App. Div. 1995) (internal quotes and citation omitted). Because the unjust enrichment claim in the Sunshine Pharmacy complaint seeks disgorgement and is substantially similar to the claims discussed above, this Court likewise concludes that it states an integrated claim that satisfies the amount-in-controversy requirement necessary for diversity jurisdiction.

(3) Albert Eirich

The amount-in-controversy requirement is also satisfied in *Eirich*. Plaintiff's complaint [**827] here also alleges a similar claim for unjust enrichment and seeks disgorgement of the \$ 40 million paid to Andrx pursuant to the Hoechst-Andrx Agreement. Paragraphs 101-106 of the complaint allege a cause of action for unjust enrichment against all Defendants, allege that it would be inequitable for [**17] Defendants to be permitted to retain any of the proceeds of the Hoechst-Andrx Agreement, and demand that Defendants "disgorge all such monies acquired through Defendants' illegal and inequitable conduct." Complaint P 106. Under Wisconsin law, a cause of action "for recovery based upon unjust enrichment is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust. Accordingly, unjust enrichment is based on equitable principles, with damages being measured by the benefit conferred upon the defendant, not the plaintiffs loss." *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 188, 557 N.W.2d 67, 79-80 (1996) (internal quotes and citations omitted).

(4) Shirlean Glover

³The same language is found in the Gabriel Complaint P 106.

Plaintiffs complaint alleges a claim of unjust enrichment under North Carolina common law and seeks restitution from Defendants. Paragraphs 144-149 of the complaint, which allege the cause of action for unjust enrichment, assert that:

145. Plaintiff and Class members have conferred a benefit upon the Hoechst Defendants by virtue of, and the Hoechst Defendants have knowingly [**18] accepted and benefitted from, the overcharges the Hoechst Defendants have been able to levy on plaintiff and Class members for Cardizem CD. The benefit conferred and accepted was not gratuitous in nature.

146. Defendant Andrx has benefitted from the unlawful acts alleged in this Complaint to the extent of the payments it has received and will continue to receive under the Hoechst-Andrx Agreement. Funds for such payments by Hoechst are derived in part from plaintiffs and Class members' overpayment of Cardizem CD. Plaintiff and Class members have conferred a benefit upon Defendant Andrx by virtue of, and Defendant Andrx has knowingly accepted and benefitted from, the overcharges the Hoechst Defendants have been able to levy on plaintiff and Class members for Cardizem CD in that such overpayment is the source and/or motivation for the payments made (and to be made) to Defendant Andrx under the Hoechst-Andrx Agreement. The benefit conferred and acceptable was not gratuitous in nature.

147. It is inequitable for Defendant Andrx to be permitted to retain any of the proceeds of the Hoechst-Andrx Agreement to the extent such funds were derived from plaintiff's and Class [**19] members' overpayment for Cardizem CD.

148. It is inequitable for the Hoechst Defendants to be permitted to retain any portion of the overpayment for Cardizem CD by plaintiff or the Class members which is derived from their unfair and unconscionable methods, acts and trade practices, including but not limited to the Hoechst-Andrx Agreement and other acts alleged herein regarding efforts to prevent or limit the introduction of QD Diltiazem products and generic Cardizem CD.

149. Plaintiff and Class members are entitled to restitution from defendants to the extent of their overpayments.

Complaint PP 145-149 (emphasis added). Plaintiff also prays for relief that includes [*828] treble damages for statutory violations, punitive damages, declaratory and injunctive relief, and "restitution of the amounts overpaid by them for Cardizem CD during the Class Period". Complaint, Prayer for Relief P f.

Although Plaintiff alleges a claim for unjust enrichment under North Carolina law, she attempts to limit recovery under this claim to the amount each member of the class overpaid for their Cardizem CD prescription. Under North Carolina law, however, an unjust enrichment claim [**20] is not limited to a plaintiffs losses. It is not designed to compensate a plaintiff for losses it suffered; rather it is designed to force a defendant to disgorge benefits that it would be unjust for it to keep. North Carolina law distinguishes between restitution recovery and damages recovery and observes that the damages award is designed to compensate a plaintiff for her loss whereas a restitution award is designed to deprive a defendant of benefits that in equity and good conscience the defendant ought not to keep. Plaintiffs unjust enrichment claim, and the determination whether it presents an integrated claim, must be evaluated with these principles in mind.

Under North Carolina law, "unjust enrichment" has been defined as:

a legal term characterizing the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself [or herself] at the expense of another.

[Adams v. H.L. Moore, 96 N.C. App. 359, 362, 385 S.E.2d 799, 801 \(N.C. App. 1989\)](#) [**21] (quoting [Ivey v. Williams, 74 N.C. App. 532, 534, 328 S.E.2d 837, 838-39 \(1985\)](#)).

The North Carolina courts have also observed that it is not necessary in all unjust enrichment cases "that the plaintiff must have actual damages." [Booher v. Frue, 86 N.C. App. 390, 393, 358 S.E.2d 127, 129 \(N.C. App. 1987\)](#), aff'd, [321 N.C. 590, 364 S.E.2d 141 \(1988\)](#). This is because "restitution recovery and damages recovery are based

on entirely different theories.... The main purpose of the damages award is some rough kind of compensation for the plaintiffs loss. This is not the case with every kind of money award, only with the damages award. In this respect, restitution stands in direct contrast to the damages action. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any unjust enrichment on the defendant's part. The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to [**22] keep ... even though plaintiff may have suffered no demonstrable losses." [Booher, 86 N.C. App. at 393-94, 358 S.E.2d at 129](#) (internal quotes and citations omitted).

Thus, if it is shown that, in equity and good conscience, Defendant Andrx should not keep the tens of millions of dollars it has been paid in connection with the Hoechst/Andrx Agreement, then under North Carolina law, it will be disgorged of that entire amount. Under equitable principles, it makes no sense to say that it would be unjust for a defendant to keep a sum of money and then limit the amount disgorged to only that amount claimed by individual plaintiffs. As observed by the Sixth Circuit in [Sellers v. O'Connell, 701 F.2d 575, 579 \(6th Cir. 1983\)](#), "an identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased." Here, the entire amount would be disgorged, and if any one class member does not collect his or her share, then the remaining plaintiffs' shares will be increased. Plaintiff cannot change the integrated nature of her unjust enrichment claim by [*829] limiting the [**23] share she wishes to take from the disgorged amount. This Court finds that the unjust enrichment claim asserted in the [Glover](#) complaint is an integrated claim that satisfies the amount-in-controversy requirement.

b. Where Unjust Enrichment Alleged and Disgorgement/Restitution Sought but Plaintiff Expressly Disclaims Damages in Excess of \$ 75,000: [Sizemore](#)

(1) Larry S. Sizemore.

The [Sizemore](#) action was originally filed in Tennessee state court and brought on behalf of a putative class of consumers in fifteen different jurisdictions including Tennessee, Michigan, California, Maine, Wisconsin, Minnesota, Mississippi, Alabama, New Mexico, South Dakota, North Carolina, Kansas, West Virginia, North Dakota, and the District of Columbia. [See Sizemore](#) Complaint P 1. It alleges violations of Tennessee's Trade Practices and Consumer Protections Acts as well as violations of similar antitrust laws in the 14 additional jurisdictions listed above. *Id.* Similar to the other complaints in this multidistrict litigation, Plaintiff alleges that Defendants' conduct has resulted in "unjust enrichment inuring to the benefit of the Hoechst Defendants, and unjust enrichment [**24] to Andrx." [Id. at P 65](#). Plaintiff prays for relief "awarding plaintiff and all members of the Class compensatory and other legal damages in an amount which may be proven at trial, together with interest thereon, including, but not limited to, treble damages pursuant to [Tenn. Code Ann. § 47-18-109\(a\)\(3\)](#)", costs, expenses, reasonable attorneys fees, and "such other and further relief to which plaintiff and the class are entitled." *Id.*, Prayer for Relief PP 3-6. Plaintiff also seeks to avoid removal by pleading for less than the jurisdictional amount. Plaintiff's complaint expressly states that "the amount in controversy as to plaintiff individually and each class member individually does not exceed \$ 74,999, including interest, and award of attorneys' fees and costs, disgorgement, restitution or treble damages" and Plaintiff expressly "disclaims for himself any recovery greater than \$ 74,999 (including interest, any award of attorneys' fees and costs, disgorgement, restitution or treble damages)". [Sizemore](#) Complaint P 6 (emphasis added). In his Reply, Plaintiff acknowledges that he and the Class are seeking disgorgement. [See Plf's Reply at 10-14.](#)⁴

[**25] Because Plaintiff has expressly claimed a damage amount that is less than the jurisdictional minimum, Defendants have a higher standard of proof. Defendants must show that there is a substantial likelihood or reasonable probability that the amount in controversy actually will exceed the jurisdictional threshold. [See Gafford, 997 F.2d at 157-158](#). The burden is satisfied here.

⁴ The Court is mindful of Plaintiff's attempt to distance himself from these statements at the hearing on this matter. Despite that attempt, the Court finds that the [Sizemore](#) complaint does make allegations of unjust enrichment and does include "disgorgement" when discussing the items of recovery sought therein.

Plaintiff argues that Defendants cannot satisfy the amount-in-controversy requirement because: (1) Plaintiff and each class member plead an amount less than the \$ 75,000 jurisdictional minimum; and (2) there is no common, integrated claim because each individual disgorgement claim is tied to the unlawful overcharges paid by each, "indirectly to the Hoechst defendants which Hoechst shared with Andrx pursuant to the Hoechst/Andrx Agreement." See Plaintiff's Reply at 10-14. This Court disagrees with Plaintiff's arguments.

First, Plaintiff's complaint does not so limit its unjust enrichment allegation and concomitant disgorgement demand as Plaintiff does in his Reply. Because Plaintiff's complaint can be construed as seeking disgorgement of the amounts paid to Andrx under the Hoechst/Andrx [**26] Agreement based on the theory of unjust enrichment, [*830] this Court concludes that it asserts an integrated claim that satisfies the amount-in-controversy requirement under [28 U.S.C. § 1332](#).

When the nature of the unjust enrichment/disgorgement claim is examined under the law of the various jurisdictions under which Plaintiff brings this action, it becomes apparent that Plaintiff's request for disgorgement of the tens of millions of dollars paid pursuant to the Hoechst/Andrx Agreement constitutes an integrated claim in which Plaintiff and the putative class possess a common and undivided interest. To illustrate, under Wisconsin law, which is one of the jurisdictions included in this action, the courts recognize that "unjust enrichment is based on equitable principles, with damages being measured by the benefit conferred upon the defendant, not the plaintiff's loss."

[Management Computer Services, 557 N.W.2d at 79-80](#). Likewise, under North Carolina law, which is also one of the jurisdictions included in this action, the courts distinguish between restitution recovery for unjust enrichment and compensatory damages because they are premised on entirely [**27] different theories. "The main purpose of the damage award is some rough kind of compensation for the plaintiff's loss. This is not the case with every kind of money award, only with the damages award. ... The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any unjust enrichment on the defendant's part. The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep ... even though plaintiff may have suffered no demonstrable losses." [Booher v. Frue, 86 N.C. App. 390, 393-94, 358 S.E.2d 127, 129 \(N.C. App. 1987\)](#) (internal quotes and citations omitted).

Finally, the Court observes that an argument, similar to Plaintiff's here, was recently rejected by the District Court for the Eastern District of Tennessee in a matter that is now consolidated in this multidistrict litigation, [Eugenia Wynne Sams v. Hoechst, et al.](#), Tenn. Case No. 2:98-cv-348, Our Case No. 99-cv-73190. In [Sams](#), the plaintiff's [**28] complaint has a similar clause expressly limiting the damage amount per plaintiff to less than the \$ 75,000 jurisdictional minimum. The court denied Plaintiff's motion for a remand observing that, although "there is nothing inherently improper in avoiding federal diversity jurisdiction by seeking a recovery below the jurisdictional amount", aggregation for jurisdictional purposes was permissible here because plaintiff's "claim for disgorgement, which obviously involves tens of millions of dollars, is the type of integrated claim which satisfies the jurisdictional amount in controversy despite the plaintiff's disclaimers." [Sams](#), Tenn. Case No. 2:98-cv-348, 4/9/99 Order at 5. The Tennessee District Court also denied a motion for reconsideration of its April 9, 1999 order denying Plaintiff's motion for a remand. [See Sams](#), Tenn. Case No. 2:98-cv-348, 5/20/99 Order. Plaintiff urged reconsideration arguing "that her disgorgement claim does not satisfy the amount in controversy requirements because each class member's right to a share of this money would be tied to his or her individual compensatory damages for drug overpayments." [Id.](#) at 3. The court rejected the plaintiff's argument, [**29] observed that "the disgorgement of illegal profits sought in this case is over and above any fund for payment of compensatory or punitive damages", and concluded that, "in this Court's judgment, it must, of necessity, produce a common fund in which the individual class members would hold an undivided, group right or interest entirely unrelated to their right to recover damages." [Id.](#) at 4-5.

c. Where Unjust Enrichment and/or Disgorgement Claims Are Not Plainly Asserted: [Galloway, Inc.](#) and [Joseph D'Esposito](#)

In both [Galloway, Inc.](#) and [D'Esposito](#), there is no express claim for unjust enrichment [*831] and/or disgorgement. In [D'Esposito](#), the Plaintiff's Reply asserts that Plaintiff and the class are not alleging a claim for unjust enrichment

and are not seeking disgorgement or restitution. In Galloway, Inc., Plaintiffs do not clarify their intent. Because these cases are closer than those addressed above, the Court explores Defendants' additional arguments in support of their claim that each action involves an amount in controversy in excess of \$ 75,000 as required under 28 U.S.C. § 1332. These include arguments that Plaintiffs' claims [**30] for statutory damages, statutory attorneys' fees, and injunctive relief can be aggregated so as to satisfy the amount-in-controversy requirement. The Court finds that, HN7[ although Plaintiffs' claims for statutory damages and attorneys' fees cannot be aggregated, the claims for injunctive relief can be aggregated and thus the amount-in-controversy requirement is satisfied in these two cases.

(1) Galloway, Inc.

The Galloway, Inc. Complaint, filed February 17, 1999 as a class action suit by pharmacies and other retail sellers, seeks redress "under the laws of the State of California, and all other jurisdictions that recognize the standing of indirect purchasers to recover damages based on combinations or conspiracies in restraint of trade for defendants' illegal course of conduct in restraining competition". Complaint P 1 (emphasis added). Plaintiff's complaint alleges that Defendants violated Sections 16720 and 16726 of the California Business and Professions Code. There is no common law claim for unjust enrichment and no specific claim for equitable relief. There are, however, allegations that: (1) Plaintiff and the Class are victims of the Hoechst-Andrx collusive and unlawful [**31] conduct (P 62); (2) the Hoechst-Andrx conduct "has resulted in overpayment by Plaintiffs and the Class of many millions of dollars for Cardizem CD, and a concomitant gain and unjust enrichment inuring to the benefit of Hoechst and Andrx" (P 63); (3) Plaintiffs and the Class are persons injured in their business or property by reason of Defendants' violations and are authorized to bring suit pursuant to Section 16750 of the California Business and Professions Code (P 76); and (4) Plaintiffs and the members of the Class have each been harmed and injured in their business and property by Defendants' actions, including among other things, loss of monies paid for the artificially inflated pharmaceuticals (P 78). Plaintiffs pray for damages, injunctive and declaratory relief. The damage claim is broad: "That damages be granted according to proof, and that Plaintiffs and the Class be awarded treble damages or statutory damages, where applicable, attorneys' fees, costs and disbursements." Complaint, Prayer for Relief P (d). There is also a claim for "further relief as the Court may deem just and proper under the circumstances." Id. at P (g).

Defendants assert that Plaintiff's complaint, [**32] Paragraph 63, alleges Defendants were unjustly enriched by their illegal conduct, and thus, this Court should construe that allegation as a claim for unjust enrichment seeking disgorgement of the tens of millions of dollars paid to Andrx in connection with the Hoechst/Andrx Agreement. See Andrx Response at 8. Defendants also emphasize the fact that, even if disgorgement or a fluid recovery fund may not be available under § 16750 of the California Business and Professions Code, disgorgement may be available under one of the other jurisdictions under which Plaintiffs bring their claims.

(2) Joseph D'Esposito

The D'Esposito Complaint, filed February 22, 1999 in New York state court, alleges an antitrust class action brought by New York purchasers of Cardizem CD against Defendants for violations of New York General Business Law § 340 (the "Donnelly Act"). Specifically, the Complaint alleges two causes of action: violation of the Donnelly Act and an action for [*832] injunctive relief. Paragraphs 116-117 assert that "all Cardizem CD purchasers are the intended, foreseeable, and direct victims of [the described] collusive and unlawful conduct by the Hoechst Defendants and [**33] Andrx, and as a result," they have sustained and will continue to sustain economic damages "attributable to this illegal conspiracy in restraint of trade" in the form of "overpayment of tens of millions of dollars for Cardizem CD." Paragraph 123 further alleges that Andrx has converted the alleged monopoly "into a \$ 40 million per year windfall for which it is required to do nothing." In his Prayer for Relief, Plaintiff seeks, among other things, treble damages, an injunction "permanently enjoining defendants from continuing to engage in the unlawful conduct alleged", reasonable attorneys fees, and "such other relief" as the court may deem just and proper under the circumstances. D'Esposito Complaint, Prayer for Relief, PP c, d, f, and g.

Plaintiff does not allege a claim for unjust enrichment or seek disgorgement or restitution with respect to the tens of millions of dollars allegedly paid to Andrx by Hoechst in connection with the Hoechst/Andrx Agreement. Nonetheless, Defendants insist that Plaintiff's complaint alleges such a claim. Plaintiff's Reply, however,

unequivocally states that the complaint contains no claim for unjust enrichment, nor any demand for disgorgement. See [\[**34\]](#) Plf's Reply at 2 and 4.

Defendants also argue that removal is proper here because Plaintiffs' claims for statutory damages, attorneys' fees, and injunctive relief should be aggregated when considering whether the amount in controversy requirement is satisfied. The Court explores these arguments below.

d. Argument that Claims for Injunctive Relief, Statutory Damages, and Attorneys' Fees Can Be Aggregated: Galloway, Inc. and D'Esposito

While it is true that potential awards of injunctive relief, statutory damages, and attorneys' fees can be added to compensatory damages and considered in determining whether the amount-in-controversy requirement is met as to each Plaintiff, the pivotal question here is whether any of these may be aggregated instead of being measured pro rata. See [Crosby, 967 F. Supp. at 261](#) (citing [Clark v. Nat'l Travelers Life Ins. Co., 518 F.2d 1167, 1168 \(6th Cir. 1975\)](#)) and [Sellers v. O'Connell, 701 F.2d 575, 579 \(6th Cir. 1983\)](#)). If they can be aggregated, then Defendants will easily satisfy their burden as to the amount-in-controversy requirement. This Court concludes that, although the claims for [\[**35\]](#) statutory damages and attorneys' fees at issue here should not be aggregated, the claims for injunctive relief should be aggregated.

1. Statutory Damages.

In the [Galloway, Inc.](#) action, Plaintiffs seek statutory damages. They assert, however, that Defendants have not and cannot meet their burden and show the amount in controversy requirement is satisfied. Despite the "many millions of dollars" that "Plaintiffs and the Class overpaid for their prescription drugs," Plaintiffs argue, this amount "breaks down into only thousands per Class member. For example, if the overcharge during the Class Period amounted to \$ 100,000,000, and there were 10,000 Class members throughout California and the relevant jurisdictions, then prorated damages would amount to \$ 10,000 per Class member. Even trebling this amount and adding prorated attorneys' fees and injunctive relief would result in an average loss per Class member of about one-half the jurisdictional minimum." Plaintiff's Br. at 9. This Court agrees that Defendants have not met their burden here.

Defendants do not attempt to show that the each Class member's statutory damages will carry it over the required jurisdictional threshold [\[**36\]](#) amount. They do not explain why this statutory damage claim [\[*833\]](#) should be construed as an "integrated" claim; i.e., one where two or more plaintiffs have united to enforce a common and undivided interest, as opposed to separate and distinct claims based on each Plaintiff and class members' overpayments. Rather, they merely assert that statutory damages of this sort are punitive in nature and thus should be aggregated like some courts have aggregated punitive damages. They rely for support on decisions from the Fifth and Eleventh Circuits which allowed the aggregation of punitive damages in a class action suit after examining the state law basis for the punitive damage claim and observing that such damages were not awarded to compensate plaintiffs for individual losses but rather were awarded to serve a broader societal purpose of punishing and deterring the defendant's unlawful conduct towards all of the class members. See [Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1358-59 \(11th Cir. 1996\)](#) (applying Alabama law); [Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1333 \(5th Cir. 1995\)](#) (applying Mississippi law).⁵ This Court finds Defendants arguments for [\[**37\]](#) aggregating the claimed statutory damages unconvincing.

⁵ This result and analysis has been rejected by the Second and Seventh Circuits. See [Gilman v. BHC Securities, Inc., 104 F.3d 1418, 1428-31 \(2d Cir. 1997\)](#) (where the Court observed that punitive damages may not be aggregated unless the plaintiffs underlying claims can be aggregated); [In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 608-09 \(7th Cir. 1997\)](#) (where the Court observed that "[a] plaintiffs award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant.... Whether it is a good rule or a bad rule it shows that the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct").

Defendants fail to discuss the state law which creates Plaintiffs' right to statutory damages and whether that law is designed to serve a broad societal purpose (possibly [**38] justifying aggregation) or whether it is designed to serve a narrower individual remedial purpose. The United States District Court for the Northern District of California recently observed that similar allegations in a related case, brought pursuant to the same California Business and Professional Code sections at issue here, required the Court to look to [§ 16750](#) for available remedies. See Betnor Inc. v. Hoechst, et al. and Aetna/US Health Care, Inc. v. Hoechst, et al., California Case Nos. 98-3609 and 98-4729, 4/14/99 Mem. and Order Denying Plaintiff's motion for remand, at 9-10. The Betnor Court further observed that [§ 16750](#) allows treble damages, injunctive relief, attorneys' fee and costs but there is no mention of punitive damages as an available remedy. Id. Accordingly, the Court found punitive damages were not available and thus there was no foundation for the defendants' aggregation argument. Id. Likewise, there is no foundation for Defendants' aggregation argument here.

2. Attorney Fees

In both the Galloway, Inc. and D'Esposito actions, Plaintiffs seek statutory attorneys' fees. Defendants argue that, because the attorneys' fees in [**39] these complex class actions are likely to exceed \$ 75,000, the amount-in-controversy requirement is satisfied. Defendants' argument assumes that the attorneys' fees may be aggregated. There is a split in the courts on the issue whether attorneys' fees may be aggregated. Some courts allow aggregation by applying the Eleventh Circuit's analysis in Tapscott which permits the aggregation of state law claims for punitive damages when there is a recognized broad societal purpose served by such an award. See Howard v. Globe Life Ins. Co., 973 F. Supp. 1412, 1419-20 (N.D. Fla. 1996); In re Abbott Labs., 51 F.3d 524, 526 (5th Cir. 1995) (where the Court observed that the Louisiana statutes at issue attributed all of a class's attorneys' fees to the named plaintiffs, thus allowing aggregation and satisfaction of the amount-in-controversy requirement for diversity jurisdiction). [*834] Others do not allow aggregation of attorneys' fees and hold instead that the fees must be pro rated across the plaintiff class because the underlying claims are separate and distinct. See Goldberg v. CPC Int'l, Inc., 678 F.2d 1365, 1367 (9th Cir. 1982); Lauchheimer v. Gulf Oil, 6 F. Supp. 2d 339, 345-346 (D. N.J. 1998) [**40] (disagreeing with the rationale and result in Howard v. Globe Life Ins. Co., 973 F. Supp. 1412 (N.D. Fla. 1996); Crosby, 967 F. Supp. at 261-62.

This Court finds the better approach to be that which "decline[s] to treat prospective attorneys' fees in class actions as a bootstrap for establishing federal jurisdiction." Colon v. Rent-A-Center, Inc., 13 F. Supp. 2d 553, 562 (S.D. N.Y. 1998). "The better approach is to allocate to each Plaintiff, for jurisdictional purposes only, his or her individual and pro rata share as a class member of the total attorney's fees." Lauchheimer, 6 F. Supp. 2d at 346. Accordingly, to satisfy their burden here, Defendants must show, by a preponderance standard, that the attorneys' fees will exceed \$ 75,000 per class member. Defendants have not met this burden.

3. Injunctive Relief

Both the Galloway, Inc. and D'Esposito complaints seek an injunction enjoining Defendants from enforcing the arrangements and conspiracies described in the complaints, including enforcement of the Hoechst/Andrx Agreement, and enjoining Defendants from continuing violations as alleged therein. [**41] Defendant Andrx argues that, if an injunction is granted, it will cost it more than the \$ 75,000 jurisdictional threshold amount to comply with it because they will no longer be able to reap the benefits (in the tens of millions of dollars) it would otherwise receive under the Hoechst-Andrx Agreement or under the license it was granted in that same agreement regarding the Hoechst patents.⁶ Plaintiffs argue that the Court cannot value the injunctive relief from Defendants' viewpoint, and even if it does, Defendants cannot consider the value of agreements Plaintiffs allege are unlawful, and Defendants cannot aggregate their costs of complying with Plaintiff's requested injunctive relief. This Court is not persuaded by Plaintiffs' arguments. HN8[↑] The Court rather follows the legal authority which evaluates the cost of

⁶ Although Defendant Hoechst joins Defendant Andrx's arguments regarding diversity jurisdiction, it does not state what costs it will incur if required to comply with the injunctive relief Plaintiffs seek.

an injunction from the viewpoint of either the plaintiff or the defendant, considers the costs of compliance Defendants will incur if the injunctive relief Plaintiffs request were granted, does not exclude lost benefits from agreements Plaintiffs allege are unlawful, concludes the injunctive relief may be aggregated, and concludes that Defendants have satisfied their jurisdictional **[**42]** burden by showing that, more likely than not, the costs of complying with the requested injunction will exceed the jurisdictional threshold in the Galloway, Inc. and D'Esposito matters.

There is a split in the federal courts concerning whose viewpoint-plaintiff's, defendant's, or either one's--the Court considers when placing a value on the requested injunction. See 14B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 3703 (West 3d ed. 1998); 15 James Wm. Moore et al., Moore's Federal Practice § 102-109 (Matthew Bender 3d ed.). This Court finds the "either viewpoint" to be the better approach. See In re Brand Name Prescription Drugs, 123 F.3d at 609-610. See also Crosby v. America Online, Inc., 967 F. Supp. 257, 264 (N.D. Ohio 1997); **[**43]** Hambell v. Alphagraphics Franchising, Inc., 779 F. Supp. 910, 912 (E.D. Mich. 1991). This rule serves "the purpose of a jurisdictional amount in controversy requirement -- to keep trivial cases away from the federal court system." 14B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 3703 at 124-25 (West 3d ed. 1998). "Because the jurisdictional amount was enacted primarily to measure substantiality of the suit, the question of whether the controversy is substantial should not be answered unqualifiedly by looking only to the value of that which the plaintiff stands to gain or lose." 15 James Wm. Moore et al., Moore's Federal Practice § 102.109[4] at 102-200 (Matthew Bender 3d ed.). Under this "either viewpoint" approach, the Court considers the pecuniary result to either party and considers both "the value to the plaintiff of conducting his ... personal affairs free from the activity sought to be enjoined" and the costs of compliance the defendant will incur if the injunction is granted. 14B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 3708 at 239 (West 3d ed. 1998).

Moreover, when considering **[**44]** the defendant's costs of compliance, the Court is not required to ignore pecuniary benefits that derive from conduct the plaintiff alleges is unlawful. The Court is not persuaded by Plaintiffs' arguments to the contrary, and Plaintiffs' reliance on dicta in In re Brand Name Prescription Drugs, 123 F.3d at 610 is misplaced. At this stage of the litigation, the Court is attempting to value the amount "in controversy." The legality of Defendants' conduct is at issue in this case, and thus, the amount in controversy, what is being fought over, includes the value of the Hoechst/Andrx Agreement and other transactions that Plaintiffs' allege are illegal. To adopt the approach Plaintiffs' urge would force the Court to simply assume Defendants' liability and ignore its potential costs of complying with the requested injunctive relief. Plaintiffs do not cite any decisions holding that this is an acceptable approach, and this Court finds its arguments unpersuasive.

When applying the "either viewpoint" approach, the Court must be careful to ensure that there is no circumvention of the nonaggregation rule expressed in Zahn and Snyder. Thus, in a class action case, "the **[**45]** court must determine the nature of the right that would be protected by an injunction in order to set the appropriate value." Shelly v. Southern Bell Tel. & Tel. Co., Inc., 873 F. Supp. 613, 616 (M.D. Ala. 1995) (citing Snow v. Ford Motor Co., 561 F.2d 787, 790 (9th Cir. 1977)). Where the claims of the plaintiff and the class members are separate and distinct, the defendant "is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated." In re Brand Name Prescription Drugs, 123 F.3d at 610 (citing Snow v. Ford Motor Co., 561 F.2d 787, 790 (9th Cir. 1977)). "Each plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint." Id. On the other hand, where the plaintiff and the class members have a common and undivided interest in the injunctive relief, it is appropriate to aggregate the total cost of the requested injunctive relief from the defendant's viewpoint. See Earnest v. General Motors Corp., 923 F. Supp. 1469, 1472-73 (N.D. Ala. 1996) (where the court observed that where the equitable **[**46]** relief sought "would benefit the putative class as a whole and not just any individual plaintiff", then "each plaintiff has a common interest in the injunctive and declaratory relief"); Hoffman v. Vulcan Materials Co., 19 F. Supp. 2d 475, 483 (M.D. N.C. 1998) (where the court considered the defendant's costs of complying with plaintiff's requested injunctive relief and observed that "because the defendant will sustain this loss even if only one plaintiff were to obtain the injunction, this is a case where plaintiffs have an undivided interest in the injunction").

Defendants have presented evidence that the cost of compliance with the requested injunction will exceed the amount in controversy threshold because it will lose the tens of millions of dollars it would otherwise receive under the Hoechst-Andrx Agreement and under the license it was granted in that same Agreement regarding [*836] the Hoechst patents. Defendants also argue that, because Plaintiffs and the class are seeking to enforce a single right in which they have a common and undivided interest, the entire value of its costs of compliance with the requested injunctive relief may be considered in determining the [**47] amount in controversy for jurisdictional purposes. This Court agrees. Plaintiffs seek injunctive relief that will benefit the class as a whole. Defendants' costs of compliance do not depend upon the size of the class or the identity of its members. Accordingly, it is based upon a common and undivided interest and constitutes an integrated claim; its entire value may be considered when determining whether the amount-in-controversy requirement for diversity jurisdiction is satisfied, and that requirement is satisfied here.

To summarize, this Court finds that Defendants have satisfied their burden of showing that this Court has diversity jurisdiction over the Galloway, Inc. and D'Esposito matters. This, however does not end the Court's inquiry. Defendants also assert that this Court has federal question jurisdiction over two Florida state court actions, Pearl Lowy and Aetna U.S. Healthcare, Inc. In the two Florida actions, removal jurisdiction is not available, unless federal question jurisdiction exists, because Defendant Andrx and Plaintiffs are both Florida citizens, thus precluding removal under 28 U.S.C. § 1441(b).

B. Federal Question [48] Jurisdiction: Galloway, Inc., D'Esposito, Pearl Lowy, and Aetna U.S. Healthcare, Inc.**

Defendants contend that federal question jurisdiction exists under 28 U.S.C. § 1331 because: (1) the Hatch-Waxman Act completely preempts state laws that would render illegal conduct authorized or mandated under that Act; and (2) application of the "artful pleading" exception to the well-pleaded complaint rule is appropriate where resolution of Plaintiffs' claims require resolution of substantial questions of federal law; i.e., interpretation of the Hatch-Waxman Act, a FTC Consent Order, patent law and the Noerr-Pennington Doctrine.

The same federal question arguments Defendants advance here have been repeatedly rejected by all but one of the federal district courts that has considered them. Compare Aetna U.S. Healthcare, Inc. v. Hoechst, et al., Case No. 99-2034-KHV (D. Kan. June 9, 1999); Betnor, Inc. and Aetna/US Healthcare, Inc., et al. v. Hoechst, et al., Consolidated Cases C-98-3609 MHP and C-98-4729 MHP (N.D. Cal. April 14, 1999); Sams v. Hoechst, et al., Case No. 2:98-CV-348 (E.D. Tenn. April 7, 1999); Lightner, et al. v. Hoechst, et al. [**49], Case No. 98-T-1057 (M.D.Ala. November 23, 1998) (Decisions rejecting Defendants' federal question jurisdiction arguments) with Aetna/U.S. Healthcare, Inc. v. Hoechst, et al., Case No. 99-124 DWF/AJB (D. Minn. April 29, 1999) (sole decision accepting Defendants' federal question jurisdiction arguments). This Court finds persuasive the analysis and result reached by the majority of the federal district courts and likewise rejects Defendants' federal question jurisdiction arguments.

1. Guiding Principles

H9 The inquiry whether federal question jurisdiction exists under 28 U.S.C. § 1331 "is guided by the well-pleaded complaint rule, which states that 'federal jurisdiction exists only when a federal question is presented on the plaintiff's properly pleaded complaint.'" Strong v. Electronics Pacing Systems, Inc., 78 F.3d 256, 259 (6th Cir. 1996) (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987)). "Since a defendant may remove a case only if the claim could have been brought in federal court, 28 U.S.C. § 1441(b), ..., the question for removal jurisdiction [**50] must also be determined by reference to the 'well-pleaded complaint.'" Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808, *837, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986). Moreover, because federal preemption is ordinarily a defense and does not appear on the face of a well-pleaded complaint, it "does not authorize removal to federal court." Strong, 78 F.3d at 259 (quoting Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1986)). "'Removal and preemption are two distinct concepts,' and the fact that plaintiffs' claim might ultimately prove to be preempted does not establish that it

is removable to federal court." [Strong, 78 F.3d at 261](#) (quoting [Warner v. Ford Motor Co., 46 F.3d 531, 535 \(6th Cir. 1995\)](#)).

There are two exceptions to the well-pleaded complaint rule: (1) the "complete preemption" doctrine permits removal when the state law the complaint is based upon has been totally preempted by federal law; and (2) the "artful pleading" doctrine permits removal when the plaintiff has "artfully" pled her complaint to avoid stating the federal claim the complaint [\[**51\]](#) is necessarily based upon. Defendants rely on both doctrines for removal.

2. Complete Preemption

Complete preemption is a recognized exception to the well-pleaded complaint rule. This doctrine "holds that when Congress intends the preemptive force of a statute to be so extraordinary that it completely preempts an area of state law, 'any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.'" [Strong, 78 F.3d at 259](#) (quoting [Caterpillar, 482 U.S. at 393](#)). The Sixth Circuit has "reasoned that the congressional intent necessary to confer removal jurisdiction upon the federal district courts through complete preemption is expressed through the creation of a parallel federal cause of action that would 'convert' a state cause of action into the federal action for purposes of the well-pleaded complaint rule." [Strong, 78 F.3d at 260](#). See also [Schmeling v. NORDAM, 97 F.3d 1336 \(10th Cir. 1996\)](#); [Rains v. Criterion Systems, Inc., 80 F.3d 339 \(9th Cir. 1996\)](#).

Defendants contend that Plaintiffs' claims are wholly [\[**52\]](#) preempted by the Hatch-Waxman amendments to the Food, Drug and Cosmetics Act, [21 U.S.C. § 355\(j\)](#) ("The Hatch-Waxman Act"). This Court disagrees. To successfully remove Plaintiffs' state law claims under the complete preemption doctrine, Defendants must show that federal law creates a parallel federal cause of action that "converts" a state court action into a federal action. [Strong, 78 F.3d at 260](#). Defendants cannot meet this burden. [HN10](#) The Hatch-Waxman Act does not provide a private right of action, [see 21 U.S.C. § 355\(j\)](#), thus there can be no removal jurisdiction under the complete preemption doctrine. [Accord, Aetna U.S. Healthcare, Inc. v. Hoechst, et al., 54 F. Supp. 2d 1042, 1054-55; Betnor, Inc., 4/14/99 Mem. and Order at 4.](#)

3. Substantial Federal Question

Defendants also contend that Plaintiffs' claims, as pleaded, require resolution of substantial questions of federal law because they require interpretation of (1) the Hatch-Waxman Act; (2) an FTC Consent Order; and (3) patent law including application of the Noerr-Pennington doctrine. This Court disagrees. Defendants have not established [\[**53\]](#) that a substantial disputed question of federal law is a necessary element of one of the Plaintiffs' well-pleaded claims. See [Merrell Dow, 478 U.S. at 810-817](#).

In [City of Chicago v. Intern'l College of Surgeons, 522 U.S. 156, 164, 118 S. Ct. 523, 529, 139 L. Ed. 2d 525 \(1997\)](#), the Supreme Court observed that "'even though state law creates [a party's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law.' [Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 1*8381 463 U.S. 1, 13, 77 L. Ed. 2d 420, 103 S. Ct. 2841 \(1983\)](#) (case arises under federal law when 'federal law creates the cause of action or ... the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law'); [Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 112, 81 L. Ed. 70, 57 S. Ct. 96 \(1936\)](#) (federal question exists when a 'right or immunity created by the Constitution or laws of the United States [is] [\[**54\]](#) an element, and an essential one, of the plaintiffs cause of action')."

a. Hatch-Waxman Act

Defendants contend that Plaintiffs' claims in essence allege that Defendants have violated the Hatch-Waxman Act, require the Court to interpret the Act, and thus raise substantial questions of federal law. Similar to the Kansas and California district courts who considered these arguments, this Court finds them unpersuasive. Plaintiffs here are

not alleging that Defendants violated the Hatch-Waxman Act. "While plaintiffs allege that defendants abused their rights under the Act, plaintiffs' claims also focus on defendants' conduct outside of the Act-the stipulation agreement. To show [the alleged state violation], plaintiffs do not need to show that defendants violated the Act; plaintiffs need only show that defendants acted to restrict competition. While this showing might include proof that defendants violated the Act, that fact alone is insufficient to confer federal question jurisdiction. [citation omitted]. Plaintiffs can just as easily show that defendants fully complied with the Act, yet unfairly restricted competition with their conduct outside of the Act. Defendants cite [**55] no portion of the Act which addresses their stipulation agreement, and while consideration of the agreement will reference defendants' rights under the Act, it will not require an interpretation or application of the Act. No substantial issue of federal law arises under the Hatch-Waxman Act." [Aetna U.S. Healthcare, Inc., 54 F. Supp. 2d at 1055](#). The mere fact that state law claims may require consideration of the Hatch-Waxman Act does not raise a sufficiently significant federal issue so as to confer federal question jurisdiction. [See Merrell Dow, 478 U.S. at 813](#) (where the Court observed that "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction").

Likewise, the Court is not persuaded by Defendants' arguments that the need for uniform interpretation of the Act creates a substantial federal question. The Supreme Court considered and rejected a similar argument in [Merrell Dow, 478 U.S. at 815-16](#). This Court agrees with the observations of the United States District Court for the Northern District of California in the consolidated [Betnor](#) action. "The [Merrell Dow](#) [**56] court found that petitioner's argument regarding uniformity of interpretation was actually an argument in favor of preemption, not an argument which supports the conclusion of federal question jurisdiction. [See id.](#) In addition, the court noted that the concern about uniformity of interpretation is considerably mitigated by the fact that even in the absence of original federal jurisdiction, the Supreme Court still retains power to review the decision of a federal issue in a state cause of action. [See id.](#) Accordingly, defendants' arguments in favor of federal jurisdiction on this grounds [sic] is meritless." [Betnor](#), 4/19/99 Mem. and Order at 6.

b. The FTC Order

The [D'Esposito, Lowy, and Aetna U.S. Healthcare, Inc.](#) complaints allege, in support of their state law claims, that Defendant Hoechst violated an FTC Consent Order and that Defendant Hoechst also renounced a commitment it made in a December 18, 1995 letter to the FDA. Defendants argue here that Plaintiffs' entitlement to relief for any violation of the FTC Consent Order, even if brought on state law grounds, necessarily depends on this Court's construction and application of [*839] that federal consent [**57] order. This same argument was recently rejected by the district courts in [Aetna U.S. Healthcare, Inc. v. Hoechst, et al., 54 F. Supp. 2d at 1054](#) and in [Betnor](#), 4/14/99 Mem. and Order at 6-7. This Court agrees with the analysis and result reached by the [Aetna](#) and [Betnor](#) courts. Plaintiffs' substantive claim is one that arises under state law; not federal law. "The allegations regarding the FTC order merely evidence plaintiffs' state law claims. As plaintiffs note, if [Hoechst] did not violate the FTC order, it could still violate state law. In a companion case, the Northern District of California has likewise found that allegations of unfair competition under state law seek to litigate [Hoechst]'s conduct, not the FTC order." [Aetna, 54 F. Supp. 2d at 1054](#) (citing [Betnor, Inc.](#), Mem. and Order at 6-7). Plaintiffs' claims do not require interpretation of the FTC order. Moreover, as the [Betnor](#) court observed, the cases Defendants rely upon fail to support their position. [See Sable v. General Motors Corp., 90 F.3d 171 \(6th Cir. 1996\); Eyak Native Village v. Exxon Corp., 25 F.3d 773, 777-79 \(9th Cir. 1994\),](#) [**58] cert. denied, 513 U.S. 943, 130 L. Ed. 2d 307, 115 S. Ct. 351 (1995); [Dennison v. City of Los Angeles Dep't of Water and Power, 658 F.2d 694 \(9th Cir. 1981\)](#)). Unlike the circumstances presented here, in each of the cited cases, "the plaintiffs' claim was a disguised attack on the propriety of a specific finding made by a federal court.... Here, plaintiffs do not seek to overturn the FTC Consent Order, nor do they challenge the appropriateness of the judgment. Rather, plaintiffs attack [Hoechst]'s conduct in carrying out the duties provided for in the consent decree." [Betnor](#), 4/14/99 Mem. and Order at 6.

c. Patent Law

"Plaintiffs allege that [Hoechst] filed frivolous patent infringement actions for the sole purpose of delaying and preventing entry of competing products into the marketplace." [Aetna, 54 F. Supp. 2d at 1052](#). Despite Defendant Hoechst's claim that Plaintiffs' complaints raise substantial questions regarding federal patent law, Plaintiffs do not question the validity of Hoechst's patents. Rather, as the Kansas District Court observed, "they allege that [Hoechst]

violated [state] law by instigating [**59] patent litigation for the sole purpose of delaying and preventing competition." [Aetna, 54 F. Supp. 2d at 1053](#). Accordingly, "Plaintiffs' right to relief does not necessarily depend[] on resolution of a substantial question of federal law, and federal law is not a necessary element of one of the well-pleaded ... claims." *Id.* (internal quotes and citations omitted). "Plaintiffs' claims do not depend on whether the [Hoechst] patents are valid; they allege only that [Hoechst] had an impure heart when it filed suit. Moreover, regardless whether the [Hoechst] patent is valid, plaintiffs allege that defendants committed other acts" that would violate state law - "such as the stipulation agreement. Any discussion of patent law is merely tangential to plaintiffs' claim that [Hoechst] had an ill motive which resulted in [state law violations]. While federal law may be implicated in an examination of [Hoechst]'s motives, it is hardly a substantial or necessary part of plaintiffs' claim." *Id. at 1053-54*.

d. Noerr-Pennington Doctrine

Defendants also argue that resolution of Plaintiffs' claims necessarily depend upon construction, interpretation [**60] and application of federal law under the Noerr-Pennington doctrine because "the doctrine requires that Plaintiffs: (1) establish that defendants' submissions to the FDA were not immune from anti-trust liability; and (2) plead and prove that the underlying patent litigation is a sham." [Betnor, 4/14/99 Mem. and Order at 7](#) (citing [United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#); [Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#)). "The Noerr-Pennington doctrine is based upon the protections of the [First Amendment](#) [*840] and exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition." [Aetna, 54 F. Supp. 2d at 1052](#) (quoting [Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495, 1503 \(10th Cir. 1997\)](#)). There is, however, a "sham" exception to the Noerr-Pennington doctrine which does not allow immunity protection to "sham" actions.

Plaintiffs here, similar to the Plaintiffs in the [Aetna](#) and [Betnor](#) cases, argue that the Noerr-Pennington [**61] doctrine is a defense and thus cannot be used to establish federal question jurisdiction under the well-pleaded complaint rule. Defendants, on the other hand, argue that the "doctrine is not really an affirmative defense because plaintiffs bear the burden of proving that defendants' conduct falls within an exception to the doctrine." [Aetna, 54 F. Supp. 2d at 1053](#). This Court agrees with the [Aetna](#) and [Betnor](#) Courts and likewise finds that, [HN11](#) [↑] because "the Noerr-Pennington doctrine constitutes a defense, it cannot form the basis for federal question jurisdiction in this case." [Aetna, 54 F. Supp. 2d at 1053](#). See also [Betnor, 4/14/99 Mem. and Order at 7-8](#). As the [Aetna](#) Court observed, "while a defendant can attack plaintiffs' complaint for failing to allege an exception to the doctrine, [citation omitted], such an exception is not a necessary element of plaintiffs' claim. Rather, it is a response to an anticipated defense. The doctrine is a defense which, once asserted by defendants, plaintiffs must defeat." [Aetna, 54 F. Supp. 2d at 1053](#) (quotations and cites omitted).

e. Summary

In light of the above, this Court finds [**62] that federal question jurisdiction does not exist under [28 U.S.C. § 1331](#). Accordingly, the [Lowy](#),⁷ [**63] and [Aetna U.S. Healthcare, Inc.](#)⁸ cases were improperly removed and Plaintiffs' motions for remand are GRANTED.

⁷ Defendant Andrx also argues, in connection with the [Lowy](#) action, that diversity jurisdiction exists despite the fact that both it and Plaintiffs are citizens of Florida. Defendant bases its argument on the fact that Defendant Hoechst is a foreign entity and thus there is only a need for minimal diversity and not complete diversity under [28 U.S.C. § 1332\(a\)\(3\)](#). This Court finds Defendant's argument unpersuasive.

Defendant's argument ignores the first part of [§ 1332\(a\)\(3\)](#) which requires that parties be citizens of different states and that the foreign citizen be an "additional party." This point is illustrated In [Transure, Inc. v. Marsh and McLennan, Inc., 766 F.2d 1297 \(9th Cir. 1985\)](#). There, the Court observed that the "presence of an alien corporation on one side as an additional party does not defeat diversity jurisdiction." *Id. at 1298* (emphasis added). Therefore, the Court reasoned, "the presence of alien corporations on both sides of the controversy did not defeat diversity jurisdiction." *Id. at 1299*. In other words, absent the alien parties, diversity jurisdiction existed. Construing the language of [§ 1332\(a\)\(3\)](#), the Court determined that the addition of alien

III. Conclusion

For the foregoing reasons, Plaintiffs' motions for remand are DENIED in Gabriel, Sunshine Pharmacy, Eirich, Glover, Sizemore, Galloway, Inc., and D'Esposito, and GRANTED in Lowy and Aetna U.S. Healthcare, Inc.

Nancy G. Edmunds

United States District Judge

Dated: OCT 14 1999

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corporations on both sides would not defeat the diversity jurisdiction that already existed. Defendant's reliance on Dresser Indus., Inc. v. Underwriters at Lloyd's of London, 106 F.3d 494 (3d Cir. 1997) is misplaced. Dresser refutes rather than supports Defendant's position. In Dresser, the Court held that "the language of section 1332(a)(3) grants federal jurisdiction when aliens are additional parties. The statute makes no distinction based upon which side of the controversy-plaintiff, defendant, or both-the aliens appear. Although the statute plainly requires that the dispute be between citizens of different states, it includes the phrase 'additional parties' without any such limitation." Id. at 497.

⁸ In light of this Court's decision that jurisdiction is lacking, there is no need to address the collateral estoppel argument that Plaintiff raises in connection with this case.



Hawaii v. Gannett Pac. Corp.

United States District Court for the District of Hawaii

October 15, 1999, Decided ; October 15, 1999, Filed

CIV. NO. 99-687 ACK-BMK

Reporter

99 F. Supp. 2d 1241 *; 1999 U.S. Dist. LEXIS 19069 **; 1999-2 Trade Cas. (CCH) P72,696

STATE OF HAWAII, by EARL I. ANZAI, Attorney General, State of Hawaii, Plaintiff, v. GANNETT PACIFIC CORPORATION, ET AL., Defendants

Disposition: **[**1]** State's motion for a preliminary injunction GRANTED. Defendants enjoined to preserve the status quo, including without limitation.

Core Terms

Newspaper, Advertiser, Termination, editorial, Preservation, enjoined, preliminary injunction, reportorial, antitrust, injunctive relief, irreparable, publish, press, public interest, anti trust law, exemptions, monopolize, merits, Sherman Act, conspiracy, hardships, voices, thirteen years, announced, commerce, parties, annual, weighs, entertainment, subscribers

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN1 Injunctions, Preliminary & Temporary Injunctions

The standards for granting a temporary restraining order and a preliminary injunction are identical.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2 Injunctions, Preliminary & Temporary Injunctions

The standard for granting a preliminary injunction is as follows: Traditionally the court considers (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3 [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

For a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4 [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

To merit a preliminary injunction, if the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly. At an irreducible minimum, however, the plaintiff must demonstrate a fair chance of success on the merits or questions serious enough to require litigation. Moreover, under any formulation of the test, the plaintiff must demonstrate a significant threat of irreparable injury.

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN5 [down arrow] **Injunctions, Temporary Restraining Orders**

The grant or denial of a temporary restraining order is reviewed for abuse of discretion.

Antitrust & Trade Law > Sherman Act > General Overview

HN6 [down arrow] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN7 [down arrow] **Sherman Act, Claims**

In order to establish a violation of [Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must establish (1) the existence of an agreement, conspiracy, or combination between two or more entities; (2) an unreasonable restraint of competition; and (3) an effect on interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

HN8 [down arrow] **Antitrust & Trade Law, Sherman Act**

To establish a claim for attempt to monopolize, a plaintiff must prove: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury.

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

Civil Procedure > Judgments > Relief From Judgments > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN9 [down arrow] **Private Actions, Remedies**

See [15 U.S.C.S. § 26](#).

Counsel: For HAWAII, STATE OF, plaintiff: Rodney I. Kimura, Office of the Attorney General-State of Hawaii, Honolulu, HI.

For GANNETT PACIFIC CORPORATION, HAWAII NEWSPAPER AGENCY, defendants: John R. Lacy, Goodsill Anderson Quinn & Stifel, Honolulu, HI.

For GANNETT PACIFIC CORPORATION, defendant: Robert C. Bernius, John S. Smith, Gordon L. Lang, Nixon Hargrave Devans & Doyle, Washington, DC.

For LIBERTY NEWSPAPERS LIMITED PARTNERSHIP, defendant: Anna H. Oshiro, Damon Key Bocken Leong & Kupchak, Honolulu, HI.

For LIBERTY NEWSPAPERS LIMITED PARTNERSHIP, defendant: Alan L. Marx, King & Barlow, Nashville, TN.

For HAWAII NEWSPAPER AGENCY, defendant: Lisa W. Munger, Goodsill Anderson Quinn & Stifel, Honolulu, HI.

Judges: Alan C. Kay, United States District Judge.

Opinion by: Alan C. Kay

Opinion

[*1243] ORDER GRANTING THE STATE'S MOTION FOR A PRELIMINARY INJUNCTION

SYNOPSIS

This case presents a difficult, close call on an issue of first impression under the Newspaper Preservation Act. It is not a typical free enterprise situation where the owner of a [**2] business wishes to close it. Here, Defendants have availed themselves of exemptions under the Newspaper Preservation Act and have been allowed to operate under a Joint Operating Agreement ("JOA") which, but for the Newspaper Preservation Act, would have violated the antitrust laws from its inception. After carefully weighing the various factors, the Court will GRANT the State's motion for a preliminary injunction.

The Court finds that the State has demonstrated a likelihood of success on the merits. In reaching this conclusion, the Court notes that it is not convinced by Defendants' arguments that the Newspaper Preservation Act exempts the Amendment and Termination Agreement ("Termination Agreement") from antitrust scrutiny. The stated purpose of the Act is to preserve newspapers, yet the current Termination Agreement would inevitably result in the closure of the Star-Bulletin [*1244] because, without the benefit of the JOA, it lacks the infrastructure necessary to continue publishing the newspaper. Thus, because Defendants' actions contravene the purpose of the Newspaper Preservation Act and, in effect, will lead to the closure of the Star-Bulletin, the Court finds that Defendants do not [**3] enjoy the antitrust exemptions otherwise available to them under the Act.

The existing JOA pays Liberty a guaranteed annual return ranging from 12% in 1999 to 17% in 2012 on its initial \$15 million investment in 1993. Under the Termination Agreement, GPC would pay Liberty what Liberty would otherwise receive as guaranteed payments over the next thirteen years -- but without Liberty having to publish the Star-Bulletin. In effect, GPC would be buying out the Star-Bulletin. This would result in the elimination of any competition to the Advertiser in this unique island community. In this regard, the Court notes that GPC's parent company (or subsidiary) first purchased the Star-Bulletin when it was the healthier of the two local newspapers operating under the JOA and then in 1993 purchased the Advertiser because at that point in time it apparently had a more promising future. It then sold the Star-Bulletin to Liberty after first stripping the Star-Bulletin of its operating equipment and assets. There evidently has been no effort by Liberty to sell the Star-Bulletin as a going concern.

The Court also finds that Defendants' *First Amendment* rights are not implicated by the current preliminary [**4] injunction requiring the parties to maintain the status quo. In this regard, the Court finds the Supreme Court's decision in *Associated Press v. United States*, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945), particularly instructive. In that case, the Supreme Court held that:

The *First Amendment*, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the *First Amendment* does not sanction repression of that freedom by private interests. [**5]

Associated Press, 326 U.S. at 20. Thus, the Court finds that Defendants' *First Amendment* arguments do not shield them from antitrust scrutiny.

Moreover, the Court finds that the State has demonstrated a strong possibility of irreparable harm if the Termination Agreement is not enjoined and that the balance of hardships tilts sharply in favor of the State. Once the Star-Bulletin has been shut down it will be virtually impossible to reopen. The Court finds that Liberty will not suffer any serious economic loss because Liberty will continue to profit by the receipt of its guaranteed annual return under the JOA. Although GPC may lose money due to the Star-Bulletin's operating losses, Defendants did not present any evidence that GPC and HNA are not profitable overall. Thus, the Court finds that the balance of hardships sharply tilts in favor of the State.

Finally, the Court finds that the public interest weighs in favor of granting injunctive relief because of the pending shutdown of the Star-Bulletin and the concomitant loss of independent editorial and reportorial voices, as well as the loss of over 100 jobs and the loss of competition for advertisers and creators [**6] of news, [*1245] editorial, and entertainment content. Taking all these factors into consideration, the Court finds it appropriate to issue a preliminary injunction.

BACKGROUND

On October 6, 1999, Plaintiff State of Hawaii (the "State") filed a complaint in federal court seeking to challenge the implementation of an agreement by Defendants Gannett Pacific Corporation ("GPC"),¹ [**7] which owns the Honolulu Advertiser (the "Advertiser"), Liberty Newspapers Limited Partnership ("Liberty"), which owns the Honolulu Star-Bulletin (the "Star-Bulletin"), and the Hawaii Newspaper Agency, a Delaware limited partnership (collectively "Defendants"), to terminate the JOA and the resultant shutdown of the Star-Bulletin. The State contends that the closure of the Star-Bulletin under these circumstances violates the Sherman Act, [15 U.S.C. §§ 1, 2](#), and state antitrust laws, [H.R.S. § 480-1 et seq.](#). In the instant motion, the State seeks a preliminary injunction² to enjoin Defendants from taking any further steps to implement the Termination Agreement and close the Star-Bulletin, with the last announced date of publication being October 30, 1999.³

The Ninth Circuit recently summarized the origins of the present Joint Operating Agreement (JOA), which Defendants now seek to terminate.

In 1962, the Advertiser was experiencing [**8] financial difficulty and was on the verge of failure. In order to prevent the newspaper's demise and preserve its editorial voice, the Advertiser entered into a Joint Operating Agreement ("JOA") with the Star Bulletin on May 31, 1962. Under the JOA, the newspapers merged their commercial, circulation, and advertising departments, but maintained separate and independent editorial voices. The newspapers formed the Hawaii Newspaper Agency to carry out the JOA.

[Hawaii Newspaper Agency v. Bronster, 103 F.3d 742, 744 \(9th Cir. 1996\)](#). At the time that the original JOA was entered into, GPC owned the Star-Bulletin, not the Advertiser. Sometime prior to January 30, 1993, GPC's parent (or subsidiary) stripped the Star-Bulletin of its operating equipment and assets by transferring them to the Advertiser. GPC's parent (or subsidiary) then sold its interest in the Star-Bulletin to Liberty and purchased the Advertiser. See State's Motion, Oct. 8, 1999, Exh. A, at 2.

In response to the Supreme Court's decision in [Citizen Publishing Co. v. United States, 394 U.S. 131, 22 L. Ed. 2d 148, 89 S. Ct. 927 \(1969\)](#), which held that a JOA between two newspapers [**9] in Tucson, Arizona violated federal antitrust laws because neither newspaper could demonstrate that it was a "failing company," Congress enacted the Newspaper Preservation Act, [15 U.S.C. §§ 1801 - 1804](#). As summarized by the Ninth Circuit:

Congress explained that JOAs were necessary to maintain "a newspaper press editorially and reportorially independent and competitive in all parts of the United States." Congress found [*1246] that "economic conditions have created a situation in which a large majority of American communities have already become one owner newspaper communities." JOAs accomplished Congress's goal because they allowed newspapers "to reduce costs by combining the economic and business aspects of newspaper production, and at the same time, permitted the newspaper participants to maintain separate editorial and reportorial staffs and independent editorial and news policies."

[Hawaii Newspaper Agency, 103 F.3d at 744](#) - 45 (citations omitted).⁴

¹ GPC was formerly known as Honolulu Advertiser, Inc. and Gannett Pacific Newspapers, Inc.

² The State originally sought a temporary restraining order. However, the parties agreed at the hearing to convert the State's motion to a motion for a preliminary injunction.

³ The Court observes that the State recently sought to eliminate the JOA when the legislature found that "the original justification for the monopoly granted by the public in 1962 may no longer be true," and ordered the Advertiser and Star-Bulletin to disclose their financial records to the state attorney general. See [Hawaii Newspaper Agency v. Bronster, 103 F.3d 742, 745 \(9th Cir. 1996\)](#). The Ninth Circuit held that Congress' passage of the Newspaper Preservation Act preempted the field. See generally [Hawaii Newspaper Agency Ltd. Partnership v. Bronster, 1996 U.S. Dist. LEXIS 1082 \(D. Haw. 1996\)](#); [City and County of Honolulu v. Hawaii Newspaper Agency, Inc., 559 F. Supp. 1021 \(D. Haw. 1983\)](#).

⁴ [Section 1803](#) of the Newspaper Preservation Act provides:

[**10] The most recent amendment to the JOA between the Advertiser and the Star-Bulletin was entered into on January 30, 1993 and had a twenty-year term (until the last Sunday in December, 2012) with subsequent five-year extensions unless either party elected to cancel the JOA. It provides two sources of income for Liberty: a guaranteed annual return and a percentage of excess profits. See State's Motion, Oct. 8, 1999, Exh. A, at 23 - 25 (JOA). Specifically, the amount of guaranteed annual return for the remainder of the JOA exceeds \$ 28 million. The JOA also provides that the Star-Bulletin shall receive 3% of any special profits, although none have been realized to date.

The instant case stems from Defendants' decision to terminate the current JOA as of October 30, 1999 and Liberty's decision to cease publishing the Star-Bulletin as of October 30, 1999. Both of these decisions, which were necessarily integrated, were announced on September 16, 1999. Since that time, no effort has been made by Liberty to sell the Star-Bulletin as a going concern.⁵ Under the Termination Agreement, which was signed on September 7, 1999, Liberty has agreed to an early termination of the JOA in exchange [**11] for receiving an up-front payment of \$ 26.5 million from GPC.⁶

[*1247] According to an affidavit given by Wayne Cahill, the [**12] administrative officer of the Hawaii Newspaper Guild, he attended a meeting with the owner of Liberty, Rupert Phillips, and questioned him about the shutdown decision. At that meeting, Phillips stated that he was shutting down the Star-Bulletin not because it was losing money, but because he was not making as much profit as other comparable newspapers and wanted to invest his money elsewhere. Cahill also avers that Phillips told him that he had signed an agreement with GPC whereby GPC would pay him the guaranteed annual profit for the remaining years of the JOA. See State's Motion, Oct. 8, 1999, Declaration of Wayne E. Cahill.

Since the announcement that the Star-Bulletin would cease publication on October 30, 1999, the State maintains that Defendants have undertaken actions that, unless halted immediately, will result in the economic demise of the

(a) It shall not be unlawful under any **antitrust law** for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided*, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any **antitrust law** any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any **antitrust law** if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any **antitrust law**.

15 U.S.C. § 1803.

⁵ The Court also observes that the JOA provides that the Star-Bulletin must obtain the consent of the Advertiser before it can assign its interest in the JOA partnership or any controlling interest of its capital stock, and that the Advertiser's consent must not be unreasonably withheld. However, the Advertiser is not required to obtain the consent of the Star-Bulletin prior to taking the same actions. See State's Motion, Oct. 8, 1999, Exh. A, at 36 - 37.

⁶ Under the terms of the 1993 amendment to the JOA, if Liberty ceased publishing the Star-Bulletin, Liberty would not be entitled to receive the guaranteed annual profits. Instead, Liberty would receive the Star-Bulletin's name, its advertiser and subscriber lists, and \$ 100. All other assets, including the printing and distributing infrastructure, would go to the Advertiser. See State's Motion, Oct. 8, 1999, Exh. A, at 31 - 32.

Star-Bulletin. Bulletin. Namely, the State argues that Defendants have taken steps to impair the circulation of the Star-Bulletin by mailing letters to current subscribers and calling current subscribers to inform them that their subscription will be converted over to the Advertiser on November 1, 1999 and that they can call to request [**13] a refund. See State's Motion, Oct. 8, 1999, at Exh. B. The State also claims that Defendants are destroying the relationship between the Star-Bulletin and its advertisers by mailing letters to advertisers that will cause advertisers to seek alternative advertising mediums. Finally, the State maintains that Defendants are impairing public access to the Star-Bulletin by removing Star-Bulletin street vending racks so that they can be repainted and reused by the Advertiser.

In response to the State's October 8, 1999 motion, Defendants filed their opposition on October 12, 1999. The Court also considered GPC's memorandum attached to its Motion to Dismiss, which was filed on October 11, 1999, although that particular motion will be heard at a later date. On October 12, 1999, the State filed additional documents in support of its motion for a preliminary injunction. The Court held a hearing on October 13, 1999.

STANDARD OF REVIEW

HN1[] The standards for granting a temporary restraining order and a preliminary injunction are identical. In [Miller v. California Pacific Medical Ctr., 19 F.3d 449 \(9th Cir. 1994\)](#), the Ninth Circuit set forth **HN2**[] the standard for granting [**14] a preliminary injunction as follows:

Traditionally we consider (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief.

Id. at 456 (citing [United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 \(9th Cir. 1987\)](#)).

HN3[] The moving party must show 'either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits.'

[Miller, 19 F.3d at 456](#) (quoting [Senate of California v. Mosbacher, 968 F.2d 974, 977 \(9th Cir. 1992\)](#)). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." [19 F.3d at 456](#). These formulations [**15] are not discrete tests, but the extremes of a single continuum. See [Los Angeles Memorial Coliseum Comm. v. National Football League, 634 F.2d 1197, 1201](#). Accordingly, "if **HN4**[] the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." [***1248**] [State of Alaska v. Native Village of Venetie, 856 F.2d 1384, 1389 \(9th Cir. 1988\)](#). At an irreducible minimum, however, the plaintiff must demonstrate a fair chance of success on the merits or questions serious enough to require litigation. See [Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937 \(9th Cir. 1987\)](#). Moreover, under any formulation of the test, the plaintiff must demonstrate a significant threat of irreparable injury. [Oakland Tribune, Inc. v. Chronicle Publishing Co., Inc., 762 F.2d 1374, 1376 \(9th Cir. 1985\)](#).

HN5[] The grant or denial of a temporary restraining order is reviewed for abuse of discretion. See [Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1132-33 \(9th Cir. 1979\)](#).

DISCUSSION

The State argues that a preliminary injunction [**16] must be issued to preserve the status quo pending a final decision in this case. After carefully considering the arguments of both parties, the Court agrees and finds that it is appropriate to issue a preliminary injunction.

I LIKELIHOOD OF SUCCESS ON THE MERITS.

First, the Court finds that the State has demonstrated a likelihood of success on the merits. The State's complaint alleges three violations of the Sherman Act -- restraint of trade, conspiracy to monopolize, and attempted monopolization -- and three similar violations of state antitrust laws. The Court will address each of the federal claims in turn.⁷

[**17] A. RESTRAINT OF TRADE.

Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce . . ." HN6[↑] 15 U.S.C. § 1. HN7[↑] In order to establish a violation of Section 1 of the Sherman Act, the State must establish (1) the existence of an agreement, conspiracy, or combination between two or more entities; (2) an unreasonable restraint of competition; and (3) an effect on interstate commerce. See American Ad Management, Inc. v. GTE Corp., 92 F.3d 781, 788 (9th Cir. 1996).

The Court agrees with the State that it is likely to prove these factors. The State is likely to establish the first and third factors fairly easily. As to the first factor, both GPC and Liberty have entered into the Termination Agreement whereby GPC has agreed to pay Liberty \$ 26.5 million (apparently the discounted present value of the guaranteed annual profit called for in the JOA). In all likelihood, this constitutes the necessary agreement. With regard to the third factor, the Court finds that the State is likely to prove that the publication, printing, and distribution of daily newspapers in general circulation constitutes [**18] and affects interstate trade and commerce. Specifically, both the Advertiser and the Star-Bulletin purchase newsprint and news content in interstate commerce and regularly use interstate wire and mail communications to operate their businesses.

As to the second factor, the Court finds that the State is likely to prove that the agreement constitutes an unreasonable restraint of competition. The editorial and reportorial competition between the Star-Bulletin and the Advertiser has been instrumental [*1249] in giving subscribers alternate news sources. The Court finds that the Termination Agreement, although it does not expressly require the closure of the Star-Bulletin, will lead to this outcome because the Star-Bulletin will not have access to the necessary infrastructure (currently held by the Hawaii Newspaper Agency and to be distributed to the Advertiser upon termination of the JOA) to continue publishing. Indeed, the interrelated decision by Liberty to terminate the JOA and cease publishing was announced simultaneously. Thus, the Advertiser will be the sole local newspaper and competition in this unique island community situate in the middle of the Pacific Ocean will be eliminated. The [**19] Star-Bulletin and the Advertiser are by far the two largest daily newspapers published in the relevant market of the state of Hawaii. There will be no competition to attract advertisers and creators of news, editorial, and entertainment content.

There appears to be no lawful justification for GPC to, in essence, buy out Liberty's interest in the JOA so that the JOA may be terminated thirteen years before its scheduled expiration date (and only six years after its inception).⁸ In reaching this conclusion, the Court emphasizes that the intent of the Newspaper Preservation Act is to preserve the publication of newspapers and that the proposed Termination Agreement has the effect of paying the Star-Bulletin not to publish for the remaining thirteen years, as called for by the JOA. The Court notes that the stated purpose and intent of both parties to the JOA is to produce high quality newspapers, improve acceptance for their

⁷ The Court need not address the state law claims separately because they essentially mirror the federal claims, see, e.g., Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Haw. 224, 247, 982 P.2d 853 (1999) (noting that the legislature followed the "federal paradigm" in fashioning Hawaii **antitrust law** and that the language of H.R.S. § 480-4 and § 480-9 traces the language of Section 1 and Section 2 of the Sherman Act). The Court notes that if the federal claims lack merit, then the state law claims would be preempted by the Newspaper Preservation Act. See Hawaii Newspaper Agency v. Bronster, 103 F.3d 742, 745 (9th Cir. 1996). However, the Court notes that daily newspapers are commodities within the meaning of H.R.S. § 480-1.

⁸ The Court recognizes that the Ninth Circuit held in Hawaii Newspaper Agency v. Bronster, 103 F.3d 742, 748 (9th Cir. 1996), that the Newspaper Preservation Act "contains no temporal limitation."

advertisers, subserve public interest by maintaining the separate identities, individuality and editorial and news freedom and integrity of the Star-Bulletin and the Advertiser. Moreover, the JOA further requires the Advertiser, as the general partner, to act "in **[**20]** a manner which it believes, in the good faith exercise of business judgment, is in the best interest of the overall economic performance of the Partnership and the Newspapers considered together . . ." State's Motion, Oct. 8, 1999, Exh. A, at 9. For these reasons, the Court finds that the State is likely to establish an unreasonable restraint of competition.

Defendants argue that there can be no antitrust violation because there is no economic competition at all in light of the Newspaper Preservation Act's antitrust exemptions. The Court recognizes that the Advertiser and Star-Bulletin operate to some extent as a single economic entity under the JOA. However, as discussed below, these actions receive antitrust exemption only so long as they are taken to preserve the independent editorial and reportorial **[**21]** voices of competing newspapers. In the instant case, the Termination Agreement contravenes the stated purpose of the Newspaper Preservation Act because it will lead to the shutdown of the Star-Bulletin thirteen years sooner than otherwise would have occurred while, at the same time, the parties to the agreement will be put in the same position as though the JOA ran until 2012 and GPC will, in effect, have bought out its only competitor in this unique island community.

The Court is not persuaded by Defendants' argument that the instant Termination Agreement involves some "non-economic social goal" rather than trade or commerce. See Opposition, Oct. 11, 1999, at 8. The Court recognizes that "trade or commerce" within the meaning of the antitrust laws generally comprises "commercial competition in the marketing of goods and services." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 84 L. Ed. 1311, 60 S. Ct. 982 (1940). This Court finds that this case falls within the definition of trade or commerce:

[*1250]

[The purpose of the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, **[**22]** 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.

Apex Hosiery, 310 U.S. at 493 (emphasis added). The Court emphasizes that, if implemented, the Termination Agreement would deprive newspaper readers of free and open competition in the sale of daily newspapers and their differing editorial and reportorial voices, deprive advertisers of free and open competition in the market for the differentiated advertising audiences represented by the Advertiser and the Star-Bulletin, and would deprive creators of news, editorial, and entertainment content of free and open competition for their output. Thus, the Court concludes that the Termination Agreement is not protected by the Newspaper Preservation Act and, therefore, Defendants' actions can be subject to antitrust scrutiny on this limited basis.

B. CONSPIRACY TO MONOPOLIZE.

The Court also finds that the State is likely to succeed in proving that Defendants have conspired to monopolize in violation of *Section 2* of the Sherman Act. To establish this claim, the State must **[**23]** prove (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize. See *American Tobacco Co. v. United States*, 328 U.S. 781, 809, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946). As with the *Section 1* claim previously discussed, the Court finds that the State is likely to establish the necessary elements in support of its claim. First, the Termination Agreement is likely to constitute the necessary combination or conspiracy. Second, the announcement of the closure of the Star-Bulletin, the notices to subscribers and advertisers, and the removal of the street vending racks constitute the requisite overt acts in furtherance of the conspiracy. Third, the Court finds that the State is likely to prove that Defendants' actions demonstrate a specific intent to monopolize. Although the form of the transaction is couched as an amendment to the existing JOA (which is expressly permitted by the Newspaper Preservation Act), the Court finds that the State has presented a strong

argument that the intent of the agreement is for GPC to buy out Liberty so that Liberty may then shut down the Star-Bulletin while still [**24] preserving the profits guaranteed to it under the JOA and GPC would be left without a competitor in this unique island community.

C. ATTEMPTED MONOPOLIZATION.

Finally, the Court finds that the State is likely to succeed in proving its claim of attempted monopolization. [HN8](#) [↑] To establish a claim for attempt to monopolize, a plaintiff must prove: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury. See *Movie 1 & 2 v. United Artists Communications, Inc.*, 909 F.2d 1245, 1254 (9th Cir. 1990) (citing *Transamerica Computer Co., Inc. v. International Business Machines*, 698 F.2d 1377 (9th Cir. 1983)).

The Court finds that the State is likely to establish the requisite elements. First, as discussed above, the requisite intent may be established by Defendants' actions. Second, the anticompetitive conduct is likely to be demonstrated by the fact that GPC is paying Liberty \$ 26.5 million up-front, an amount that approximates the amount of money it would be required to pay Liberty for the life of the JOA, [**25] in order to terminate the JOA now rather than in 2012. Although Liberty is not [*1251] required to cease publishing the Star-Bulletin, the closure of the Star-Bulletin will be virtually assured because it lacks the necessary infrastructure to continue publishing. The Court emphasizes that the decisions to terminate the JOA and to cease publishing the Star-Bulletin were integral to one another and were announced simultaneously. As stated earlier, this essentially constitutes a buyout of its sole competitor by GPC. Moreover, the Court recognizes that, in light of the fact that the Star-Bulletin was stripped of its operating equipment and assets in 1993 when it was owned by GPC's parent company (or subsidiary), it is unlikely to be a viable competitor if and when the JOA is terminated. Therefore, the Court finds that the State is likely to prove that this buyout constitutes anticompetitive conduct.

Third, the Court finds that the State will most likely be able to prove that, unless this agreement is enjoined, there is a dangerous probability that GPC will acquire monopoly power. As previously discussed, it appears with near certainty that the Star-Bulletin will have to shut down if the JOA is [**26] terminated. Fourth, the Court finds that this outcome would result in antitrust injury because no other daily newspaper would be published on Oahu, a unique island community, to compete with the Advertiser. In addition, there would be the concomitant loss of competition for advertisers and creators of news, editorial, and entertainment content. The Court notes that GPC's parent company (or subsidiary) first purchased the Star-Bulletin when it was the healthier of the two local newspapers operating under the JOA and then in 1993 purchased the Advertiser because at that point in time it apparently had a more promising future. It then sold the Star-Bulletin to Liberty after first stripping the Star-Bulletin of its operating equipment and assets.

D. APPLICABILITY OF THE NEWSPAPER PRESERVATION ACT.

Defendants argue that the Newspaper Preservation Act exempts the Termination Agreement from antitrust laws. Although superficially appealing, the Court finds this argument ultimately unpersuasive. The Court recognizes that the JOA is exempt from antitrust laws, and that the Newspaper Preservation Act expressly permits the parties to amend an existing JOA simply by filing the amendment [**27] with the Department of Justice so long as the amendment does not add a newspaper to the existing JOA. Thus, Defendants reason, they are exempt from antitrust laws and should not be enjoined from amending the JOA.

The Court finds that Defendants' arguments lose force when the purpose of the Act -- to preserve independent editorial and reportorial voices -- is considered. The statute expressly states that it is the "public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into . . ." [15 U.S.C. § 1801](#). The Court finds that if Defendants are permitted to consummate the Termination Agreement as it now stands, the practical result would be that GPC would pay up-front to Liberty \$ 26.5 million for the right to terminate the JOA thirteen years early -- without Liberty having to publish the Star-Bulletin for the next thirteen years. The Court is not persuaded by Defendants' arguments that the Termination Agreement actually increases competition. The Court recognizes that the terms of the

agreement do not preclude Liberty, or anyone else, [**28] from publishing the Star-Bulletin. However, the Court will not close its eyes to the practical effect of the agreement because the Star-Bulletin, which lacks the infrastructure to continue publishing the newspaper, would inevitably close. In fact, as discussed above, this decision was announced simultaneously with the interrelated decision to terminate the JOA and Liberty has made no effort to sell the Star-Bulletin as a going concern.

[*1252] The Court finds that it does have the power to enjoin the instant Termination Agreement. Any other outcome would be completely at odds with the congressional intent embodied in the Newspaper Preservation Act. The Court emphasizes that Defendants were not compelled to extend the JOA until 2012; yet having done so, and having benefitted from the antitrust exemptions created by the Newspaper Preservation Act, Defendants now propose that one party, in effect, buy out another while the public interest is deprived of an additional thirteen years of competing, independent editorial and reportorial voices, with the Star-Bulletin left in a denuded, inoperable condition.

E. FIRST AMENDMENT CLAIMS.

Defendants also claim that any injunctive relief will [**29] necessarily violate their *First Amendment* rights to refrain from speaking or publishing. The Court finds the Supreme Court's decision in *Associated Press v. United States*, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945), particularly instructive. In *Associated Press*, the Government sought to enjoin members of the Associated Press from prohibiting its members from selling news to non-members and granting each member powers to block its non-member competitors from membership. The Supreme Court affirmed an injunction issued by a three-judge panel. In doing so, the Supreme Court rejected the argument that the press is immune from the antitrust laws by virtue of the *First Amendment*, stating:

The *First Amendment*, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental [**30] combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the *First Amendment* does not sanction repression of that freedom by private interests.

Associated Press, 326 U.S. at 20. Thus, if the Court is correct that the State is likely to prove that Defendants have violated antitrust laws and that the Newspaper Preservation Act does not otherwise exempt them from antitrust scrutiny, then the Supreme Court's decision in *Associated Press* makes it clear that there is no *First Amendment* violation.

In support of their argument that the *First Amendment* precludes injunctive relief, Defendants cite *Wooley v. Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977) (holding that the *First Amendment* prohibited Delaware from requiring its citizens to advertise the motto "Live Free or Die" on automobile license plates), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256, 41 L. Ed. 2d 730, 94 S. Ct. 2831 (1974) [**31] (holding that Florida right-of-reply statute violated the *First Amendment* because it compelled newspaper editors or publishers to publish that which reason tells them should not be published and that this was a penalty based on the content of the newspaper). The Court finds this argument unpersuasive for several reasons.

First, the Court finds that these cases are distinguishable because here the Court is not compelling Defendants to publish any particular viewpoint. In *Wooley*, the Plaintiffs were compelled to advertise the motto "Live Free or Die" on their license plates, and in *Tornillo* the plaintiff was compelled to publish any reply by a political candidate to editorials criticizing that candidate. Conversely, here the Court [*1253] would merely enjoin Defendants to continue doing that which they are already doing under the terms of the JOA, namely publishing a newspaper with

whatever editorial and reportorial content they deem appropriate. In reaching this conclusion, the Court notes that the Supreme Court addressed a similar claim in *Associated Press*:

It is argued that the decree interferes with freedom 'to print as and how one's reason or one's interest dictates'. [**32] The decree does not compel AP or its members to permit publication of anything which their "reason" tells them should not be published. It only provides that after their 'reason' has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication.

326 U.S. at 20 n.18.

Second, the Court is not convinced by Defendants' argument that any injunctive relief will infringe upon their *First Amendment* right of freedom of association. In support of this argument, Defendants rely on *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984) (holding that a state may not require private organization to admit women as full voting members), for the proposition that "freedom of association . . . plainly presupposes a freedom not to associate." Defendants apparently argue that any order enjoining them from terminating the JOA necessarily implicates their freedom not to associate with each other. The Court finds otherwise. The Court observes that Defendants voluntarily entered into the JOA to gain the protection of the Newspaper Preservation Act. Although Defendants will be temporarily [**33] enjoined from terminating the JOA, there is no element of compelled association because the Advertiser and Star-Bulletin constitute separate entities with independent editorial and reportorial functions. An outcome to the contrary would mean that every time the Court enjoined termination of a contract, this right would be implicated. Accordingly, the Court finds Defendants' *First Amendment* arguments unconvincing.

II POSSIBILITY OF IRREPARABLE INJURY TO THE MOVING PARTY.

The Court recognizes that Congress enacted Section 16 of the Clayton Act to encourage the grant of injunctive relief in order to prevent the threat of irreparable injury. [HN9](#) [↑] [15 U.S.C. § 26](#); see also *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 112-13 & n.8, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986). Section 16 authorizes courts in private antitrust actions to grant injunctive relief "against threatened loss or damage" proximately resulting from an antitrust violation, and to issue a preliminary injunction upon "a showing that the danger of irreparable loss or damage is immediate." [15 U.S.C. § 26](#). In the instant case, the Court finds [**34] that the State has made a strong showing that it will be irreparably injured if the Termination Agreement is not enjoined.

If the State is able to prove its claims, which the Court has previously concluded is likely, then the Court finds that it will be irreparably injured if a preliminary injunction is not granted. Specifically, the State has shown that Defendants have impaired the circulation of and access to the Star-Bulletin, undermined the relationship between the Star-Bulletin and its advertisers, and adversely affected public perception of the viability of the Star-Bulletin. If these actions are not enjoined now, and the State later prevails, any relief that this Court could afford would be inadequate because the Star-Bulletin would no longer be a viable newspaper. Once closed, the Star-Bulletin is unlikely to be reopened because it will have lost its subscriber and advertiser base. The Court finds that no monetary amount will be able to compensate for the loss of the Star-Bulletin's editorial and reportorial voice, the elimination of a significant forum for the airing of ideas and thoughts, the elimination of an important source of democratic expression, [**1254] and the removal of [**35] a significant facet by which news is disseminated in the community. See, e.g., *Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("We have also recognized that intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm.").

III BALANCE OF HARDSHIPS.

The Court finds that the balance of hardships tilts sharply in favor of the State. "For this factor, the Court must identify the harm which a TRO or preliminary injunction might cause the Defendants and weigh it against the Plaintiffs' threatened injury." *Uarco Inc. v. Lam*, 18 F. Supp. 2d 1116, 1126 (D. Haw. 1998) (citing *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980)). As explained

above, the economic demise of the Star-Bulletin will impair the ability of this Court to provide the relief requested by the State and will result in the silencing of competing news and editorial voices as well as curtailing, if not eliminating, the competition for advertisers and creators of news, editorial, and entertainment content.

In [**36] contrast, the Court finds relatively little cost to Defendants if it grants injunctive relief. Enjoining the Termination Agreement means that Defendants will be required to continue publishing the Star-Bulletin in the interim until the Ninth Circuit can rule on Defendants' appeal and, if the Court's decision is affirmed, until the parties can fully litigate this lawsuit. Liberty will not suffer any significant loss because it will continue to earn its guaranteed annual profit for its owners. Although GPC and the Hawaii Newspaper Agency may lose money due to the Star-Bulletin's operating losses, Defendants have presented no evidence that they are not profitable overall. The Court is cognizant of the fact that injunctive relief, no matter how short, will require an interim delay in Defendants' plans and that this delay is not costless. However, when weighed against the hardships that would be suffered by the State if injunctive relief was not granted, the Court finds that the hardship to Defendants pales.

IV ADVANCEMENT OF THE PUBLIC INTEREST.

In determining the propriety of granting injunctive relief, the Court must also consider whether the public interest will be advanced [**37] by granting the preliminary relief. See *Miller v. California Pacific Med. Center, 19 F.3d 449, 456 (9th Cir. 1994)*; *Uarco Inc. v. Lam, 18 F. Supp. 2d 1116, 1126 (D. Haw. 1998)*. The Court finds that the State has demonstrated that the public interest strongly weighs in favor of granting injunctive relief. As shown by the Newspaper Preservation Act, there is a strong public interest in maintaining a newspaper press editorially and reportorially independent and competitive. See *15 U.S.C. § 1801*. If the Termination Agreement is not enjoined, the Court finds that the loss of the Star-Bulletin's independent editorial and reportorial voices, the loss of competition to attract advertisers and creators of news, editorial, and entertainment content, and the loss of over 100 jobs would severely harm the public interest. Accordingly, the Court finds that this factor weighs in favor of granting injunctive relief.

CONCLUSION

After carefully weighing all four of these factors, the Court GRANTS the State's motion for a preliminary injunction. From the date hereof and for the duration of this lawsuit, Defendants are hereby enjoined [**38] to preserve the status quo, including without limitation:

1. Defendants shall take no steps whatsoever to implement, or make any payments under, the Termination Agreement dated September 7, 1999, or any other agreement of like intent or effect;
2. Defendants shall take no steps that are contrary to, or inconsistent with, the stated purpose and intent of the Hawaii Joint Operating Agreement - Amendment [*1255] and Restatement of Mutual Publishing Plan Agreement of January 30, 1993 to produce high quality newspapers for their readers, improve acceptance for their advertisers, subserve public interest by maintaining the separate identities, individuality and editorial and news freedom and integrity of the Star-Bulletin and the Advertiser;
3. Defendants shall refrain from taking any actions that may cause any material adverse change in the business, including loss of subscribers and advertisers, or financial condition of the Star-Bulletin as a viable going concern.

Pursuant to Rule 65(c), the Court hereby requires the State to post a security. However, in light of the State's financial resources, the Court finds it appropriate to only require the State to post a nominal bond in the amount [**39] of \$ 10,000.⁹

⁹ At the hearing, counsel for Defendants expressed concern that any monetary recovery that his clients might have if they prove that the State has wrongly obtained injunctive relief is limited to the amount of the bond. In the event that the State does not confirm that any recovery by Defendants is not limited to the amount of the bond, and such confirmation is not filed within five (5) days of the date of this Order, the Court will reconsider the amount of the bond upon motion made by either party.

99 F. Supp. 2d 1241, *1255 (1999 U.S. Dist. LEXIS 19069, **39

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, OCT 15 1999.

Alan C. Kay

United States District Judge

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Hingel v. Exxon Corp.

United States District Court for the Eastern District of Louisiana

October 15, 1999, Decided ; October 15, 1999, Filed; October 18, 1999, Entered

CIVIL ACTION NO: 99-2424 SECTION: "J"(5)

Reporter

1999 U.S. Dist. LEXIS 16126 *; 1999 WL 893574

NICHOLAS J. HINGEL, ET AL VERSUS EXXON CORP., ET AL

Disposition: [*1] Plaintiffs' Motion to Remand GRANTED.

Core Terms

products, dealers, unfair, deceptive, retail, state court, plaintiffs', jobbers, unfair trade practice, anti trust law, service station, allegations, fraudulent, commerce, removal, courts

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

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

HN1[Removal, Specific Cases Removed

28 U.S.C.S. § 1441(a) provides that any civil action brought in a state court of which the district courts of the United States have original jurisdiction may be removed by the defendant. Removal jurisdiction must be strictly construed, however, because it implicates important federalism concerns.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

HN2[Removal, Specific Cases Removed

Any doubts concerning removal must be resolved against removal and in favor of remanding the case back to state court.

Civil Procedure > ... > Removal > Procedural Matters > General Overview

HN3 Removal, Procedural Matters

The party invoking the removal jurisdiction of federal courts bears the burden of establishing federal jurisdiction over the state court suit.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

HN4 Removal, Specific Cases Removed

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. [28 U.S.C.S. § 1447\(c\)](#).

Civil Procedure > Parties > Joinder of Parties > Fraudulent Joinder

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > Parties > Joinder of Parties > Misjoinder

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > General Overview

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > Joinder of Claims

HN5 Joinder of Parties, Fraudulent Joinder

In determining the validity of a claim of fraudulent joinder, the district court must evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of plaintiff.

Civil Procedure > Parties > Joinder of Parties > Fraudulent Joinder

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > Parties > Joinder of Parties > Misjoinder

HN6 Joinder of Parties, Fraudulent Joinder

If the plaintiff has any possibility of recovery under state law against the party whose joinder is questioned, then the joinder is not fraudulent in fact or law.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[HN7](#) Regulated Practices, Price Fixing & Restraints of Trade

The Louisiana **Antitrust Law**, [La. Rev. Stat. Ann. 51:121 et seq.](#), makes illegal every contract, combination, or conspiracy, in restraint of trade or commerce. [La. Rev. Stat. Ann. § 51:122](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

[HN8](#) Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

No person engaged in commerce shall, in the course of such commerce, sell or contract for the sale of goods or other commodities for use, consumption, or resale within the state, or fix a price on the condition, agreement, or understanding that the purchaser shall not use or deal in the goods or other commodities of a competitor of the vendor, where the effect of the sale, contract for sale, or condition, agreement, or understanding, is to substantially lessen competition or tends to create a monopoly in any line of commerce. [La. Rev. Stat. Ann. § 51:124\(A\)](#).

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

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 > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > Sherman Act > General Overview

[HN9](#) Costs & Attorney Fees, Clayton Act

Any person who claims loss or damage by a violation of Louisiana antitrust provisions may sue for injunctive relief. [La. Rev. Stat. Ann. § 51:129](#). In addition, treble damages and attorneys fees may be recovered. [La. Rev. Stat. Ann. § 51:137](#).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[HN10](#) Regulated Practices, Price Fixing & Restraints of Trade

In order to state a claim under the Louisiana **Antitrust Law**, La. Rev. Stat. Ann. § 51.121 et seq., 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 > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN11[] **Trade Practices & Unfair Competition, State Regulation**

The Louisiana Unfair Trade Practices Act, [La. Rev. Stat. Ann. § 51:1401 et seq.](#), makes unlawful any unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. [La. Rev. Stat. Ann. § 51:1405\(A\)](#).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN12[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Louisiana Unfair Trade Practices Act, La. Rev. Stat. Ann. § 51.1401 et seq., expressly allows for a private cause of action on behalf of any person who suffers any ascertainable loss of money as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by [La. Rev. Stat. Ann. § 51:1405](#).

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN13[] **Antitrust & Trade Law, Consumer Protection**

The Louisiana Unfair Trade Practices Act, La. Rev. Stat. Ann. § 51.1401 et seq., provides a cause of action both for trade practices that are unfair and those that are deceptive. It is not necessary that the alleged act be both unfair and deceptive. The statutory language is very broad and, as a result, Louisiana courts determine what constitutes an unfair or deceptive practice on a case by case basis.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN14[] **Trade Practices & Unfair Competition, State Regulation**

In analyzing a claim under the Louisiana Unfair Trade Practices Act, La. Rev. Stat. Ann. § 51.1401 et seq., Louisiana courts have used a two-prong test, finding a practice unfair when (1) it offends established public policy, or (2) it is unethical, oppressive, unscrupulous, or substantially injurious.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN15[] Regulated Practices, Trade Practices & Unfair Competition

Fraud, misrepresentation, deception and similar conduct are prohibited, but mere negligence is not. Otherwise legal actions can be found unfair or deceptive if they produce unfair or deceptive results.

Counsel: For NICHOLAS J HINGEL, GREMILLION ENTERPRISES, INC., GRAYSON ENTERPRISES, INC., KHAJA ALIUDDIN AHMED, KASA CORPORATION, THEODORE G ANDRESSEN, LITTLE FARMS EXXON, INC., GIOE ENTERPRISES INC, GSR ENTERPRISES INC, SUSAN HOFFER, HOFFER'S OF CHALMETTE, INC., JUNE ENTERPRISES INC, K SIMON INC, K D E INC, TAHIR ALI KHAN, KHAN INC, LAKE FOREST AUTOMOTIVE SERVICE, INC., POMES INC, SEVERN VENTURES, L.L.C., TERRACE CORPORATION, TRI G 1 INC, R N STARK INC, ABDUL SATTAR KHAN, NAYEEM INC, ASHFAQ A CHEEMA, SGR ENTERPRISES, L.L.C., plaintiffs: Walter C. Thompson, Jr., Mark Powell Seyler, James Monroe White, Barkley & Thompson, LC, New Orleans, LA.

For NICHOLAS J HINGEL, GREMILLION ENTERPRISES, INC., GRAYSON ENTERPRISES, INC., KHAJA ALIUDDIN AHMED, KASA CORPORATION, THEODORE G ANDRESSEN, LITTLE FARMS EXXON, INC., GIOE ENTERPRISES INC, GSR ENTERPRISES INC, SUSAN HOFFER, HOFFER'S OF CHALMETTE, INC., JUNE ENTERPRISES INC, K SIMON INC, K D E INC, TAHIR ALI KHAN, KHAN INC, LAKE FOREST AUTOMOTIVE SERVICE, INC., POMES INC, SEVERN VENTURES, L.L.C., TERRACE CORPORATION, TRI G 1 INC, R N STARK INC, ABDUL SATTAR KHAN, NAYEEM INC, ASHFAQ A CHEEMA, SGR ENTERPRISES, [*2] L.L.C., plaintiffs: Glen Alan Woods, Glen A. Woods, Attorney at Law, New Orleans, LA.

For EXXON CORPORATION, defendant: Robert B. McNeal, Edward F. Kohnke, IV, Frilot, Partridge, Kohnke & Clements, LC, New Orleans, LA.

For RETIF OIL & FUEL INC, defendant: George Pivach, II, Pivach & Pivach, Belle Chasse, LA.

For RETIF OIL & FUEL INC, defendant: Alphonse M. Alfano, Bassman, Mitchell & Alfano, Washington, DC.

Judges: Carl J. Barbier, Judge.

Opinion by: Carl J. Barbier

Opinion

This matter is before the Court on Plaintiffs' **Motion to Remand**. Plaintiffs assert this Court lacks subject matter jurisdiction and this matter should be remanded to the state court from which it was removed. Defendants, Exxon Corporation, d/b/a Exxon Company, U.S.A. ("Exxon") and Retif Oil & Fuel, Inc. ("Retif") oppose remand. The motion, set for hearing on October 13, 1999, is before the Court on briefs without oral argument.

Background

Plaintiffs, a group of Exxon retail service station dealers, filed suit in state court against defendants Exxon and Retif, one of Exxon's jobbers or distributors, seeking injunctive relief, damages, and attorneys fees based upon alleged antitrust violations, [*3] unfair trade practices and price discrimination under Louisiana law. Plaintiffs expressly disavowed any federal claim. Nonetheless, defendants removed the matter to federal court, suggesting there is federal subject matter jurisdiction based upon diversity of citizenship and jurisdictional amount. [28 U.S.C. § 1332](#). Although Retif is a Louisiana citizen whose presence as a defendant would destroy diversity jurisdiction, defendants argue that removal is proper because Retif was "fraudulently joined". In other words, defendants contend that plaintiffs have not stated a viable cause of action against Retif and, therefore, Retif's citizenship must be disregarded for purposes of diversity jurisdiction.

Applicable Legal Standard

HN1[¹] Title [28 U.S.C. § 1441\(a\)](#) provides that "any civil action brought in a State Court of which the district courts of the United States have original jurisdiction may be removed by the defendant. . . ." Removal jurisdiction must be strictly construed, however, because it "implicates important federalism concerns." [Frank v. Bear Stearns & Co., 128 F.3d 919, 922 \(5th Cir.1997\)](#).

In addition, **HN2**[²] any [*4] doubts concerning removal must be resolved against removal and in favor of remanding the case back to state court. **HN3**[³] [Vasquez v. Alto Bonito Gravel Plant Corporation, 56 F.3d 689 \(5th Cir. 1995\)](#). The party invoking the removal jurisdiction of federal courts bears the burden of establishing federal jurisdiction over the state court suit. **HN4**[⁴] [Frank, 128 F.3d at 922](#). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." [28 U.S.C. § 1447\(c\)](#).

Defendants argue that jurisdiction is proper in federal court based on diversity of citizenship, [28 U.S.C. § 1332\(a\)\(4\)](#), and that plaintiff's joinder of the nondiverse distributor, Retif, as a defendant is fraudulent. **HN5**[⁵] In determining the validity of a claim of fraudulent joinder, the district court "must evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of plaintiff." [Burden v. General Dynamics Corporation, 60 F.3d 213 \(5th Cir. 1995\)](#), citing [B., Inc. v. Miller Brewing Co., 663 F.2d 545 \(5th Cir. 1981\)](#). [*5] The court must resolve all ambiguities in the controlling state law in plaintiff's favor. [60 F.3d at 216](#); **HN6**[⁶] [Dodson v. Spiliada Maritime Corp., 951 F.2d 40 \(5th Cir. 1992\)](#). If the plaintiff has any possibility of recovery under state law against the party whose joinder is questioned, then the joinder is not fraudulent in fact or law. [Dodson, 951 F.2d at 42](#).

Discussion

In order to determine whether plaintiffs have stated a possible claim against the non-diverse defendant, Retif, the Court has carefully reviewed the original Petition filed in state court. In that Petition, plaintiffs allege the following:

Plaintiffs are Louisiana citizens who operate, or who formerly operated, Exxon service stations in the greater New Orleans area. Defendant Exxon not only supplies its branded petroleum products to retail dealers such as plaintiffs, but also operates company-owned retail stations in direct competition with plaintiffs' stations. Exxon also owns many of the stations which are leased to retail dealers such as plaintiffs. Defendant Retif is an Exxon wholesale distributor or "jobber". Retif entered into a contract with Exxon to distribute certain petroleum products, [*6] including motor oil and gasoline, to independent dealers. Retif also operates its own retail service stations.

Exxon sells its products to Retif at a substantially lower price than the price at which the same products are sold to plaintiffs. Because of the contract between Exxon and Retif, plaintiffs cannot purchase their petroleum products from Retif or any other wholesaler or jobber. The differential between the price plaintiffs must pay to Exxon and the price at which Exxon sells to Retif is much greater than the cost of delivery or transportation. In fact, the price differential is so great that it allows Retif, even after its profit markup, to resell the products to other, independent retailers or to sell at its own retail stations, at a price less than that charged to plaintiffs by Exxon. As a consequence, defendants Exxon and Retif, by virtue of their contract, have acted and conspired to engage in unfair trade practices and to limit plaintiffs' ability to fairly compete with service stations operated by Exxon and Retif, or by independent dealers serviced by Retif. More specifically, Exxon and Retif allegedly have violated Louisiana law in several ways, including violations [*7] of the Louisiana [Antitrust Law](#), [La. R.S. 51:121 et seq.](#); the Louisiana Price Discrimination Act, [La. R.S. 51:331, et seq.](#); and the Louisiana Unfair Trade Practices Act ("LUTPA"), [La. R.S. 51:1401, et seq.](#). In addition, plaintiffs allege a claim for "unjust enrichment" under Louisiana law.

Defendants argue that these allegations do not amount to even a possible cause of action against Retif because it is Exxon, not Retif, which controls the distribution and pricing of Exxon petroleum products. Retif argues that it has no authority or control over the manner in which Exxon sets up its dealer arrangements or over the manner in which Exxon decides to price its product or control distribution of its products. In fact, Retif claims it was presented by

Exxon with a standard form, "take-it-or-leave-it" contract. The contract is non-negotiable and Retif had only two choices, accept the jobber contract or it will not be authorized to sell Exxon's products. Therefore, argues Retif, it could not sell or distribute Exxon products to retail dealers such as plaintiffs without breaching its contractual relationship with Exxon.¹

[*8] However, Retif's arguments beg the real question, which is whether or not the contract or agreement between Exxon and Retif violates Louisiana law. For Retif to suggest that it cannot be held liable for the reason that it is acting pursuant to its contract with Exxon is circular reasoning at best. No one compelled Retif to enter into an agreement in violation of Louisiana law.² Whether Retif has done so is at the very heart of this case.

(a) Louisiana Antitrust Law

HN7 The Louisiana Antitrust Law, [La. R.S. 51:121 et seq.](#), makes illegal "every contract, combination . . . or conspiracy, in restraint of trade or commerce . . ." [La. R.S. 51:122](#). The same law provides that "no **HN8** person, engaged in commerce shall, in the course of such commerce, . . . sell, or contract for the sale of goods, [*9] . . . or other commodities, . . . for use, consumption, or resale within this state, or fix a price . . . on the condition, agreement, or understanding that the purchaser . . . shall not use or deal in the goods . . . or other commodities of a competitor of the vendor . . . where the effect of the sale, contract for sale, . . . or condition, agreement, or understanding is to substantially lessen competition or tends to create a monopoly in any line of commerce." [La. R.S. 51:124\(A\)](#). **HN9** Any person who claims loss or damage by a violation of these provisions may sue for injunctive relief. [La. R.S. 51:129](#). In addition, treble damages and attorneys fees may be recovered. [La. R.S. 51:137](#).

The Louisiana Antitrust Law is virtually identical to the federal Sherman Act, [15 U.S.C. § 1, et seq.](#) Under the Sherman Act, not every contract, combination or conspiracy in restraint of trade is unlawful, but only those combinations or contracts which are unlawful or unreasonable. This is called the Rule of Reason. [Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)](#). Similarly, Louisiana courts have recognized that the [*10] 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. [Louisiana Power & Light Co. v. United Gas Pipe Line Co., 518 So. 2d 1050, 1053 \(La. App. 4th Cir. 1987\), writ denied, HN10](#) 523 So. 2d 232 (La. 1988).

In order to state a claim under the Louisiana Antitrust Law, "the plaintiff is required to allege that the defendant is a party to a contract which results in an unreasonable restraint of trade." [Jefferson v. Chevron U.S.A., Inc., 713 So. 2d 785, 790 \(La. App. 4th Cir. 1998\); Reppond v. City of Denham Springs, 572 So. 2d 224, 230 \(La. App. 1st Cir. 1990\)](#).

In *Jefferson*, the plaintiffs were current or former Chevron service station dealers in the greater New Orleans area. Plaintiffs filed suit in state court against Chevron and several of its jobbers contending that by means of the contractual arrangements set up by Chevron with its dealers and jobbers, Chevron arbitrarily manipulated the price of the fuel it sold to independent dealers and [*11] unreasonably prohibited plaintiffs from purchasing fuel at lower prices from jobbers. The Louisiana Court of Appeal found that such allegations stated a viable cause of action under the state antitrust law. [713 So. 2d at 789-791](#).³

¹ Exxon has made essentially identical arguments in opposition to plaintiffs' motion to remand.

² To the extent defendants rely on their contract, the Court notes that the contract itself contains an explicit provision that any unlawful provision shall be considered inoperative. Distributor Sales Agreement, para. 24.

³ The Court recognizes that the issue on appeal involved only the trial court's denial of Chevron's motion for summary judgment. Plaintiffs' claims against the jobbers were not part of the appeal. [713 So. 2d at 788](#). However, if plaintiffs stated a cause of action against Chevron based upon its contract with its jobbers, then the Louisiana Antitrust Law would apply to all parties to the contract. The very nature of the antitrust claim alleges an *agreement* between these parties to restrain trade. [La. R.S. 51:122](#). As

[*12] In this case plaintiffs' factual allegations practically mirror those by the plaintiffs in the *Jefferson* case. Plaintiffs have alleged a viable claim against defendant Retif. At the very least, it cannot be said that plaintiffs have "no possibility" of recovering against this non-diverse defendant. Although the Court has no doubt about its conclusion, if any such doubt existed it would necessarily be resolved in plaintiffs' favor.⁴

(b) Louisiana Unfair Trade Practices Act

Plaintiffs also allege claims against Retif and Exxon under the [HN11](#) Louisiana Unfair Trade Practices [*13] Act, [La. R.S. 51:1401 et seq.](#) ("LUTPA").⁵ LUTPA makes unlawful any "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . ." R.S. 51:1405(A). [HN12](#) The statute expressly allows for a private cause of action on behalf of "any person who suffers any ascertainable loss of money . . . as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by [La. R.S. 51:1405 . . .](#) [La. R.S. 51:1409\(A\)](#). This language has been interpreted to confer the private right of action on both consumers and business competitors, such as the plaintiff dealers in this case. [Jefferson, 713 So. 2d at 792](#). [HN13](#) LUTPA provides a cause of action both for trade practices that are "unfair" and those that are "deceptive". It is not necessary that the alleged act be both unfair and deceptive. *Id.* The statutory language is very broad and, as a result, Louisiana courts determine what constitutes an unfair or deceptive practice on a case by case basis. *Id.* [HN14](#) In analyzing a claim under the statute, Louisiana courts have used a two-prong test, finding a practice unfair when (1) it offends established [*14] public policy, or (2) it is unethical, oppressive, unscrupulous, or substantially injurious. [HN15](#) Fraud, misrepresentation, deception and similar conduct are prohibited, but mere negligence is not. Otherwise legal actions can be found unfair or deceptive if they produce unfair or deceptive results. Comment, *Louisiana Unfair Trade Practices Act: Broad Langauge And Generous Remedies Supplemented By A Confusing Body Of Case Law*, 41 Loy. L. Rev. 759, 762 (1996).

Plaintiffs have alleged that because of the contract between Exxon and Retif, plaintiffs are being charged unreasonably high prices for the gasoline and other products which they are forced to purchase from Exxon directly. Plaintiffs allege this arrangement is unfair and violates LUTPA. While Exxon and Retif argue that their contractual relationship [*15] is nothing but an ordinary and lawful business arrangement, that issue must be decided by the ultimate fact finder at trial. Plaintiffs' allegations make out a viable claim against Retif under LUTPA. [Jefferson, supra, 713 So. 2d at 793](#).⁶

For these reasons, this Court cannot say that the non-diverse defendant, Retif, was fraudulently joined. Accordingly,

IT IS ORDERED that plaintiffs' **Motion to Remand** should be and is hereby **GRANTED**;

IT IS FURTHER ORDERED that, pursuant to [28 U.S.C. § 1447\(c\)](#), this case is hereby **REMANDED** to the Civil District Court for [*16] the Parish of Orleans.

* * * *

the Louisiana appellate court recognized, all that is required to state a claim under the antitrust law are factual allegations that "the defendant is a party to a contract" which unreasonably restrains trade. [713 So. 2d at 789](#).

⁴ [Vasquez v. Alto Bonito Gravel Plant Corp., 56 F.3d 689 \(5th Cir. 1995\)](#); [Dodson v. Spiliada Maritime Corp., 951 F.2d 40 \(5th Cir. 1992\)](#). The Court notes that the *Jefferson v. Chevron U.S.A. Inc.* lawsuit was removed from state court and then remanded by this Court despite Chevron's claim that its jobbers had been fraudulently joined. [1994 U.S. Dist. LEXIS 10334, 1994 WL 396326](#) (Berrigan, J., E.D.La. 1994).

⁵ For an overview of LUTPA, see: Comment, *Louisiana Unfair Trade Practices Act: Broad Language And Generous Remedies Supplemented By A Confusing Body Of Case Law*, 41 Loy. L. Rev. Review 759 (1996).

⁶ Plaintiffs have also alleged claims under the Louisiana Price Discrimination Act, [La. R.S. 51:331](#) (apparently against Exxon only) and for "unjust enrichment" under Louisiana law. Because the Court has found that plaintiffs have alleged viable claims against the non-diverse defendant, Retif, under the Louisiana Antitrust Law and LUTPA, it is not necessary to discuss these remaining claims.

Carl J. Barbier

Judge

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Alabama Ambulance Serv. v. City of Phenix City

United States District Court for the Middle District of Alabama, Eastern Division

October 21, 1999, Decided ; October 21, 1999, Filed

Civil Action No. 98-A-921-E

Reporter

71 F. Supp. 2d 1188 *; 1999 U.S. Dist. LEXIS 16763 **; 2000-1 Trade Cas. (CCH) P72,870

ALABAMA AMBULANCE SERVICE, INC., Plaintiff, v. CITY OF PHENIX CITY, ALABAMA, et al., Defendants.

Disposition: [**1] CRHS's Motion for Summary Judgment GRANTED as to [15 U.S.C. § 2](#) claims. Judgment entered in favor of Defendant, CRHS Long Term and Home Care, Inc. and against Plaintiff, Alabama Ambulance Service, Inc.

Core Terms

interstate commerce, bid, summary judgment, monopolization, Sherman Act, subcontract, monopoly power, antitrust, emergency, ambulance service, alleges, prices, conspiracy to monopolize, material fact, monopoly, nonmoving, genuine, anticompetitive, competitors, conspiracy, terminated, pleadings, supplies

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > 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 > Legal Entitlement

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

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

[HN1](#) [+] Discovery, Methods of Discovery

Under [Fed. R. Civ. P. 56\(c\)](#), 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law.

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

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Evidence > Burdens of Proof > Ultimate Burden of Persuasion

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 > Supporting Materials > General Overview

HN2 Discovery, Methods of Discovery

The party asking for summary judgment 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 movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing, or pointing out to, the district court that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof.

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

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

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

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

HN3 Discovery, Methods of Discovery

Once the moving party for summary judgment has met its burden, *Fed. R. Civ. P. 56(e)* requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. To avoid summary judgment, the nonmoving party must do more than show that there is some metaphysical doubt as to the material facts. On the other hand, the evidence of the nonmovant must be believed and all justifiable inferences must be drawn in its favor.

Civil Procedure > ... > Summary Judgment > Motions for 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

HN4 Summary Judgment, Motions for Summary Judgment

After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

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Antitrust & Trade Law > Sherman Act > General Overview

HN5 [down] **Antitrust & Trade Law, Sherman Act**

To determine whether a practice violates the antitrust laws, the court must look at the effect of the practice challenged on competition in the field as a whole.

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

HN6 [down] **Monopolies & Monopolization, Attempts to Monopolize**

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#) prohibits the formation of trusts to restrain trade, while section two of the Sherman Act prohibits the monopolization of markets.

Antitrust & Trade Law > Sherman Act > General Overview

HN7 [down] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN8 [down] **Scope, Monopolization Offenses**

[15 U.S.C.S. § 2](#) affords a basis for three distinct antitrust offenses: monopolization, attempt to monopolize, and conspiracy to monopolize.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Real Property Law > Common Interest Communities > Condominiums > Management

Antitrust & Trade Law > Sherman Act > General Overview

HN9 [down] **Sherman Act, Jurisdiction**

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When alleging a Sherman Act, [15 U.S.C.S. § 1 et seq.](#), claim in the Eleventh Circuit, jurisdiction requires a focus on the interstate markets involved in the defendant's business activities. Jurisdiction can be met in two ways: the activities must either be in interstate commerce or the activities must affect interstate commerce. The latter test comes from the well-settled rule that the interstate commerce requirement can be satisfied even if the source or application of the business restraint is entirely local.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

[HN10](#) [blue icon] Antitrust & Trade Law, Sherman Act

Local activity can satisfy the interstate commerce requirement of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), if the restraint has a substantial effect on interstate commerce, and stifles or restrains such commerce. Therefore, to establish jurisdiction a plaintiff must demonstrate by submission of evidence that the defendants' local activities have a substantial effect on some other appreciable activity in interstate commerce. A plaintiff is not required to show that the defendants' challenged conduct itself had a substantial effect on interstate commerce. The plaintiff must only establish that there exists a sufficient nexus between the challenged activity and interstate commerce so that it can be said as a matter of practical economics that there is a not insubstantial effect on the interstate commerce involved.

Antitrust & Trade Law > Sherman Act > General Overview

[HN11](#) [blue icon] Antitrust & Trade Law, Sherman Act

When determining whether interstate commerce under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), is affected by an alleged violation, courts will often examine both the defendant's relationship with interstate markets and the plaintiffs.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

[HN12](#) [blue icon] Entitlement as Matter of Law, Appropriateness

Summary judgment may be particularly appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition. Consequently, when opposing a motion for summary judgment, an antitrust plaintiff must present evidence that tends, when interpreted in a light most favorable to plaintiff, to exclude the possibility that defendant's conduct was as consistent with permissible competition as with illegal conduct.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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Antitrust & Trade Law > Sherman Act > General Overview

HN13 [↑] Sherman Act, Claims

A claim of monopoly under [15 U.S.C.S. § 2](#) requires two elements: possession of monopoly power in the relevant market, and 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.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN14 [↑] Antitrust & Trade Law, Sherman Act

Conspiracy to monopolize has three elements: the existence of a combination or conspiracy, an overt act in furtherance of the conspiracy, and specific intent to monopolize.

Counsel: For Plaintiff: Deborah H. Biggers.

For Defendant: W. Donald Morgan, Jeffrey A. Brown.

Judges: W. HAROLD ALBRITTON, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: W. HAROLD ALBRITTON

Opinion

[*1190] MEMORANDUM OPINION

I. INTRODUCTION

This case is before the court on a Motion for Summary Judgment filed by the Defendant, CRHS Long Term and Home Care, Inc. ("CRHS"), on July 27, 1999 (Doc. # 34). Also before this court is a Motion to Strike filed by CRHS (Doc. # 43).

Plaintiff, Alabama Ambulance Service, Inc. ("Alabama Ambulance"), filed its Complaint on August 19, 1998, against both CRHS and the City of Phenix City (the "City" or "Phenix City"). Alabama Ambulance and the City filed a joint Motion to Dismiss the City on September 17, 1999, after a settlement was reached (Doc. # 47).

Alabama Ambulance filed a Motion for Default Judgment against CRHS on September 25, 1998. On October 2, 1998, CRHS filed its Answer with the court. Consequently, on October 13, 1998, this **[**2]** court entered a Consent Order finding that the Motion for Default Judgment was moot. On January 13, 1999, CRHS filed a Motion for Judgment on the Pleadings. On February 25, 1999, this court denied CRHS's Motion for Judgment on the Pleadings.

II. SUMMARY JUDGMENT STANDARD

HN1 [↑] Under [Rule 56\(c\) of the Federal Rules of Civil Procedure](#), 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

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no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." **HN2** [↑] [Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#).

The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for [*1191] 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." [Id. at 323](#). The movant can meet this burden by presenting evidence showing there [**3] is no dispute of material fact, or by showing, or pointing out to, the district court that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. See **HN3** [↑] [id. at 322-24](#).

Once the moving party has met its burden, [Rule 56\(e\)](#) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" [Id. at 324](#). To avoid summary judgment, the nonmoving party "must do more than 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 \(1986\)](#). On the other hand, the evidence of the nonmovant must be believed and all justifiable inferences must be drawn in its favor. See **HN4** [↑] [Anderson v. Liberty Lobby, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#).

After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment [**4] if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See [Fed. R. Civ. P. 56\(c\)](#).

III. FACTS

The submissions of the parties establish the following facts viewed in the light most favorable to the nonmovant:

Alabama Ambulance is an African-American owned and operated corporation. Alabama Ambulance has provided ambulance service in and around Phenix City, Alabama for thirty years. CRHS, a non-minority owned corporation, also has provided ambulance service in Phenix City.

On February 27, 1996, Phenix City issued a solicitation for bids to provide emergency medical services and transports in response to emergency 911 center notifications in Phenix City. Prior to the bid announcement by the City, Alabama Ambulance had shared the contract for emergency 911 medical services with other ambulance service providers, operating on a rotational basis. In response to the bid solicitation, CRHS and Alabama Ambulance each submitted a bid.

On September 9, 1996, Phenix City awarded the bid to CRHS and entered into a contract with CRHS under which CRHS became the exclusive provider of emergency 911 medical and transport services [**5] in Phenix City. CRHS subsequently entered into a subcontract with Alabama Ambulance whereby the two companies agreed to handle the emergency 911 calls in Phenix City on a rotational basis beginning in November of 1996. On August 17, 1997, however, CRHS unilaterally canceled the subcontract with Alabama Ambulance.

Alabama Ambulance alleges that CRHS violated [15 U.S.C. § 2](#) by conspiring with Phenix City and entering into an exclusive contract with the City to provide emergency 911 ambulance service. See Complaint P13. Alabama Ambulance also alleges that CRHS has deprived Alabama Ambulance of the "rights to make and enforce contracts" as in violation of [42 U.S.C. § 1981](#). See *id.* P14. Finally, Alabama Ambulance alleges that CRHS wrongfully canceled its subcontract to provide ambulance service. See *id.* P11.

IV. DISCUSSION

CRHS has challenged each of Alabama Ambulance's claims in its Motion for Summary Judgment. The court will address the antitrust claim in this opinion, but will defer ruling on the Motion as to the other claims and the Motion to Strike until after hearing from counsel at the pretrial hearing.

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[*1192] The Sherman [**6] Antitrust Act ("Sherman Act"), [15 U.S.C. § 1 et seq. \(1997\)](#), was enacted to protect competition and prevent monopolies. See [Standard Oil Co. v. Federal Trade Commission](#), [340 U.S. 231, 95 L. Ed. 239, 71 S. Ct. 240 \(1951\)](#). The Act rests on the theory that "the unrestrained interaction of competitive forces will yield the best allocation of . . . 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 . . . democratic political and social institutions." [Northern Pacific Railway Co. v. United States](#), [356 U.S. 1, 4, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). The Sherman Act was not enacted to protect competitors from competitive business practices. [HN5](#)[↑] Thus, to determine whether a practice violates the anti-trust laws, the court must look at the effect of the practice challenged on competition in the field as a whole. See [Checker Motors Corp. v. Chrysler Corp.](#), [283 F. Supp. 876 \(S.D.N.Y. 1968\)](#) (explaining that competition, not competitors, is protected by the Sherman [HN6](#)[↑] Act). Section one of the Sherman Act prohibits [**7] the formation of trusts to restrain trade, while section two of the Act prohibits the monopolization of markets.

Section two of the Sherman Act states,

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, \$ 35,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[HN7](#)[↑] [HN8](#)[↑] [15 U.S.C. § 2. Section 2](#) affords a basis for three distinct antitrust offenses: monopolization, attempt to monopolize, conspiracy to monopolize. See [Heattransfer Corp. v. Volkswagenwerk](#), [553 F.2d 964, 981 \(5th Cir. 1977\)](#) (recognizing three claims)¹; see also [Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Servs.](#), [746 F. Supp. 320, 326 \(S.D.N.Y. 1990\)](#). Alabama Ambulance contends that CRHS and the City are "conspiring to put minority owned [Alabama Ambulance] out of business [**8] and have caused a monopoly to exist in the area of emergency medical services and ambulance services in Phenix City, Alabama, that substantially affects interstate commerce . . ." Complaint P13. From its Complaint, it appears that Alabama Ambulance is alleging a monopolization claim and a conspiracy to monopolize claim.

[**9] Before addressing the two [§ 2](#) claims specifically, the court must find that the threshold jurisdictional requirement for a Sherman Act claim is met. When alleging a Sherman Act claim in the Eleventh Circuit "jurisdiction requires a focus on the interstate markets involved in the defendant's business activities." [Shahawy v. Harrison](#), [778 F.2d 636, 640 \(11th Cir. 1985\)](#). Jurisdiction can be met in two ways: the activities must either be "in interstate commerce" or the activities must "affect interstate commerce." See [Burke v. Ford](#), [389 U.S. 320, 321, 19 L. Ed. 2d 554, 88 S. Ct. 443 \(1967\)](#); see also [Chatham Condominium Ass'n v. Century Village](#), [\[*1193\] et al., 597 F.2d 1002, 1007 \(11th Cir. 1979\)](#). The latter test comes from the well-settled rule that the interstate commerce

¹ In the case of [Bonner v. City of Prichard, Alabama](#), [661 F.2d 1206, 1207 \(11th Cir. 1981\)](#), the Eleventh Circuit adopted Fifth Circuit law prior to September 31, 1981, as binding on the Eleventh Circuit.

Other cases in the Eleventh Circuit have stated that only two claims exist under a [§ 2](#) claim, namely monopolization and attempted monopolization. See [Ad-Vantage Tel. Dir. Consult. v. GTE Directories](#), [849 F.2d 1336, 1341 \(11th Cir. 1987\)](#). However, Eleventh Circuit cases have addressed the conspiracy to monopolize claim as a separate claim. See [Levine v. Central Florida Medical Affiliates, Inc.](#), [72 F.3d 1538, 1555-56 \(11th Cir. 1996\)](#) (giving elements of monopoly, attempted monopolization, and conspiracy to monopolize). The statute includes monopolization, attempted monopolization, and conspiracy to monopolize. See [15 U.S.C. § 2](#). Consequently, this court finds that binding precedent indicates that there are three [§ 2](#) claims as stated in the statute.

requirement can be satisfied even if the "source or application of the business restraint is entirely local." *Huelsman v. Civic Center Corp.*, 873 F.2d 1171, 1174 (8th Cir. 1989).²

[**10] Local activity can satisfy the interstate commerce requirement "if the restraint has a 'substantial' effect on interstate commerce," and "stifle[s] or restrain[s]" such commerce. *873 F.2d at 1175*. Therefore, to establish jurisdiction a plaintiff must demonstrate by submission of evidence that the defendants' local activities have a substantial effect on some other appreciable activity in interstate commerce. See *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980). A plaintiff is not required to show that the defendants' challenged conduct itself had a substantial effect on interstate commerce, as the Supreme Court has said: "If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect." *Id. at 243*.³ [**12] The plaintiff must only establish that there exists a sufficient nexus between the challenged activity and interstate commerce so that it can be said "as a matter of practical economics" that there is "a not insubstantial [**11] effect on the interstate commerce involved."⁴ *Id. at 246*.

There is some dispute as to whether a court can look at the activities of a plaintiff to determine whether a defendant's activities affect interstate commerce. See *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 766-68 (11th Cir. 1983) (hereinafter "CAT"). *McLain*, which has given the Eleventh Circuit guidance in this area, focused on the activities of the defendant, but as the CAT court pointed out, the *McLain* case "involved plaintiffs who were consumers rather than businesses." *CAT*, 710 F.2d at 766 n.31. The CAT court found that a court should initially look at the defendant's interstate commerce activities [**13] but that often times a court will have to look at the plaintiff's activities as well to determine if jurisdiction exists. Consequently the CAT court found, *HN11*[↑] "when determining [*1194] whether interstate commerce is affected by an alleged violation courts will often examine both the defendant's relationship with interstate markets and the plaintiffs." *Id.* After all, the CAT court noted, this "approach makes good sense because injury to the plaintiff may result directly in injury to the market." *Id.*

Alabama Ambulance only addresses how its business operations allegedly have a substantial effect on interstate commerce. See Pl. Br. at 3. Alabama Ambulance contends that it spent "thousands of dollars each year" purchasing supplies from out of state suppliers. See *id.* To evidence these expenditures, Alabama Ambulance submitted over fifty invoice receipts for supplies purchased from companies located outside of the state of Alabama

²This "aggregation of affect" theory harks back to the Supreme Court's holding in *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942).

HN10[↑]

³The court recognizes that the circuits are split as to the interpretation of which activities of the defendant must affect interstate commerce. See ABA Section of *Antitrust Law*, *Antitrust Law Developments* 32-33 (4th ed. 1997). The Supreme Court announced in *McLain*, "To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' . . . activity." *McLain*, 444 U.S. at 242. Confusion arose, however, when the Court went on to say, "Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful." *Id.* These two comments by the Supreme Court have led to a circuit split over what activities must affect interstate commerce. Compare *United States v. ORS, Inc.*, 997 F.2d 628, 629 n.4 (9th Cir. 1993) (noting that to meet the "effect on commerce test" the plaintiff had to allege that the defendant's business had a substantial effect on commerce) with *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 808-10 (1st Cir.) (finding that the defendant's "unlawful activity" must affect interstate commerce). The Eleventh Circuit has adopted the more lenient interpretation, requiring only that the defendant's general business affect interstate commerce. See *Shahawy*, 778 F.2d at 641.

⁴The Eleventh Circuit has found that "the reach of the Sherman Act is coextensive with Congress' power under the *Commerce Clause*." *McLain*, 444 U.S. at 241. Thus, the ultimate question for the court to ask when addressing a question of interstate commerce is whether Congress can prohibit the challenged conduct under the *Commerce Clause*. See *Chatham*, 597 F.2d at 1008.

and for services rendered by non-Alabama companies.⁵ See Pl. Br. Exhs. CRHS claims that the "contract and subcontract at issue which [Alabama Ambulance] alleges support its claim for damages based upon the violation of the [Sherman Act] deal **[**14]** exclusively with the provision of emergency medical transport services within Phenix City, Russell County, Alabama." Def. Br. at 4. CRHS alleges that all of the activities challenged are local in nature and do not affect interstate commerce. See *id.*

The court notes that Alabama Ambulance does not address whether CRHS's activities affect interstate commerce.⁶ However, because the Eleventh Circuit has recognized that the defendant's activities are not the only activities to consider when deciding the jurisdictional issue, the court is willing to overlook this flaw **[**15]** and consider Alabama Ambulance's evidence. At least one other court has found that an ambulance service provider in a single community may affect interstate commerce.⁷ Also, courts have found that "a plaintiff's purchase of supplies from out of state or its use of interstate financing has frequently been held to satisfy the interstate commerce requirement on the theory that if the plaintiff were competitively injured by the restraint, it would be forced to reduce its use of supplies or financing." **Antitrust Law** Developments 35-36 (citing CAT, 710 F.2d at 767-68). Because Alabama Ambulance has provided some evidence of interstate commerce and because this evidence was in the form of supplies bought out of state, the court finds that, although Alabama Ambulance's evidence on this point is not overwhelming, it is sufficient to meet the jurisdictional burden, and this court may consider its **§ 2** claims.

[16]** Assuming that proper jurisdictional facts exist, however, the court concludes that the plaintiff has failed to present sufficient evidence to create a genuine issue of material fact to support Alabama Ambulance's monopoly or conspiracy to monopolize claims.

The Supreme Court has made clear that **HN12** summary judgment may be particularly appropriate in an antitrust case because **[*1195]** of the chill antitrust litigation can have on legitimate price competition. See **Matsushita, 475 U.S. at 594**. Consequently, "when opposing a motion for summary judgment, an antitrust plaintiff must present evidence that tends, when interpreted in a light most favorable to plaintiff, to exclude the possibility that defendant's conduct was as consistent with permissible competition as with illegal conduct." **McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1493 (11th Cir. 1988)** (citing **Matsushita, 475 U.S. at 588**). Alabama Ambulance is unable to meet this burden.

HN13 A claim of monopoly under **§ 2** requires two elements: (1) possession of monopoly power in the relevant market, and (2) willful acquisition or maintenance of that power as distinguished from growth or development **[**17]** as a consequence of a superior product, business acumen, or historic accident. See **United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); T. Harris Young & Assoc., Inc. v. Marquette Electronics, Inc., 931 F.2d 816, 823** (11th Cir.), cert. denied, **502 U.S. 1013, 116 L. Ed. 2d 749, 112 S. Ct. 658** (1991). Having monopoly power is a key element of the monopolization claim. Monopoly power is defined as "the power to raise prices to supra-competitive levels or . . . the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market." **US Anchor Mfg.,**

⁵ The court notes that the evidence of interstate commerce submitted by Alabama Ambulance does not evidence expenditures during the time period of the subcontract or contract. The contract between the City and CRHS commenced on September 9, 1996, and was to run for 24 months. See Contract Exh. PP 1 & 8. The subcontract between CRHS and Alabama Ambulance commenced on November 18, 1996 and ended on August 17, 1997. See SubContract Exh. P 1.

⁶ The court does note, however, that CRHS is a Georgia company doing business in Alabama.

⁷ In **Springs Ambulance Service, Inc. v. City of Rancho Mirage, et al.**, it was pled that "medical supplies, ambulances and gasoline, manufactured and/or processed outside the state of California, are purchased in connection with the ambulance services provided" by the parties to the suit. See **1983 U.S. Dist. LEXIS 13356**, No. CV82-5917CBM, 1983 WL 1878, at *6 (C.D. Cal. Sept. 27, 1983), rev'd in part on other grounds, **745 F.2d 1270 (9th Cir. 1984)**. In addition, the plaintiff in **Springs Ambulance** alleged that the activities of the city and the other defendants "affect the likelihood that persons and business presently located outside of California [would] seek employment or start businesses for the purpose of rendering ambulance services . . ." **Id. at *7**. Judge Marshall found that there was "a sufficient nexus" between the ambulance service and interstate commerce to support an federal antitrust claim. See *id.*

71 F. Supp. 2d 1188, *1195 (1999 U.S. Dist. LEXIS 16763, **17

Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 (11th Cir. 1993) (quoting American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1581 (11th Cir. 1985)); see United States v. E.I. du Pont & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956) (noting that monopoly power is "the power to control prices or exclude competition").

In the present case, CRHS alleges that it does not have the requisite monopoly power. See [**18] Def. Br. at 5-7. According to CRHS, the contract that was bid on by both Alabama Ambulance and CRHS was a contract for a fixed term at a fixed cost. See Def. Br. at 6. CRHS states that although it won the bid it was not able to "control prices or exclude competition" in the emergency 911 field. *Id.* CRHS alleges that it could not raise prices during the term of the contract and that it would have to submit another bid at the end of the contract to maintain its contract for providing emergency 911 services to Phenix City. See *id.* These facts are similar to the facts of Kirk-Mayer, Inc. v. Pac Ord, Inc., 626 F. Supp. 1168 (C.D. Cal. 1986).

The *Kirk-Mayer* court found that a successful bidder for a contract does not necessarily have monopoly power for purposes of the Sherman Act. See Kirk-Mayer, 626 F. Supp. at 1170. In *Kirk-Mayer*, the defendant successfully bid for "an exclusive 'blue collar' contract to repair and maintain electronics equipment for the Naval Electronics Systems Engineering Center at Vallejo, California." *Id. at 1169*. The contract was for a fixed term at a fixed price. See *id. at 1170*. [**19] Other firms bid for the contract, including the plaintiff. See *id.* The plaintiff alleged that the defendant violated § 2 of the Sherman Act by monopolizing the market after it won the bid. See *id.* The *Kirk-Mayer* court found that "a government contractor who obtains the contract for a fixed term at a fixed price in open bidding against a number of other bidders . . . does not have the power to control prices or exclude competition." *Id. at 1171*. Consequently, because the bid winner did not have the power to control prices, the winner did not have monopoly power.

Alabama Ambulance argues that *Kirk-Mayer* is not applicable to the present case because CRHS entered into a subcontract with Alabama Ambulance. See Pl. Br. at 4. The court, however, disagrees. Simply because CRHS later sub-contracted with Alabama Ambulance does not mean that CRHS gained monopoly power over the emergency 911 market. CRHS, as *Kirk-Mayer* illustrates, did not have monopoly power over the 911 market when it contracted with Alabama Ambulance. Thus, [*1196] when CRHS terminated its subcontract with Alabama Ambulance it was not controlling the market in a way so as to have market power-it [**20] was only exercising control over the contract it was awarded by the City.

The Eleventh Circuit, in Colsa Corp. v. Martin Marietta Services, Inc., 133 F.3d 853 (1998), also has addressed the monopoly power issue in a contract bidding situation. Colsa found that a subcontractor who was suing a government contractor under the Sherman Act for alleged anti-competitive conduct has a suit in contract not in antitrust law. This court finds this holding applicable in this case. In *Colsa*, the Eleventh Circuit reviewed the granting of summary judgment for the government contractor. Colsa had filed a suit against Martin Marietta for violations of § 2 of the Sherman Act. See Colsa, 133 F.3d 853. Martin Marietta had been awarded a contract with the United States Navy to provide "operation and maintenance" services for the Atlantic Fleet Weapons Training Facility in Puerto Rico. See *id. at 854*. The contract was for six months with four one-year options exercisable by the government. See *id.* In order to perform the contract, Martin Marietta entered into a subcontract with Colsa "whereby Colsa agreed to provide a limited number of personnel [**21] to support Martin Marietta in performing" the government contract. *Id.* Colsa served as a subcontractor for the original term and three additional renewals. See *id.* Before the final option by the government was exercised, Martin Marietta terminated the subcontract with Colsa. See *id. at 855*.

Colsa argued that the alleged antitrust violation was Martin Marietta's "termination of [Colsa's] subcontract . . ." *Id. at 856* (quoting Colsa Complaint). Colsa claimed that the termination of the subcontract was predatory and was an attempt to eliminate Colsa as a competitor. See *id.* The Eleventh Circuit stated, "We fail to see how this conduct can be characterized as anticompetitive. . . . It is not anticompetitive for Martin Marietta (a party to the [government contract]) to exclude Colsa (a non-party to the [government contract]) from performing services under the [government contract]." *Id.*

Although *Colsa* is a predatory pricing case, the monopoly power question is premised on similar facts to the present case. CRHS was awarded the emergency 911 service contract by Phenix City through a bidding process. CRHS subcontracted with [**22] Alabama Ambulance in order to fulfill its contract with the City. CRHS then terminated its contract with Alabama Ambulance during the term of its contract with the City. This conduct, like the conduct in *Colsa*, can not be characterized as anti-competitive and is not actionable under § 2 of the Sherman Act. Consequently, Alabama Ambulance has not provided the court with evidence of a genuine issue of material fact to sustain a monopoly claim.⁸ As in *Colsa*, this court finds this case to sound in contract law and not in **antitrust law**.

Alabama Ambulance also alleges that CRHS conspired to monopolize. HN14 [+] Conspiracy to monopolize has three elements: (1) the existence of a combination or conspiracy, (2) an overt act in furtherance of the conspiracy, and (3) specific intent to monopolize. See United States v. Yellow Cab Co., 332 U.S. 218, 225, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947), [**23] overruled on other grounds by Copperweld Corp. v. Independence Tube Co., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984); Hill Aircraft & Leasing Corp. v. Fulton County, 561 F. Supp. 667, 677 (N.D. Ga. 1982), aff'd mem., 729 F.2d 1467 (11th Cir. 1984). Because this court has found that the alleged activities of CRHS and Phenix City do not amount to an activity that can be considered illegal monopolization, CRHS can not be found liable for conspiracy to monopolize, either. See **Antitrust Law** Developments 305 (noting that "where the [*1197] alleged conspiracy, if successful, would not amount to illegal monopolization, there may be no liability for conspiracy to monopolize") (citing Phoenix Elec. Co. v. National Elec. Contractors Ass'n, 861 F. Supp. 1498, 1514 (D. Or. 1994) (finding that because a shared monopoly does not violate § 2, neither does conspiracy to create shared monopoly)). In this situation, even if there was a conspiracy to have a white owned company provide the emergency 911 services in Phenix City, the contract did not violate § 2; therefore, the conspiracy to monopolize claim cannot stand.

V. [**24] CONCLUSION

CRHS's Motion for Summary Judgment is due to be GRANTED as to the 15 U.S.C. § 2 claims. A separate Order and Judgment will be entered in accordance with this Memorandum Opinion.

Done this 21st day of October, 1999.

W. HAROLD ALBRITTON

CHIEF UNITED STATES DISTRICT JUDGE

ORDER AND JUDGMENT

In accordance with the Memorandum Opinion entered in this case on this day, it is hereby

ORDERED that the Defendant's Motion for Summary Judgment is GRANTED as to the Plaintiff's antitrust claim, alleging violation of 15 U.S.C. § 2. Judgment is hereby entered in favor of the Defendant, CRHS Long Term and Home Care, Inc., and against the Plaintiff, Alabama Ambulance Service, Inc., on that claim. Ruling is deferred on the Defendant's Motion for Summary Judgment as to the remaining claims.

DONE this 21st day of October, 1999.

W. HAROLD ALBRITTON

CHIEF UNITED STATES DISTRICT JUDGE

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⁸ The court further notes that Alabama Ambulance does not address what the "relevant market" is in this case. Relevant market is an element of the monopoly claim.



Pickett v. HCA Hosp. Corp.

United States Court of Appeals for the Fifth Circuit

October 22, 1999, Decided

No. 98-40697, No. 98-40873

Reporter

1999 U.S. App. LEXIS 39318 *

BRIAN R. PICKETT, M.D., Plaintiff - Appellant-Cross-Appellee, versus HCA HOSPITAL CORPORATION, doing business as Woodland Heights Medical Center, also known as Woodland Heights Hospital, Lufkin, Texas, also known as HCA Hospital Corporation; ET AL., Defendants, HCA HOSPITAL CORPORATION, doing business as Woodland Heights Medical Center, also known as Woodland Heights Hospital, Lufkin, Texas, also known as HCA Hospital Corporation, Defendant - Appellee-Cross-Appellant. BRIAN R. PICKETT, M.D., Plaintiff-Appellee, versus HCA HOSPITAL CORPORATION, doing business as Woodland Heights Medical Center, also known as Woodland Heights Hospital, Lufkin, Texas, also known as HCA Hospital Corporation; ET AL., Defendants, HCA HOSPITAL CORPORATION, doing business as Woodland Heights Medical Center, also known as Woodland Heights Hospital, Lufkin, Texas, also known as HCA Hospital Corporation, Defendant-Appellant.

Notice: RULES OF THE FIFTH 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.

Prior History: [*1] Appeal from the United States District Court for the Eastern District of Texas. (9:96-CV-175).

Pickett v. HCA Hosp. Corp., 199 F.3d 440, 1999 U.S. App. LEXIS 31746 (5th Cir. Tex., 1999)

Pickett v. HCA Hosp. Corp., 199 F.3d 440, 1999 U.S. App. LEXIS 31745 (5th Cir. Tex., 1999)

Core Terms

district court, tortious interference, entitled to immunity, peer review, cross-appeal, antitrust, damages

Judges: Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges.

Opinion

PER CURIAM:*

Dr. Pickett sued the defendant hospital alleging violations of federal and state antitrust law. He also alleged state claims based on tortious interference with his business relationships. We have now considered the record, the briefs, and the oral argument presented in this case, all of which lead us directly to the conclusion that the district court correctly ruled on all matters before it. We are convinced that Dr. Pickett produced no evidence that would create a material factual dispute to prevent the grant of summary judgment on each of the claims he asserted. We

* Pursuant to **5TH CIR. R. 47.5**, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in **5TH CIR. R. 47.5.4**.

therefore affirm the district court and we hold: (1) that the defendant is entitled to immunity under the Health Care Quality Improvement Act (the "HCQIA") on all claims for damages based on activities arising out of the professional peer review action. The defendant is [*2] entitled to immunity because the evidence adduced by Dr. Pickett does not rebut the presumption, a presumption provided the hospital by the HCQIA, that the professional peer review action was based upon a reasonable belief that the defendant was acting in the best interest of quality health care; (2) that Dr. Pickett's federal and state antitrust claims fail for lack of satisfactory evidence of a relevant geographic market; and (3) that Dr. Pickett's tortious interference claims fail for lack of proof of damages.

With respect to the defendant's cross-appeal, the district court properly denied its motion for attorney's fees because it made no showing that Dr. Pickett's claims were unfounded. Additionally, there is no merit to the defendant's cross-appeal of the district court's denial of its motion to compel Pickett to return a privileged document.

In sum, the district court is in all respects

AFFIRMED.

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In re Baseball Bat Antitrust Litig.

United States District Court for the District of Kansas

October 28, 1999, Decided ; October 28, 1999, Filed; October 29, 1999, Entered on the Docket

No. 98-mc-1249-KHV

Reporter

75 F. Supp. 2d 1189 *; 1999 U.S. Dist. LEXIS 18356 **; 2000-1 Trade Cas. (CCH) P72,769

IN RE: BASEBALL BAT ANTITRUST LITIGATION (MDL No. 1249); This Document Applies To: Baum Research, et al. v. Hillerich & Bradsby Co., Inc., et al., (No. 99-2112-KHV)

Subsequent History: Later proceeding at [Baum Research & Dev. Co. v. Hillerich & Bradsby Co. \(In re Baseball Bat Antitrust Litig.\), 112 F. Supp. 2d 1175, 2000 U.S. Dist. LEXIS 11150 \(J.P.M.L., 2000\)](#)

Prior History: [Baum Research & Dev. Co. v. Hillerich & Bradsby Co., 31 F. Supp. 2d 1016, 1998 U.S. Dist. LEXIS 21761 \(E.D. Mich., 1998\)](#)

Disposition: [\[**1\]](#) Baum plaintiffs' Motion For Reconsideration And To Amend The Complaint (Doc. # 53) overruled in part and sustained in part. Plaintiffs' motion for reconsideration OVERRULED. Plaintiffs' motion to amend the complaint SUSTAINED as to the claim for tortious interference with prospective economic advantage in violation of state law.

Core Terms

bat, amend, manufacturers, reconsideration motion, antitrust, antitrust claim, alleges, aluminum bat, baseball bat, defendants', composition, baseball, competitor, predicate, conspiracy, leave to amend, amateur, anti trust law, tortious interference, propose an amendment, district court, anticompetitive, amended complaint, antitrust violation, motion to dismiss, Hitting, Machine, coaches, futile, prospective economic advantage

LexisNexis® Headnotes

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

[HN1](#) **Choice of Law, Forum & Place**

Although a transferee court must apply the substantive law of transferor, the transferee district court may apply its own rules governing the conduct and dispatch of cases in its court.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

75 F. Supp. 2d 1189, *1189 (1999 U.S. Dist. LEXIS 18356, **1

Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue

HN2 Relief From Judgments, Altering & Amending Judgments

The court has discretion whether to grant or deny a motion to reconsider.

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 court may recognize any one of three grounds justifying reconsideration: an intervening change in controlling law, availability of new evidence, or the need to correct clear error or prevent manifest injustice.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue

HN4 Relief From Judgments, Altering & Amending Judgments

A motion to reconsider is appropriate when the court has obviously misapprehended a party's position, the facts, or the applicable law, or when a party introduces new evidence that could not have been obtained through exercise of due diligence.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue

HN5 Relief From Judgments, Altering & Amending Judgments

A motion to reconsider is not a second chance for the losing party to make his strongest case or to dress up arguments that previously failed. Such motions are not appropriate if the movant only wants the court to revisit issues already addressed or to hear new arguments or supporting facts that could have been presented originally.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue

HN6 Relief From Judgments, Altering & Amending Judgments

The Federal Rules of Civil Procedure do not recognize motions for reconsideration. While the Rules of Practice and Procedure for the District of Kansas contain a provision entitled "Motions to Reconsider," U.S. Dist. Ct., D. Kan., R. 7.3, this provision is intended to apply only to non-dispositive judgments and orders. Nevertheless, a motion to alter or amend is essentially a motion for reconsideration.

75 F. Supp. 2d 1189, *1189 (1999 U.S. Dist. LEXIS 18356, **1

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue

HN7 [] **Relief From Judgments, Altering & Amending Judgments**

Generally, and without restricting the discretion of the court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the court, either expressly or by reasonable implication, shall not be granted. 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. U.S. Dist. Ct., E.D. Mich., R. 7.1(g)(3).

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN8 [] **Amendment of Pleadings, Leave of Court**

Under [Fed. R. Civ. P. 15\(a\)](#), a party may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise a party may amend its pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

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

HN9 [] **Relief From Judgments, Altering & Amending Judgments**

After the district court enters judgment on a motion to dismiss, plaintiff no longer may amend its complaint as of right, and may only do so with leave of the court.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN10 [] **Amendment of Pleadings, Leave of Court**

Notwithstanding the requirement in [Fed. R. Civ. P. 15\(a\)](#) that leave to amend shall be given freely, a district court may deny leave to amend where amendment would be futile. A proposed amendment is futile if the amended complaint would be subject to dismissal.

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

HN11 [] **Private Actions, Remedies**

75 F. Supp. 2d 1189, *1189 (1999 U.S. Dist. LEXIS 18356, **1

Whether or not a particular practice violates the antitrust laws is determined by its effect on competition, not its effect on a competitor.

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

HN12 [+] **Private Actions, Remedies**

It is not intrinsically an antitrust violation for an organization to limit its endorsement to those who meet its published standards unless the standard itself is shown to be anticompetitive in purpose or effect.

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

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN13 [+] **Private Actions, Remedies**

The antitrust injury doctrine bars recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation.

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN14 [+] **Venue, Multidistrict Litigation**

The transferee court should be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit.

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN15 [+] **Venue, Multidistrict Litigation**

In multidistrict litigation a transferee court should normally use its own best judgment about the meaning of federal law when evaluating a federal claim.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

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

Civil Procedure > Attorneys > General Overview

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

[**HN16**](#) [blue document icon] Responses, Defenses, Demurrsers & Objections

After a motion to dismiss has been granted, a plaintiff must first reopen the case pursuant to a motion under [Fed. R. Civ. P. 59\(e\)](#) or [60\(b\)](#) and then file a motion under [Fed. R. Civ. P. 15](#), and properly apply to the court for leave to amend by means of a motion which in turn complies with [Fed. R. Civ. P. 7](#). In that event, in accordance with [Rule 15](#), leave shall be freely given when justice so requires.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

[**HN17**](#) [blue document icon] Amendment of Pleadings, Leave of Court

When a motion for leave to amend is not properly before it, district court does not abuse discretion in failing to address plaintiff's request for leave to cure deficiencies in her pleadings.

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

Torts > Business Torts > Commercial Interference > General Overview

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

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

[**HN18**](#) [blue document icon] Intentional Interference, Elements

Under Michigan law, the elements of tortious interference with economic relations are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferor, (3) intentional interference inducing or causing a breach or termination of a relationship or expectancy, and (4) damages.

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

Torts > Business Torts > Commercial Interference > General Overview

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

[**HN19**](#) [blue document icon] Intentional Interference, Elements

Although Michigan law governing tortious interference with prospective economic advantage requires the plaintiff to allege more than a mere hope for a future business opportunity or the innate optimism of the salesman, the plaintiff need not demonstrate a guaranteed relationship because anything that is prospective in nature is necessarily uncertain. The claim does not deal with certainties, but with reasonable likelihood or probability.

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

[**HN20**](#) [blue document icon] Commercial Interference, Prospective Advantage

The tort of interference with business relationships and prospective economic advantage contemplates a relationship, prospective or existing, of some substance, some particularity, before an inference can arise as to its value to the plaintiff and the defendant's responsibility for its loss. To demonstrate such a realistic expectation, plaintiff must prove a business relationship with an identifiable class of third parties.

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

HN21 [+] **Commercial Interference, Prospective Advantage**

To establish whether an expectation of economic advantage was reasonable, plaintiff need not prove the existence of an enforceable contract; it is sufficient to show interference with specific third parties or an identifiable prospective class of third persons with whom plaintiff had a reasonable expectation of contracting.

Counsel: For EASTON SPORTS INC, plaintiff: Bruce Keplinger, Norris & Keplinger, L.L.C., Overland Park, KS.

For EASTON SPORTS INC, plaintiff: David A Ettinger, Honigan Miller Schwartz & Cohn, Detroit, MI.

For BAUM RESEARCH AND DEVELOPMENT CO., INC., STEVE BAUM, plaintiffs: David L Nelson, Patrick B McCauley, David J Szymanski, Sommers, Schwartz, Silver & Schwartz, P.C., Southfield, MI.

For BAUM RESEARCH AND DEVELOPMENT CO., INC., plaintiff: Christopher E Ondeck, Jenkens & Gilchrist, P.C., Washington, DC.

For STEVE BAUM, plaintiff: Salvatore A Romano, Christopher E Ondeck, Jenkens & Gilchrist, P.C., Washington, DC.

For NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, defendant: Craig T. Kenworthy, James A. Durbin, Swanson Midgley, LLC, Kansas City, MO.

For NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, defendant: Gregory L Curtner, Julie P Close, [**2] Mark T Boonstra, Susan I Robbins, Miller, Canfield, Paddock & Stone, P.C., Ann Arbor, MI.

For HILLERICH & BRADSBY CO., defendant: John K. Power, Husch & Eppenberger, Kansas City, MO.

For HILLERICH & BRADSBY CO., defendant: John K Bush, Christie A Moore, Peggy B Lyndrup, Greenebaum, Doll & McDonald, PLLC, Louisville, KY.

For HILLERICH & BRADSBY CO., defendant: Barbara L Goldman, Dykema Gossett PLLC, Bloomfield Hills, MI.

For EASTON SPORTS INC, defendant: Bruce Keplinger, Norris & Keplinger, L.L.C., Overland Park, KS.

For SPORTING GOODS MANUFACTURERS ASSOCIATION, defendant: John M Peterson, Jonathan T Howe, Howe & Hutton, Ltd., Chicago, IL.

For WORTH INC, defendant: Frank M Northam, Arthur L Herold, Webster, Chamberlain & Bean, Washington, DC.

For WORTH INC, defendant: Dennis Barnes, Eugene Driker, Barris, Sott, Denn & Driker, PLC, Detroit, MI.

Judges: Kathryn H. Vratil, United States District Judge.

Opinion by: Kathryn H. Vratil

Opinion

[*1191] **MEMORANDUM AND ORDER**

75 F. Supp. 2d 1189, *1191 (1999 U.S. Dist. LEXIS 18356, **2

Following a transfer order of the judicial panel on multidistrict litigation under [28 U.S.C. § 1407](#), the Court has jurisdiction over consolidated pretrial proceedings in these [**3] actions. This matter comes before the Court on Motion For Reconsideration And To Amend The Complaint (Doc. # 53) which the Baum plaintiffs filed December 4, 1998 in Baum Research & Dev. Co. v. Hillerich & Bradsby Co., Inc., Case No. Civ. A. 99-2112-KHV.

Pursuant to E.D. Mich. Local Rule 7.1(g)(3), plaintiffs seek reconsideration of the order of the United States District Court for the Eastern District of Michigan which dismissed their state and federal antitrust claims for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#). Pursuant to [Rule 15\(a\)](#), [Fed. R. Civ. P.](#), plaintiffs also seek leave to amend their antitrust claims and claims for tortious interference. For reasons stated below, plaintiffs' motion is sustained in part and overruled in part.¹

[4] Procedural Background**

On July 13, 1998, Steve Baum and Baum Research and Development Company [collectively [\[*1192\]](#) "Baum"] filed a complaint against Hillerich & Bradsby Co., Inc. ["H&B"], Easton Sports, Inc. ["Easton"], Worth, Inc., the National Collegiate Athletic Association ["NCAA"], and the Sporting Goods Manufacturers Association ["SGMA"], claiming violations of state and federal antitrust laws and tortious interference with contractual relations and prospective economic advantage in violation of state law.² See Complaint (Doc. # 1) filed July 13, 1998 in Case No. Civ. A. 99-2112-KHV.

On November 19, 1998, the United States District Court for the Eastern District of Michigan dismissed Baum's state and federal antitrust claims for [**5] failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#). Assuming that Baum had suffered injury as a result of defendants' antitrust violations, it held that Baum's injury was not the result of any anticompetitive effect on the market; rather, Baum's injury stemmed from competition itself. The Michigan court further held that Baum had not pleaded actionable claims for tortious interference, and directed Baum to amend the complaint to better describe the specific expectation of an economic relationship. The court held that if Baum should fail to sufficiently amend those claims, the court would dismiss them.

Baum filed the present motion on December 4, 1998. Five days later, on December 9, 1998, the judicial panel on multidistrict litigation transferred the Baum action to this Court pursuant to [28 U.S.C. § 1407](#).³

[6] Applicable Standards**

¹ Because jurisdiction over consolidated pretrial proceedings lies in this transferee Court, we apply the Rules of Practice and Procedure of this district. See, e.g., Van Dusen v. Barrack, 376 U.S. 612, 639 n.40, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964) (although [HN1](#)↑ transferee court must apply substantive law of transferor, "the transferee District Court may apply its own rules governing the conduct and dispatch of cases in its court."). As discussed below, however, the Court would reach the same result under the local rules of either court.

² Baum has abandoned the claim for tortious interference with contractual relations. See Memorandum In Support of [Baum's] Motion For Reconsideration And To Amend The Complaint (Doc. # 52) filed December 4, 1998 in Case No. Civ. A. 99-2112-KHV, at 1 n.1.

³ [Section 1407\(a\)](#) provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred [by the judicial panel on multidistrict litigation] to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made . . . for the convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, that the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

1. Motion To Reconsider

[HN2](#) The Court has discretion whether to grant or deny a motion to reconsider.⁴ [**8](#) See [HN3](#) [Hancock v. City of Okla. City, 857 F.2d 1394, 1395 \(10th Cir. 1988\)](#); [Shinwari v. Raytheon Aircraft Co., 25 F. Supp. 2d 1206, 1208 \(D. Kan. 1998\)](#). The Court may recognize any one of three grounds justifying reconsideration: an intervening change in controlling law, availability of new evidence, or the need to correct clear error or prevent manifest injustice. See [Shinwari, 25 F. Supp. 2d at 1208](#). See also [Anderson v. United Auto Workers, 738 F. Supp. 441, 442 \(D. Kan. 1990\)](#) (motion [HN4](#) to reconsider appropriate when court has obviously misapprehended party's position, facts, or applicable law, or when party introduces new evidence that could not have been obtained through exercise of due diligence). [HN5](#) A motion to reconsider is not a second chance for the [\[*1193\]](#) losing party to make his strongest case or to dress up arguments that previously failed. See [Shinwari, 25 F. Supp. 2d at 1208](#) (citing [Voelkel v. General Motors Corp., 846 F. Supp. 1482, 1483, \[**7\] aff'd 43 F.3d 1484 \(10th Cir. 1994\)](#)). Such motions are not appropriate if the movant only wants the Court to revisit issues already addressed or to hear new arguments or supporting facts that could have been presented originally. See id. (citing [Van Skiver v. United States, 952 F.2d 1241, 1243 \(10th Cir. 1991\)](#), cert. denied, 506 U.S. 828, 121 L. Ed. 2d 51, 113 S. Ct. 89 (1992)).⁵

2. Amendment Of Pleadings

[HN8](#) Under [Rule 15\(a\), Fed. R. Civ. P.](#), a party may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise a party may amend its pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. [HN9](#) After the district court enters judgment on a motion to dismiss, plaintiff no longer may amend its complaint as of right, and may only do so with leave of the Court. See [Glenn v. First Nat'l Bank in Grand Junction, 868 F.2d 368 \(10th Cir. 1989\)](#) [\[*9\]](#) (after district court granted motion to dismiss, appellants could have amended their complaint only by leave of court or by written consent of adverse party). See also [Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180, 189 \(3d Cir. 1998\)](#) ("after the district court enters judgment on a motion to dismiss, a plaintiff no longer may amend [its] complaint as of right," and may only do so with leave of court) (citations omitted), vacated on other grounds, [525 U.S. 459 \(1999\)](#). The Court may refuse to grant leave to amend where, for example, the proposed amendment would be futile. See [Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 858-59 \(10th Cir. 1999\)](#) (notwithstanding [HN10](#) [Rule 15\(a\)](#) requirement that leave to amend shall be given freely, district court may deny leave to amend where amendment would be futile and proposed amendment is futile if amended complaint would be subject to dismissal).

Factual Background

⁴ [HN6](#) The Federal Rules of Civil Procedure do not recognize motions for reconsideration. See [Hatfield v. Board of County Comm'rs, 52 F.3d 858, 861 \(10th Cir. 1995\)](#); [Loum v. Houston's Restaurants, Inc., 177 F.R.D. 670, 671 \(D. Kan. 1998\)](#). While the Rules of Practice and Procedure for the District of Kansas contain a provision entitled "Motions to Reconsider," D. Kan. Rule 7.3, this provision is intended to apply only to non-dispositive judgments and orders. See [Loum, 177 F.R.D. at 671](#). Nevertheless, a motion to alter or amend is essentially a motion for reconsideration. See [Hilst v. Bowen, 874 F.2d 725, 726 \(10th Cir. 1989\)](#); [Koch v. Shell Oil Co., 911 F. Supp. 487, 489 \(D. Kan. 1996\)](#).

⁵ [HN7](#) Eastern District of Michigan Rule 7.1(g)(3) sets forth a similar standard:

Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the court, either expressly or by reasonable implication, shall not be granted. 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.

[**10] In this case, the relevant market is the market for amateur baseball bats, which includes but is not limited to college baseball. Baum manufactures wood composition baseball bats. H&B, Easton and Worth [collectively, "bat manufacturers"] manufacture aluminum baseball bats. The SGMA is a not-for-profit trade association of bat manufacturers. The NCAA is an association of colleges and universities that participate in intercollegiate athletics. Among other things, the NCAA adopts and promulgates playing rules.

Ninety percent of the market uses aluminum bats which defendant manufacturers [*1194] produce, and they have signed exclusive contracts to provide baseball bats to various college teams. Wood bats cost less, but Baum implicitly acknowledges that defendants' aluminum bats outperform wood bats. NCAA rules allow both wood and aluminum bats in NCAA-sanctioned baseball games. During the relevant period, NCAA rules did not restrict bat performance. According to Baum, the NCAA rules (or lack thereof) were the product of a conspiracy to squeeze its wood composition bat out of the market. In particular, Baum alleges that the bat manufacturers conspired to eliminate competition from the market [**11] by (1) engaging in exclusive arrangements with colleges, universities and coaches to foreclose these teams from using competing products, and (2) cooperating with SGMA and the NCAA to manipulate and control the standard-setting function of the NCAA Baseball Rules Committee ["Rules Committee"] to establish unreasonable bat performance standards that excluded wood or wood composition bats from competition.

Analysis

Baum brings suit against the NCAA, the bat manufacturers and the SGMA, claiming violations of federal and state antitrust laws and tortious interference in violation of state law. The gravamen of Baum's complaint is that to perpetuate their dominance and exclude Baum from the market for amateur baseball bats, aluminum bat manufacturers conspired with the NCAA to manipulate the standard for baseball bats used in NCAA-sanctioned baseball games. In a nutshell, the theory is that because of lax NCAA standards which allowed aluminum bats, Baum could not sell wood composition baseball bats in the amateur baseball bat market. According to Baum, the lax standards stemmed from a conspiracy between the bat manufacturers, SGMA and the NCAA and the conspiracy violated federal [**12] and state antitrust law.⁷

Baum's theory of tortious interference with business relationships and prospective economic advantage is that the bat manufacturers and the SGMA engaged in a concerted campaign to remove and destroy Baum's bats, "sideline" the Baum Hitting Machine, prevent Baum from establishing relationships with amateur baseball teams, and disrupt Baum's sales to minor league professional baseball teams.

Baum seeks reconsideration of the order which dismissed its antitrust claims as well as leave to amend those claims. Specifically, Baum seeks reconsideration of the Michigan court's dismissal of the state and federal antitrust claims on the ground that "additional events have taken place which directly bear [**13] on and support" those claims. Motion For Reconsideration And To Amend The Complaint at 2. Baum also seeks "to amend, clarify and streamline" its antitrust claims "based on the former rulings of [the Michigan] Court, the factual information set forth

⁶The Court derives this factual background from the Michigan court's opinion which dismissed the Baum complaint. See Baum Research and Dev. Co. v. Hillerich & Bradsby Co., 31 F. Supp. 2d 1016 (E.D. Mich. 1998). Where appropriate, the Court notes additional factual allegations set forth in the Baum Complaint (Doc. # 1) filed July 13, 1998 in Case No. Civ. A. 99-2112-KHV and Baum's [Proposed] First Amended Complaint (Doc. # 50) filed March 8, 1999 in this consolidated action, In Re Baseball Bat Antitrust Litig., 75 F. Supp. 2d 1189, 1999 U.S. Dist. LEXIS 18356.

⁷The analysis is the same for Baum's state antitrust claims and federal antitrust claims. See Mich. Comp. Laws 445.784(2) (in construing Michigan Antitrust Reform Act, courts shall give "due deference to interpretations given by federal courts to comparable antitrust statutes . . .").

in Steve Baum's Affidavit, and the new facts that have taken place after the filing of the original Complaint and to more clearly set forth the nature of the antitrust violation and antitrust injuries Plaintiffs have sustained." *Id.* at 3.

I. Motion To Reconsider The Dismissal Of Baum's State And Federal Antitrust Claims

A. Antitrust Injury

The United States District Court for the Eastern District of Michigan dismissed Baum's antitrust claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The court held that the Baum [*1195] complaint failed to properly allege antitrust injury, in that Baum's injury did not result from any anticompetitive effect on the market; rather, Baum's injury stemmed from competition itself.

Baum argues that since the Michigan court dismissed its antitrust claims, "additional events have taken place which directly bear on and support" those claims. Motion For Reconsideration And [**14] To Amend The Complaint at 2. In particular, Baum notes that the NCAA Rules Committee adopted a "new bat rule" on July 14, 1998. The new rule established off-the-bat ball speed limitations at "wood-like levels" and "had the market effect of permitting wood, wood composition and wood-like bats to compete." *Id.* Baum contends that the new rule has caused "a substantial increase in competition and now wood and wood composition bat manufacturers are competing with aluminum bat manufacturers," *id.* at 3, thus establishing that "the absence of the new performance standard changes did not foster competition; rather, it had the effect of stifling competition and limiting competition" to aluminum bat manufacturers. Memorandum In Support of [Baum's] Motion For Reconsideration And To Amend The Complaint at 4.

Baum further notes that after the NCAA adopted the new rule, Easton sued the NCAA in this Court, claiming that the new rule violated Section 1 of the Sherman Act.⁸ According to Baum, the Easton complaint contains "a number of admissions which support" the Baum claims. The gist of Easton's complaint, says Baum, is that Easton has been injured by the new bat rule because Easton [**15] "no longer controls and manipulates the NCAA rule-making process to its benefit." *Id.* at 5.

Likewise, Baum notes that the NCAA has filed a declaratory judgment complaint against Hillerich & Bradsby, Worth and Baum, and that it contains admissions which support Baum's claims. See National Collegiate Athletic Ass'n v. Hillerich & Bradsby, Co., Inc., et al., No. 99-2367-KHV. Baum contends that the NCAA complaint makes it clear that the NCAA had the "duty and authority to promulgate rules or standards designed to insure player safety and the integrity of the game," and that defendants' conspiracy to obstruct the NCAA from enacting a rule "did not foster competition unless it can be found that the NCAA neither had the duty nor the authority to do so." *Id.* at 5.

Finally, Baum [**16] contends that "Easton has now falsely disparaged the Baum Hitting Machine and has threatened to sue college teams or coaches who have signed exclusive use contracts with Baum if they switch to wood or wood composition bats or fail to use Easton's high performance aluminum bats." *Id.*

Even assuming that this "new evidence" was unavailable, the Court is not persuaded that it justifies a different outcome. Inclusion of the "new evidence" does not alter the flawed theory of antitrust injury which the evidence purports to support. This Court agrees with the Michigan court that "there is a logical inference that the absence of a rule regulating bat performance actually fosters competition." Baum Research & Dev. Co. v. Hillerich & Bradsby Co., 31 F. Supp. 2d 1016, 1022 (E.D. Mich. 1998). The Michigan court properly pointed out that "the main purpose of the antitrust laws is to preserve and promote competition," and "whether HN11[ or not a particular practice violates the antitrust laws is determined by its effect on competition, not its effect on a competitor." *Id.* at 1021 n.7 (quoting Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 825 (6th Cir. 1982)) [**17] (emphasis

⁸ On September 29, 1999, the Court dismissed the Easton Sports, Inc. v. National Collegiate Athletic Ass'n case, No. 98-2351-KHV. See Stipulation And Order Dismissing Case With Prejudice (Doc. # 144) filed Sept. 29, 1999.

[*1196] added).⁹ See also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) (antitrust laws were enacted for protection of "competition not competitors"). The Michigan court therefore correctly concluded that "Baum has failed to state an antitrust claim upon which relief can be granted because it can prove no set of facts to show that it suffered an antitrust injury." *Baum*, 31 F. Supp. 2d at 1022.

Baum also uses an array of antitrust buzzwords to argue that its [**18] "new evidence" establishes, e.g., "the onset of the conspiracy," "predatory" "exclusionary" and "overt acts" and control of the "cartel market," "dominant market power" by the NCAA, and "before and after market conditions." Taken as a whole, Baum's convoluted arguments essentially re-argue the issue which the Michigan court has already decided. A motion to reconsider is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed. See *Shinwari*, 25 F. Supp. 2d at 1208 (citing *Voelkel v. General Motors Corp.*, 846 F. Supp. 1482, 1483, aff'd 43 F.3d 1484 (10th Cir. 1994)). Such motions are not appropriate if the movant only wants the Court to revisit issues already addressed or to hear new arguments or supporting facts that could have been presented originally. See id. (citing *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991), cert. denied, 506 U.S. 828, 121 L. Ed. 2d 51, 113 S. Ct. 89, (1992)). See also E.D. Mich. Rule 7.1(g)(3) (motions for reconsideration which merely present same issues ruled upon by court, either expressly [**19] or by reasonable implication, shall not be granted).

To the extent that Baum's motion for reconsideration implicitly claims the need to correct clear error or prevent manifest injustice, the foregoing analysis is equally applicable. As noted, the Michigan court's opinion was thoughtful, well-reasoned and -- in this Court's view -- entirely correct. None of the arguments which Baum has advanced in the present motion convince this Court otherwise.¹⁰

Baum has submitted a supplemental citation of authority which advances the conclusory argument that *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), [**20] is "informative on the issue of antitrust injury and standing" and "should further clarify any confusion that somehow Sixth Circuit and Tenth Circuit holdings on antitrust injury" differ from this case. Baum's Supplemental Citation Of Authority (Doc. # 103) filed April 16, 1999 in Case No. Civ. A. 98MC1249-KHV, at 1-2. According to Baum, *Re/Max* confirms that "a direct competitor has standing and suffers antitrust injury when it is targeted and victimized by a conspiracy to exclude it from competition." Id. at 2.

In *Re/Max*, a national real estate brokerage franchisor, subfranchisor and franchisees sued two local real estate firms. Under defendants' adverse-splits policy, whenever Re/Max agents were involved in a transaction, defendants paid them only 25 or 30 percent of the commission, rather than the industry norm of a 50/50 split. Plaintiffs alleged that the adverse-splits [*1197] policy -- the means by which defendants chose to dominate the market for hiring real estate agents -- violated the antitrust laws. Plaintiffs claimed that defendants controlled the market for knowledgeable and experienced sales agents and that through the unfair adverse-splits policy, they prevented [**21] Re/Max from recruiting those agents, thereby depriving Re/Max franchises of the information and expertise they needed to effectively serve buyers and sellers of homes.

In *Re/Max*, the Sixth Circuit rejected defendants' argument that the franchisor plaintiffs lacked standing to bring antitrust claims because they could not show antitrust injury. The court noted that "defendants admitted [that] they intended to thwart, through the implementation of adverse splits, Re/Max's attempt to recruit defendants' agents." The court further noted that

⁹ Nor does Baum's concern about the safety of aluminum bats alter the analysis whether an antitrust injury exists. See *Baum Research and Dev. Co.*, 31 F. Supp. 2d at 1022 n. 9 (citing *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) (rejecting attempt to justify restraint on competition on basis that competition posed threat to public safety and ethics of profession, as contrary to policy of Sherman Act)).

¹⁰ The Court would reach the same result under E.D. Mich. Local Rule 7.1(g)(3). Baum has failed to demonstrate a palpable defect by which the Michigan court and the parties have been mislead. Also, the Court is in substantial agreement with the arguments which the bat manufacturers have proffered in opposition to Baum's motion, and the Court therefore adopts those arguments by reference.

Although the policy was aimed more directly at Re/Max franchises, the effect was to deter agents from defecting to Re/Max, thereby impeding an innovative competitor's access to the market. * * * Denying the franchisors standing would result in antitrust violations going "undetected or unremedied" if in fact Re/Max franchises were barred from [the] markets.

173 F.3d at 1023.

That situation is not analogous to this case. Here, defendants allegedly induced the NCAA not to pass a rule which restricted bat performance standards. As a result, bat manufacturers continued to produce and market different bat designs **[**22]** and the amateur baseball market retained the right to choose which type of baseball bats to use. It was the consumers' unhindered preference for aluminum bats, then, which prevented Baum from selling composite wood bats. The Michigan court therefore properly concluded that "there is a logical inference that the absence of a rule regulating bat performance actually fosters competition." Baum, 31 F. Supp. 2d at 1022. See also Valley Products, 128 F.3d 398 at 403 (antitrust injury doctrine bars recovery where asserted injury, although linked to alleged violation of antitrust laws, flows directly from conduct that "is not itself an antitrust violation").

Baum also cites DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999), for the proposition that the antitrust laws specifically prohibit defendants' "conspiratorial and biased standard setting activities" because defendants distorted and manipulated the standard setting process to prevent increased competition. In DM Research, the First Circuit Court of Appeals noted that in cases which involve anticompetitive quality standards, "the principal concern has been the **[**23]** use of standards setting as a predatory device by some competitors to injure others" and that in such cases, there is normally "a showing that the standard was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or other improper forms of influence, in addition to a further showing of market foreclosure." 170 F.3d at 57-58 (footnote omitted). The First Circuit further opined that "it HN12[] is not intrinsically an antitrust violation for an organization to limit its endorsement to those who meet its published standards unless the standard itself is shown to be anticompetitive in purpose or effect." 170 F.3d at 58. In this case, however, Baum's complaint is not that the NCAA set an anticompetitive standard; its complaint is that the NCAA's failure to set a standard (albeit because of a distorted standard-setting process) injured its ability to compete. As the Michigan court noted, it is logical to infer from Baum's allegations that the absence of a bat performance rule actually enhanced competition. Therefore DM Research is clearly inapposite.

Finally, Baum cites Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745, *11981 (10th Cir. 1999), **[**24]** for the proposition that the proposed amended complaint properly alleges antitrust injury, in that Baum was the target of the conspiracy and was victimized by its anticompetitive consequences. Full Draw Productions is readily distinguished, however, on its facts. In that case an archery trade show promoter sued archery manufacturers and an archery trade association, alleging a group boycott of its trade show in violation of the antitrust laws. In concluding that plaintiff's injury reflected the anticompetitive effects of the group boycott, the Tenth Circuit noted that because plaintiff produced "one of only two archery trade shows in the United States, the purposeful and wrongful destruction of [plaintiff's] business by Defendants directly injured competition as well as injuring [plaintiff]." 182 F.3d at 754. The court further opined that "we have no doubt that alleging the loss of one of two competitors in this case alleges injury to competition" and therefore "the instant case is not one in which it is alleged that a competitor fell prey to competition; it is one in which it is alleged that competition fell prey to a competitor." Id. Finally, the court noted **[**25]** that the effect of defendants' boycott "was not to increase competition," but rather to reduce competition through the elimination of one source of output, "thereby limiting consumer choice to the other source of output" and causing "the unnatural demise of [plaintiff's trade show] at the hands of defendants." Id. at 755.

This case involves several competitors, and Baum cannot allege the loss of one of only two competitors. More importantly, this is essentially a case in which plaintiff complains that a competitor fell prey to competition. Baum alleges that defendants induced the NCAA not to pass a rule which restricted baseball bats. As a result, amateur baseball retained the right to choose which types of bats to use, and in exercising that right did not choose Baum's wood composition bat. Thus, unlike Full Draw Productions, the elimination of a competitor was the direct result of "the economic freedom of participants in the relevant market." Id. (citations omitted).

For all of these reasons, the Court concludes that Baum has not alleged antitrust injury and that its motion for reconsideration of that issue should be overruled.

B. Necessary Predicate

[**26] As an alternative basis for dismissing Baum's antitrust claims, the Michigan court held that "even if Baum could somehow establish that NCAA's failure to regulate bat performance had an anticompetitive effect on the market, Baum cannot show that its injury flowed from the purported violation of the antitrust laws." [Baum, 31 F. Supp. 2d at 1023](#). Simply stated, the court held that Baum cannot establish that the antitrust violation was the "necessary predicate" to its injury because the NCAA had the lawful authority to refuse to change the baseball bat rules in Baum's favor. *Id.* See also [Valley Prods. Co., Inc. v. Landmark, 128 F.3d 398, 403-04 \(6th Cir. 1997\)](#) ("the Sixth Circuit, it is fair to say, has been reasonably aggressive in using [HN13](#) [↑] the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation.").

Baum briefly challenges this portion of the Michigan court's ruling, arguing that its exclusion from the amateur baseball bat market was the "direct and proximate consequence" of defendants' conspiracy, that [**27] Baum's resulting injury was the "ineluctable result" thereof, and that "the violation was the necessary predicate to Baum's injury." [Memorandum In Support of \[Baum's\] Motion For Reconsideration And To Amend The Complaint](#) at 9. Baum [*1199] further argues that its injury does not flow from the NCAA's lawful refusal to change the rules because the rule process is "rigged" by defendants' conspiracy. In the alternative, Baum claims since the recent rule change promotes competition and were it not for defendants' conspiracy, the change "would and should have taken place at least five years ago." *Id.* at 9-10.

The bat manufacturers note that the "necessary predicate" requirement was not the basis for their motion to dismiss Baum's original complaint. They argue that the Michigan court's discussion of the necessary predicate requirement was secondary to its holding that Baum had not suffered antitrust injury. The bat manufacturers also contend that the "necessary predicate" requirement is peculiar to the Sixth Circuit and has been widely criticized and rejected in other circuits, *see, e.g., Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299, 1302 (4th Cir. 1979); Ostroff v. Crocker Co., Inc., 670 F.2d 1378, 1384-87 (9th Cir. 1982);* [**28] *Irvin Indus. v. Goodyear Aerospace Corp., 974 F.2d 241, 245 (2d Cir. 1992)*, and that the doctrine is inconsistent with Tenth Circuit caselaw on antitrust injury. *See, e.g., Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 960-63 (10th Cir. 1990)* (upholding antitrust damage award despite defendant's right to refuse to deal with plaintiff absent anticompetitive behavior). Accordingly, the bat manufacturers argue that the Court need not address the Michigan court's analysis of the issue in ruling on Baum's motion for reconsideration.

Concurring with the reasoning of the Michigan court, the NCAA argues that

any alleged injury that [Baum] suffered from the NCAA's promulgation of bat performance standards cannot be an "antitrust injury" because the NCAA's power to set those standards is derived from its own rulemaking authority, and not the alleged conspiracy[,] and thus the NCAA's alleged participation in this "conspiracy" was not a necessary predicate to Baum's alleged injury. *See Hodges v. WSM, Inc., 26 F.3d 36 (6th Cir. 1994).*

NCAA [Response To Plaintiffs' Motion For Reconsideration And To Amend The](#) [**29] [Complaint](#) (Doc. # 1) filed December 23, 1998, at 2. Because Baum cannot establish the necessary predicate requirement, the NCAA concludes that Baum's proposed amended complaint will suffer the same fate as Baum's original complaint: dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#). Accordingly, the NCAA argues that Baum's motion for reconsideration and to amend must be denied.

Unlike the bat manufacturers, however, the NCAA does not believe that this Court, in ruling on Baum's motion for reconsideration, should simply disregard the portion of the Michigan decision which addresses the "necessary predicate" requirement. The NCAA argues that the Michigan court order is "the law of the case." *See, e.g., KCI Corp. v. Kinetic Concepts, Inc., 18 F. Supp. 2d 1212, 1214 (D. Kan. 1998)* ("traditional principals of law of the case counsel against the transferee court reevaluating the rulings of the transferor court"). Therefore, the NCAA

75 F. Supp. 2d 1189, *1199 (1999 U.S. Dist. LEXIS 18356, **29

contends, the only proper basis upon which this Court may upset the Michigan court determination of the issue is one of the three grounds justifying reconsideration. See, e.g., Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1516 (10th Cir. 1991). [**30]

The NCAA disputes the bat manufacturers' contention that the "necessary predicate" requirement is inconsistent with the Tenth Circuit approach to the question of antitrust injury. It also posits that even if the "necessary predicate" requirement is inconsistent with Tenth Circuit precedent, such inconsistency is irrelevant in this multidistrict litigation case because the Baum [*1200] action (should it be revived) will eventually return to Michigan for trial. See Lexecon v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 140 L. Ed. 2d 62, 118 S. Ct. 956 (1998) (cases consolidated under Section 1407 must be remanded to transferor court for trial). The NCAA contends that reinstatement of Baum's antitrust claims on the ground that the Tenth Circuit does not follow the "necessary predicate" requirement would lead to a bizarre result, in that once the action returned to Michigan, it would again be subject to dismissal under Sixth Circuit precedent.

The Court agrees with the Court of Appeals for the District of Columbia that "the HN14[[↑]] transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor [**31] circuit." In re Korean Airlines Air Disaster, 265 U.S. App. D.C. 39, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (quoting Marcus, Conflict Among Circuits and Transfers Within the Federal Judicial System, 93 Yale L.J. 677, 721 (1984); and citing Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U. Pa. L. Rev. 595, 662-706 (1987)). See also In re United Mine Workers of Am. Employee Benefit Plans Litig., 854 F. Supp. 914, 919 (D.D.C. 1994) (accepting basic principle that HN15[[↑]] in multidistrict litigation "a transferee court should normally use its own best judgment about the meaning of federal law when evaluating a federal claim") (citing In re Korean Airlines Air Disaster, 829 F.2d at 1174).

Although this Court is not bound by stare decisis to follow Sixth Circuit precedent simply by virtue of the fact that it is a transferee Court, nor is it obligated to ignore Sixth Circuit precedent. Unlike In re Independent Serv. Orgs. Antitrust Litig., 1998 WL 919125, at *2-3 (D. Kan. 1998), where this Court queried whether it was bound to [**32] follow Ninth Circuit precedent in resolving motions for summary judgment, in the present case the Michigan court has already applied Sixth Circuit precedent in dismissing Baum's antitrust claims. As a transferee Court ruling on Baum's motion for reconsideration, it is clearly reasonable to follow Sixth Circuit precedent. Applying its own best judgment, In re Korean Airlines Air Disaster, 829 F.2d at 1174, the Court therefore concludes that Baum's motion for reconsideration should be analyzed under Sixth Circuit precedent.

That said, the Court concludes that Baum has failed to establish that the Michigan court erred in applying the "necessary predicate" issue. Baum's cursory and conclusory arguments do not establish, or even attempt to invoke, any of the grounds which justify reconsideration: an intervening change in controlling law, availability of new evidence, or the need to correct clear error or prevent manifest injustice. See Shinwari, 25 F. Supp. 2d at 1208; see also Anderson, 738 F. Supp. at 442. The Court agrees with the well-reasoned opinion of the Michigan court on this issue. Baum cannot establish that an antitrust violation [**33] was the "necessary predicate" to its injury because the NCAA had the lawful authority to refuse to change the bat rules in Baum's favor. Nothing in Baum's motion persuades the Court of any error in the Michigan decision. Baum's motion for reconsideration on the necessary predicate issue is therefore overruled.

II. Motion For Leave to Amend The State And Federal Antitrust Claims

Baum argues that it "may have" a right to amend its antitrust claims without leave of court and that in any event, the Court should grant leave to amend to correct a palpable defect or prevent manifest injustice. See Rule 15(a), Fed. R. Civ. P.; see also Foman v. Davis, 371 U.S. 178, 182-83, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962); [*1201] Ohio Cas. Ins. Co. v. Farmers Bank, 178 F.2d 570 (6th Cir. 1949) (where no responsive pleading filed when appellant tendered first amendment to complaint, asserted untimeliness of amendment was not valid ground for rejecting amendment); Firchau v. Diamond Nat'l Corp., 345 F.2d 269, 270-71 (9th Cir. 1965) (plaintiff may amend one time as a matter of right even after motion to dismiss has been granted); Smith, 139 F.3d at 189 [**34] (under Rule

[15\(a\)](#) plaintiff has absolute right to amend complaint once at any time before responsive pleading is served; thereafter, plaintiff must seek leave to amend, and although within its discretion, district court "should grant such requests freely when justice so requires").

Baum characterizes its motion as a request for "reconsideration of the [Michigan] Court's apparent refusal to permit amendment of the antitrust claims based on the erroneous and unsupported factual conclusion that under no set of facts could Baum ever show 'antitrust injury.'" [Baum's Reply To Briefs In Opposition To Motion For Reconsideration And To Amend Complaint](#) (Doc. # 6) filed January 8, 1999, in [In Re Baseball Bat Antitrust Litig., 75 F. Supp. 2d 1189](#), Case No. 98MC1249-KHV, at 5-6.

Baum's argument that it is entitled to amend without leave of court is not well taken in light of Tenth Circuit authority. In [Glenn v. First Nat'l Bank in Grand Junction, 868 F.2d 368 \(10th Cir. 1989\)](#), plaintiffs did not exercise their right to amend before the trial court decided defendants' motion to dismiss. On appeal, the Tenth Circuit held that "after the court granted the motion to dismiss, Appellants could [\[**35\]](#) have amended their complaint only by leave of court or by written consent of the adverse party." [868 F.2d at 370](#). The Tenth Circuit further rejected plaintiffs' argument that because they "requested" leave to amend before the trial court dismissed their complaint, they were entitled to formally amend as a matter of right. It reasoned:

If Appellants' theory were to be adopted, the pleading phase of a lawsuit would never end. Such a practice would undermine the distinctions in [Fed. R. Civ. P. 15](#) between "right" to amend and "leave" to amend, and plaintiffs' counsel would then have the right to amend indefinitely simply by including a "request to amend" in their response to a motion to dismiss . . . [HN16](#)[¹⁵] After a motion to dismiss has been granted, plaintiffs must first reopen the case pursuant to a motion under [Rule 59\(e\)](#) or [Rule 60\(b\)](#) and then file a motion under [Rule 15](#), and properly apply to the court for leave to amend by means of a motion which in turn complies with [Rule 7](#). In that event, in accordance with [Rule 15](#), "leave shall be freely given when justice so requires."

[868 F.2d at 371](#) (emphasis added). Cf. [Brever v. Rockwell Intern. Corp., 40 F.3d 1119, 1131 \(10th Cir. 1994\)](#) [\[**36\]](#) (where record clearly showed that plaintiff had repeatedly expressed willingness to amend and had demonstrated particular grounds, but district court misled her to believe that she should wait to amend until court disposed of motions to dismiss, court should have reserved to plaintiff right to amend upon dismissal of action); [Tripplett v. Leflore County, 712 F.2d 444, 445 \(10th Cir. 1983\)](#) (accepting plaintiff's motion to reconsider as request to amend despite its irregularity because motion to reconsider -- which included brief with bold captioned title reading "REQUEST FOR LEAVE TO AMEND COMPLAINT" -- unequivocally gave district court and opposing counsel clear notice of request to amend and grounds therefore).

In dismissing Baum's antitrust claims, the Michigan court made no mention of any proposed amendments to the antitrust claims. Indeed Baum has identified no pleadings which sought to amend those [\[*1202\]](#) claims. To the extent that Baum characterizes the present motion for leave to amend as a motion to "reconsider" the Michigan court's "apparent refusal to permit amendment of the antitrust claims," the motion must fail: Baum has not shown that it properly sought to amend [\[**37\]](#) its complaint prior to the Michigan court's order of dismissal, and therefore it cannot establish that the Michigan court's apparent "refusal" to permit such amendment sua sponte constitutes clear error or results in manifest injustice. See, e.g., [Calderon v. Kansas Dep't of Social and Rehab. Servs., 181 F.3d 1180, 1187 \(10th Cir. 1999\)](#) (because [HN17](#)[¹⁵] motion for leave to amend was never properly before it, district court did not abuse discretion in failing to address plaintiff's request for leave to cure deficiencies in her pleadings) (citing [Brannon v. Boatmen's First Nat'l Bank, 153 F.3d 1144, 1150 \(10th Cir. 1998\)](#) (court need not address motion never placed before it); [Dahn v. United States, 127 F.3d 1249, 1252 \(10th Cir. 1997\)](#) (same)).

Addressing Baum's motion as one for leave to amend in the first instance, the Court briefly analyzes whether justice requires it to exercise its discretion in favor of the proposed amendment. See [Fed. R. Civ. P. 15\(a\)](#). The Court may refuse to grant leave to amend where the proposed amendment would be futile. See [Jefferson County School Dist. No. R-1, 175 F.3d at 858-59](#) (proposed amendment [\[**38\]](#) futile if amended complaint would be subject to dismissal). Baum argues that its proposed amended complaint "streamlines and clarifies the antitrust claims," defines the onset of the conspiracy, avers that Baum was the specific target, details defendants' overt acts

("exclusionary and predatory conduct designed to prevent changes in the NCAA bat rules," obstruction of acceptance of the Baum Testing Machine, and use of exclusive dealing arrangements and gifts to keep Baum from competing), more clearly demonstrates the interrelatedness of the conspiratorial acts and how they adversely affected competition, sets forth more precisely the lack of any procompetitive or efficiency rationales, and more specifically articulates that defendants' conspiracy was designed to and did injure competition and specifically caused antitrust injury to Baum. Furthermore, in an apparent effort to address the Michigan court's conclusion that Baum has not alleged antitrust injury, [31 F. Supp. 2d at 1023](#), Baum proposes to amend its complaint to include allegations that, e.g., "the effect of the Defendants' conspiratorial conduct has been to systematically exclude and foreclose the manufacturers of wood or wood [**39] composition bats, such as Plaintiffs, from the markets for amateur baseball bats," [\[Proposed\] First Amended Complaint](#) at 6, P15, and the "anticompetitive conduct of the [bat manufacturers] had the effect of foreclosing all other competing bat products, such as wood or wood composite bats from the amateur baseball [bat] markets." [Id.](#) at 2, P69.

Baum has proffered no grounds which justify leave to amend. None of the proposed amendments would alter the flawed theory which is the basis for Baum's antitrust claims. The Michigan court properly concluded that even if Baum suffered injury as a result of antitrust violations by defendants, Baum's injury was not the result of any anticompetitive effect on the market, but rather stemmed from competition itself. Baum's effort to evade the ruling by alleging that it claims injury to a competitor rather than to competition are to no avail. The assertion that defendants' conduct injured Baum and other wood and wood composition bat manufacturers and the liberal use of the word "competition," throughout the allegations of antitrust injury, do not alter the nub of Baum's case. The proposed complaint still alleges that non-restrictive [**40] bat performance standards granted a competitive advantage to aluminum bat manufacturers, "which had the [*1203] effect in the markets of excluding competitors such as Baum," and that Baum was the "specific target" of the aluminum bat manufacturers. [Id.](#) at 23, P76. The gravamen of the proposed complaint remains the same as the original, legally insufficient, complaint.

The Court's analysis with respect to the motion for reconsideration is equally applicable here. It would be futile to grant leave to amend because the proposed amended complaint, like the original complaint, would be subject to dismissal for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#). Accordingly, Baum's motion for leave to file an amended complaint pursuant to [Fed. R. Civ. P. 15\(a\)](#) is overruled.

III. Tortious Interference With Business Relationships And Prospective Economic Advantage

[HN18](#) Under Michigan law, the elements of tortious interference with economic relations are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferor, (3) intentional interference inducing or causing a breach or termination of a relationship [**41] or expectancy, and (4) damages. [See Lifeline Ltd. v. Connecticut Gen. Life Ins. Co., 821 F. Supp. 1213, 1216 \(E.D. Mich. 1993\); Pryor v. Sloan Valve Co., 194 Mich. App. 556, 487 N.W.2d 846, 848-49 \(Mich. Ct. App. 1992\).](#)

Defendants moved to dismiss Baum's claim for tortious interference in the original complaint, on the ground that Baum had alleged no reasonable expectation of a business relationship. The Michigan court agreed, holding that "the allegations supporting this count are sparse." It gave Baum an opportunity to amend the complaint to better describe those expectations, however, and cautioned that if Baum did not do so, the count would be dismissed. [See Baum, 31 F. Supp. 2d at 1025](#). Accordingly, Baum now seeks to amend "to elaborate the nature of Defendant[s]' interference and state the nature of Baum's business expectation." [Memorandum In Support of \[Baum's\] Motion For Reconsideration And To Amend The Complaint](#) at 1 n.1.

Defendants complain that the proposed amendment merely alleges that many people buy baseball bats; that professional baseball leagues prefer wood bats; that Baum "can think of reasons why people [**42] might prefer its bats" and some customers have agreed with those reasons; and that Baum has sold 15,000 bats. The bat manufacturers argue that except for Baum's allegations concerning the Mid-American and Cape Cod Conferences,

¹¹ the proposed amendment does not identify specific business relationships or sales that Baum would have made and with which defendants interfered. Further, none of the allegations set forth facts necessary to establish a reasonable expectancy of business. Accordingly, the bat manufacturers argue that Baum's proposed amendment would be futile and that the Court should therefore deny its motion for leave to amend.

[**43] These arguments are unpersuasive. [HN19](#) [↑] Although Michigan law governing tortious interference with prospective economic advantage requires Baum to allege more than a mere hope for a future business opportunity or the innate optimism of the salesman, e.g., [Bell Data Network Comms., Inc. v. Symbol Techs., Inc., 1995 U.S. Dist. LEXIS 17523, 1995 WL 871222](#), at *5 (E.D. Mich. 1995); [Schipani v. Ford Motor Co., 102 Mich. App. 606, *1204](#) 302 N.W.2d 307, 314 (Mich. Ct. App. 1981), Baum need not demonstrate a guaranteed relationship, however, because "anything that is prospective in nature is necessarily uncertain," and "we are not here dealing with certainties, but with reasonable likelihood or probability." [Schipani, 102 Mich. App. at 622, 302 N.W.2d at 314](#) (citing [Behrend v. Bell Tel. Co., 242 Pa. Super. 47, 363 A.2d 1152, 1160 \(Pa. Ct. App. 1976\)](#)).

"The [HN20](#) [↑] tort contemplates a relationship, prospective or existing, of some substance, some particularity, before an inference can arise as to its value to the plaintiff and the defendant's responsibility for its loss." *Id.* "To demonstrate such a realistic expectation, [plaintiff] must prove a business relationship [**44] with an identifiable class of third parties." [Liberty Heating & Cooling, Inc. v. Builders Square, Inc., 788 F. Supp. 1438, 1451](#) (E.D. Mich.) (citing [Schipani, 302 N.W.2d at 314](#)), appeal dismissed, 968 F.2d 1215 (6th Cir. 1992); see also Hoffman v. Roberto, 85 B.R. 406, 416 (W.D. Mich. 1987) (to [HN21](#) [↑] establish whether expectation of economic advantage was reasonable, plaintiff need not prove existence of enforceable contract; it is sufficient to show interference with specific third parties or identifiable prospective class of third persons with whom plaintiff had reasonable expectation of contracting) (citing [Schipani, 102 Mich. App. at 621-22, 302 N.W.2d 307](#) and [Wilkerson v. Carlo, 101 Mich. App. 629, 300 N.W.2d 658, 659 \(Mich. Ct. App. 1980\)](#)).

The amendments which Baum proposes would rectify the defects in the original complaint. In its revised incarnation, the complaint alleges that the market for amateur baseball bats is huge, consisting of some 11,000 colleges and universities, 16,000 high schools, and 3,600,000 little league baseball players throughout the world; that Baum's wood [**45] composition bats are durable and sell for half the price of aluminum bats; that professional baseball teams, players and coaches compliment Baum bats for durability, reliability, performance and value as compared to aluminum and traditional wood bats; that major professional baseball leagues purchase and use Baum bats for use in minor leagues; that major professional leagues prefer college and high school teams to use bats with woodlike speeds for training purposes; that since 1991 Baum has manufactured 15,000 bats, generating approximately \$ 1,600,000.00 in total revenues; that representatives of H&B and Easton have admitted that Baum's bat is a marketable product; that the Baum hitting machine has wide approval among industry experts and is "the best hitting device available to test batted ball speeds"; and that if the NCAA had enforced its wood-like bat standards during the relevant period, the Baum bat "would have been extensively used in college, high school and amateur baseball since 1992, and the Baum Hitting Machine would have been used as a device to test baseball bat speeds since 1996." [Proposed] First Amended Complaint at 33-34, P100.

The proposed complaint further [**46] alleges that defendants induced the NCAA Executive Committee to override decisions of the Rules Committee; induced the Mid-American and Cape Cod Conferences to terminate arrangements with Baum for the use of Baum bats, removed and destroyed Baum's bats and replaced them with free high performance aluminum bats; gave free aluminum bats, equipment and money to colleges, universities and coaches to "induce and coerce" the Rules Committee, the Executive Committee and NCAA member schools and coaches "to refrain from adopting any rules, standards or tests that curtailed the use of high performance aluminum bats" in order to exclude wood or wood composition bats; submitted information to the NCAA, the National Federation of State High School Associations, and college, high school and amateur baseball [*1205] coaches

¹¹ The proposed amended complaint alleges that the bat manufacturers and SGMA "interfered with Baum's business opportunity and expectancy" by inducing the Mid-American and Cape Cod Conferences "to terminate arrangements Baum had made for the use of Baum's bats" in the conferences and by "removing and destroying Baum's bats and replacing them with free high performance aluminum bats." [Proposed] First Amended Complaint at 34, P101.

which falsely indicated that defendants' aluminum bats were safe and no faster than wood, that aluminum bats did not upset the offensive/defensive balance or affect the "integrity of the game," and that the "Brandt BPF standard" confirmed the safety of aluminum bats (when in fact it was an invalid test); and boycotted the Baum Hitting Machine. Id. at 34-35, P101.

Finally, the proposed **[**47]** complaint alleges that in November 1998 Easton disseminated to the Rules Committee and to hundreds of college and high school baseball coaches false information regarding results of tests on the Baum Hitting Machine. Id. at 35-36, P101. The complaint alleges that defendants' misconduct interfered with Baum's business relationships and prospective economic advantage, in the form of lost profits on sales of Baum bats; loss of licensing fees for the Baum Hitting Machine; loss of time and expense incurred in developing the Baum bat and Baum Hitting Machine; and injury to Baum's business, good will, name and business reputation. See id. at 36, P102.

The proposed complaint sufficiently alleges the existence of a valid business expectancy. The allegations reveal that Baum had more than a mere hope for business opportunities or the innate optimism of a salesman. They indicate that Baum's composite wood bats were well received by baseball players and coaches and had previously enjoyed not insubstantial sales. The allegations also point to an identifiable class of prospects to whom Baum had a reasonable expectation of selling composite wood bats. If these revised allegations are true, **[**48]** Baum realistically could have expected better sales and profits from the amateur baseball bat market.

The Court concludes that Baum's claim for tortious interference with business relationships and prospective economic advantage would not be subject to dismissal in its amended form and that the proposed amendments would not be futile. Accordingly, Baum's motion for leave to amend is sustained.

IT IS THEREFORE ORDERED that the Baum plaintiffs' Motion For Reconsideration And To Amend The Complaint (Doc. # 53) filed December 4, 1998 in Baum Research and Dev. Co. v. Hillerich & Bradsby Co., Case No. Civ. A. 99-2112-KHV, be and hereby is overruled in part and sustained in part. Plaintiffs' motion for reconsideration is **OVERRULED**. Plaintiffs' motion to amend the complaint is **SUSTAINED** as to the claim for tortious interference with prospective economic advantage in violation of state law. Baum shall file its first amended complaint on or before November 8, 1999.

Dated this 28th day of October, 1999, at Kansas City, Kansas.

Kathryn H. Vratil

United States District Judge



United States v. Dentsply Int'l, Inc.

United States District Court for the District of Delaware

October 4, 1999, Argued, Wilmington, Delaware ; October 29, 1999, Decided

Civil Action No. 99-5 MMS, Civil Action No. 99-255 MMS, Civil Action No. 99-343 MMS

Reporter

190 F.R.D. 140 *; 1999 U.S. Dist. LEXIS 17169 **; 45 Fed. R. Serv. 3d (Callaghan) 1380; 1999-2 Trade Cas. (CCH) P72,731

UNITED STATES OF AMERICA, Plaintiff, v. DENTSPLY INTERNATIONAL, INC., Defendant. HOWARD HESS DENTAL LABORATORIES INCORPORATED and PHILIP GUTTIEREZ d/b/a DENTURES PLUS, on behalf of themselves and all others similarly situated, Plaintiffs, v. DENTSPLY INTERNATIONAL, INC., Defendant. ROBERT B. RAIBER, DDS, P.C., individually and on behalf of all others similarly situated, Plaintiff, v. DENTSPLY INTERNATIONAL, INC., Defendant.

Subsequent History: Motion granted by [United States v. Dentsply Int'l, Inc., 2000 U.S. Dist. LEXIS 6925 \(D. Del., May 10, 2000\)](#)

Related proceeding at [Jersey Dental Labs. v. Dentsply Int'l, Inc., 180 F. Supp. 2d 541, 2001 U.S. Dist. LEXIS 22253 \(D. Del., 2001\)](#)

Prior History: [United States v. Dentsply Int'l, Inc., 187 F.R.D. 152, 1999 U.S. Dist. LEXIS 10072 \(D. Del., 1999\)](#)

Disposition: [**1] Dentsply's motion to consolidate pretrial proceedings in Government action with Hess and Raiber actions denied.

Core Terms

consolidation, antitrust, discovery, cases, teeth, artificial, government's case, suits, pretrial proceedings, antitrust case, damages, parties, public policy, allegations, exemption, dealers, multidistrict litigation, manufacturers, witnesses, enforcement action, antitrust suit, articulated, duplicative, complaints, tag-along, overlap

LexisNexis® Headnotes

Civil Procedure > Trials > Consolidation of Actions

HN1 [down arrow] Trials, Consolidation of Actions

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. [Fed. R. Civ. P. 42\(a\)](#).

Civil Procedure > Trials > Consolidation of Actions

HN2 [down] Trials, Consolidation of Actions

Fed. R. Civ. P. 42(a) gives the court broad powers to consolidate actions involving common questions of law or fact if, in its discretion, such consolidation would facilitate the administration of justice.

Civil Procedure > Trials > Consolidation of Actions

HN3 [down] Trials, Consolidation of Actions

The mere existence of common issues, a prerequisite to consolidation, does not require consolidation.

Civil Procedure > Trials > Consolidation of Actions

HN4 [down] Trials, Consolidation of Actions

In determining whether to consolidate, the court balances the savings of time and effort gained through consolidation against the inconvenience, delay, or expense that it might cause.

Civil Procedure > Trials > Consolidation of Actions

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN5 [down] Trials, Consolidation of Actions

28 U.S.C.S. § 1407 provides for transfer for consolidation or coordination of pretrial proceedings in most civil actions involving one or more common questions of fact pending in different districts.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN6 [down] US Department of Justice Actions, Civil Actions

Even in cases involving common questions of law or fact, the multidistrict litigation statute provides an explicit exemption for any action in which the United States is a complainant arising under the antitrust laws of the United States. 28 U.S.C.S. § 1407(g).

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

HN7 [down] Private Actions, Standing

A finding in favor of the United States in an antitrust enforcement action is prima facie evidence of a violation for injured competitors or customers bringing a subsequent private suit. [15 U.S.C.S. § 16\(a\) \(1994\)](#).

Counsel: For United States of America, plaintiff (Civil Action No. 99-5): Carl Schnee, Esquire, United States Attorney, Judith M. Kinney, Esquire, Assistant United States Attorney, United States Department of Justice, Wilmington, Delaware.

For United States of America, plaintiff (Civil Action No. 99-5): Mark J. Botti, Esquire, William E. Berlin, Esquire, Frederick S. Young, Esquire, Michael S. Spector, Esquire, Of Counsel, United States Department of Justice, Washington, D.C.

For Howard Hess Dental Laboratories Incorporated, Philip Gutierrez, plaintiffs (Civil Action No. 99-255): Pamela S. Tikellis, Esquire, Robert J. Kriner, Jr., Esquire, Chimicles & Tikellis, LLP, Wilmington, Delaware.

For Howard Hess Dental Laboratories Incorporated, Philip Gutierrez, plaintiffs (Civil Action No. 99-255): Thomas A. Dubbs, Esquire, Hollis L. Salzman, Esquire, Of Counsel, Goodkind Labaton Rudoff & Sucharow LLP, New York, New York.

For Robert B. Raiber, DDS, P.C., plaintiff (Civil Action No. 99-343): Edward B. Rosenthal, Esquire, Rosenthal, Monhait, Gross & Goddess, P.A.

For **[**2]** Robert B. Raiber, DDS, P.C., plaintiff (Civil Action No. 99-343): Stephen D. Oestreich, Esquire, Patricia I. Avery, Esquire, Of Counsel, Wolf Popper LLP, New York, New York.

For Dentsply International, Inc., defendant (Civil Action No. 99-5, Civil Action No. 99-255, Civil Action No. 99-343): James P. Hughes, Jr., Esquire, Young, Conaway, Stargatt & Taylor, Wilmington, Delaware.

For Dentsply International, Inc., defendant (Civil Action No. 99-5, Civil Action No. 99-255, Civil Action No. 99-343): Margaret M. Zwisler, Esquire, Richard A. Ripley, Esquire, Kelly A. Clement, Esquire, Eric J. McCarthy, Esquire, Of Counsel, Howrey & Simon, Washington, D.C.

Judges: Murray M. Schwartz, Senior District Judge.

Opinion by: Murray M. Schwartz

Opinion

OPINION

Argued: October 4, 1999

Dated: October 29, 1999

Wilmington, Delaware

SCHWARTZ, Senior District Judge

[*141] Dentsply International Inc. ("Dentsply") is the sole defendant in three antitrust actions currently pending before this court: an antitrust enforcement action brought by the United States Department of Justice and two "tag-along" private antitrust damages actions. Dentsply has moved to consolidate pretrial proceedings in all **[**3]** three actions. If one ignores this is a nationwide government antitrust suit, the relevant considerations, such as commonality of factual and legal issues, identity of parties, and overlap in discovery typically dictate consolidation.

However, based on public policy considerations set forth in the multidistrict litigation statute ¹ and its legislative history, the motion to consolidate will be denied.

I. Factual and Procedural Background

The Antitrust Division of the United States Department of Justice ("Government") filed an antitrust suit against Dentsply on January 5, 1999, seeking to enjoin Dentsply's alleged violations of federal **antitrust law**. *United States of America v. Dentsply Int'l, Inc.*, C.A. No. 99-5 ("Government" action). The complaint alleges Dentsply has engaged in, and continues to engage in, various actions to unlawfully maintain its monopoly power in the market for prefabricated, artificial teeth and to deny competing manufacturers **[**4]** of artificial teeth access to independent distributors (known in the industry as "dealers") of artificial teeth in the United States, in violation of **§§ 1 and 2** of the Sherman Act ² and § 3 of the Clayton Act. ³ The Government alleges the dealers are a necessary means for manufacturers of artificial teeth to effectively distribute their products in the United States ⁴ and that Dentsply has entered into restrictive agreements and taken other actions to induce and compel dealers not to carry certain competing lines of artificial teeth. As a result of Dentsply's actions, the Government contends rival manufacturers of artificial teeth have been foreclosed from selling their teeth through the large majority of outlets that carry artificial teeth, thereby reducing competition **[*142]** among artificial teeth manufacturers, resulting in higher prices, fewer choices, less market information, and lower quality artificial teeth. The Government seeks to enjoin Dentsply's alleged anticompetitive conduct.

[5]** On January 8, 1999, Robert Raiber, DDS, P.C., filed a class action lawsuit against Dentsply in the Supreme Court of New York on behalf of all dentists who purchased artificial teeth manufactured by Dentsply, either directly or through a dealer or dental laboratory, in the preceding four years. *Robert B. Raiber, DDS, P.C. v. Dentsply Int'l, Inc.*, C.A. No. 99-343 ("Raiber" action). Raiber's antitrust allegations are substantially identical to those in the Government action, although Raiber's claim is based upon New York state **antitrust law**, the Donnelly Act. ⁵ The complaint seeks damages and a jury trial in addition to enjoining Dentsply's alleged anticompetitive conduct.

Dentsply removed the Raiber case to the United States District Court for the Southern District of New York. Raiber then moved to transfer to the United States District Court for the Middle District of Pennsylvania, and Dentsply cross-moved for transfer to this court. On May 24, 1999, the United **[**6]** States District Court for the Southern District of New York granted Dentsply's cross-motion to transfer the Raiber case to this court pursuant to **28 U.S.C. 1404(a)**.

Before any ruling was made on the cross-motions for transfer in the Raiber case, Howard Hess Dental Laboratories, Inc. brought a class action suit against Dentsply in this court on behalf of all dental laboratories who purchased defendant's products from dealers since January 1, 1987. *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, C.A. No. 99-255 ("Hess" action). The Hess complaint alleges violations of the same federal antitrust statutes as the Government complaint, and the antitrust allegations are nearly verbatim to those set forth in the Government complaint. Hess, like Raiber, seeks damages and a jury trial in addition to injunctive relief.

¹ [28 U.S.C. § 1407 \(1994\)](#).

² [15 U.S.C. §§ 1, 2 \(1994\)](#).

³ [15 U.S.C. § 14 \(1994\)](#).

⁴ The Government's complaint states that almost all artificial teeth sold in this country are used by dental laboratories to make dentures. Although some manufacturers of artificial teeth sell their product directly to dental laboratories, dealers (also referred to in the complaint as "dental laboratory dealers," "independent dealers," and "independent distributors") are the primary channel through which dental laboratories purchase artificial teeth.

⁵ [N.Y. Gen. Bus. Law § 340](#) (McKinney 1999).

On July 2, 1999, Dentsply moved to consolidate the three actions for purposes of pretrial proceedings under [Fed. R. Civ. Pro. 42\(a\)](#).⁶ It maintains that consolidation is warranted because the complaints in each case are virtually identical; there are common facts and law at issue; there is considerable overlap in discovery; and the defendant [**7] is the same in each action. Dentsply also correctly asserts that consolidation will benefit Dentsply and third party witnesses and promote judicial efficiency by ensuring that discovery from one case can be used in all three cases, thereby avoiding duplicative discovery and motions practice. Finally, Dentsply vigorously contends that without consolidation there is no guarantee it can use discovery obtained in the Government case in its defense of the private class actions.

The plaintiffs in the Hess and Raiber actions have declined to take a position on consolidation. The Government opposes consolidation, arguing that Congress [**8] and the courts have articulated a public policy against consolidating government antitrust suits with private antitrust actions. The Government further contends that consideration of the relevant factors demonstrates that consolidation is not warranted because it poses risks of delay in the government case; that the Government's situation is different from that of the class action plaintiffs in the Hess and Raiber actions; that consolidation will adversely affect the rights of the Government; and that informal coordination amongst the parties has largely avoided duplicative discovery and motions practice to date.

II. Discussion

"Rule [HN2](#)[] [42\(a\)](#) of the Federal Rules of Civil Procedure gives this Court broad powers to consolidate actions involving common questions of law or fact if, in its discretion, such consolidation would facilitate the administration [[*143](#)] of justice."⁷ [**9] However, "the [HN3](#)[] mere existence of common issues, a prerequisite to consolidation, does not require consolidation."⁸ [HN4](#)[] In determining whether to consolidate, the court balances the savings of time and effort gained through consolidation against the inconvenience, delay, or expense that it might cause.⁹

A. Standard considerations under [Rule 42\(a\)](#) favor consolidation

Given the similarity of the allegations in the Government's complaint and the "tag-along" class suits, [Rule 42\(a\)](#)'s requirement of common factual or legal issues is met.¹⁰ Additionally, several factors in this case favor consolidation under [Rule 42\(a\)](#), including overlapping parties (Dentsply is the sole defendant in each case), similar claims based on common facts and transactions, and discovery overlap.¹¹

⁶ [HN1](#)[] [Fed. R. Civ. P. 42\(a\)](#) provides:

Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

⁷ [Waste Distillation Tech., Inc. v. Pan Am Resources, Inc.](#), 775 F. Supp. 759, 761 (D. Del. 1991) (citing [Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.](#), 339 F.2d 673, 675 (3d Cir. 1964), cert. denied, 382 U.S. 812, 15 L. Ed. 2d 60, 86 S. Ct. 23 (1965)).

⁸ *Id.* (citing [Rohm & Haas Co. v. Mobil Oil Corp.](#), 525 F. Supp. 1298, 1309 (D. Del. 1981)).

⁹ See *id.*; 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2383, at 438-39 (2d ed. 1995).

¹⁰ The Government does not dispute the existence of common factual and legal issues.

¹¹ See 8 JAMES WM. MOORE, [MOORE'S FEDERAL PRACTICE § 42.10\[6\]](#) (3d ed. 1999); 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2384.

[**10] First, the claims in each case are similar and arise from the same alleged conduct by Dentsply: that Dentsply has taken various actions to unlawfully maintain its monopoly power in the market for artificial teeth and to deny competing manufacturers of artificial teeth access to dealer distribution networks through its use of various restrictive dealer arrangements. The most apparent differences among the complaints are that Hess and Raiber request monetary damages and the Government does not,¹² [**11] and that the Hess and Raiber suits are class actions seeking a jury trial. Neither of these differences alone would be sufficient to preclude consolidation.¹³ Moreover, discovery related to the damages and class issues is scheduled to take place in the Raiber and Hess cases after discovery has concluded in the Government case.

Second, the virtual correspondence of the substantive antitrust allegations in the three cases means there will be a substantial overlap in discovery. The three cases require discovery of many of the same witnesses and review of many of the same documents. Consolidated discovery would conserve Dentsply resources because it would not have to obtain agreement from all plaintiffs and involved third parties before it could use discovery obtained in one case in the others, and it could avoid issuing duplicative discovery process in each case. Moreover, burdens on third party witnesses would be reduced through avoidance of duplicative discovery. Most importantly, without consolidation, Dentsply will [**12] not be guaranteed the use of discovery obtained in the Government case in the other two suits. Dentsply urges that foreign courts may be loath to grant it permission to depose witnesses again for the private cases if it has already deposed such witnesses on many of the same issues in the Government case.

From what has been said *supra*, an analysis of the standard factors under [Rule 42\(a\)](#) would counsel consolidation in this case. However, based on the public policy position articulated by the United States Congress, discussed *infra*, the pretrial proceedings in [*144] the Government case will not be consolidated with the other cases.¹⁴

B. For public policy reasons, the private damages suits will not [13] be consolidated with the Government antitrust case**

Although [Rule 42\(a\)](#) does not expressly prohibit consolidation of pretrial proceedings in any particular type of case, Congress has articulated a strong public policy against combining antitrust complaints brought by the Government with private antitrust damages suits. This public policy is embodied in the multidistrict litigation statute, [HN5](#) [↑] [28 U.S.C. § 1407](#), which provides for transfer for consolidation or coordination of pretrial proceedings in most civil actions involving one or more common questions of fact pending in different districts. [HN6](#) [↑] Even in cases involving common questions of law or fact, the multidistrict litigation statute provides an explicit exemption for "any action in which the United States is a complainant arising under the antitrust laws [of the United States]."¹⁵

¹² The Government also points out that the Raiber claim is based not on the federal antitrust statutes but on New York's Donnelly Act. Nonetheless, there is still the potential for enormous overlap in discovery because the Raiber complaint's allegations are nearly verbatim to the allegations in the Government's complaint, indicating the claims are based on the same facts and transactions.

¹³ See, e.g., [Waste Distillation Tech., 775 F. Supp. at 761](#) (consolidating cases where the "only appreciable difference between the two complaints is an additional claim for relief"); cf. [Martinez v. Bechtel Corp., 1975 U.S. Dist. LEXIS 15226](#), No. C-74-2402 SW, at *4-5 (N.D. Cal. Nov. 18, 1975) (ordering consolidation despite differences in proposed class composition).

¹⁴ Because the court bases its decision not to consolidate the Government action based on the public policy rationale discussed *infra*, there is no need to address in more detail the Government's arguments that other standard considerations relevant to the [Rule 42\(a\)](#) analysis militate against consolidation.

¹⁵ [28 U.S.C. § 1407\(g\)](#).

The statute does not preclude consolidation of government cases brought under §§ 4A and 4C of the Clayton Act. See [28 U.S.C. § 1407\(g\)-\(h\)](#). Because a government entity bringing suit under these sections seeks damages, not an injunction, and therefore stands in a position similar to a private litigant, consolidation may be appropriate. See H.R. Rep. No. 90-1130, at 5, 8 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1903, 1905; [In re Antibiotic Drugs, 309 F. Supp. 155 \(J.P.M.L. 1970\)](#).

[**14] The legislative history of [§ 1407\(g\)](#) discloses the antitrust exemption was founded on congressional concern that "consolidation might induce private plaintiffs to file actions merely to ride along on the Government's cases," and that this would "almost certainly" cause delay in the resolution of the Government's cases.¹⁶ In this case, as indicated by the nearly identical allegations of the Government complaint and the Hess and Raiber complaints, the Hess and Raiber actions are the type of private tag-along actions Congress feared would delay the Government's cases. If consolidation were permitted with the Government antitrust case under [Rule 42\(a\)](#), it would encourage more private tag-along suits, which would likely delay future Government antitrust cases. Moreover, allowing defendants to consolidate private antitrust cases filed in the same district with Government antitrust cases would allow them to circumvent [§ 1407\(g\)](#) by seeking transfer of individual cases to the same forum and then moving for consolidation under [Rule 42\(a\)](#).

[**15] The legislative history of [§ 1407\(g\)](#) acknowledges that exempting Government antitrust complaints from pretrial transfer and consolidation with private antitrust actions imposes some burdens on defendants. However, in weighing the public interest in expedited resolution of government antitrust enforcement actions against the potential burdens of duplicative discovery on defendants, Congress chose to strike the balance in favor of the public's interest in expedited relief:

While exempting the Government from this legislation may occasionally burden defendants because they may have to answer [*145] similar questions posed by both the Government and by private parties, this is justified by the importance [to] the public of securing relief in antitrust cases as quickly as possible.¹⁷

This antitrust exemption is not capricious, but rather based on congressional recognition of the primacy of antitrust enforcement actions brought by the United States, and that such actions are of special urgency and serve a different purpose than private damages suits because they seek to enjoin ongoing anticompetitive conduct:

To treat the Government differently is not arbitrary, for [**16] the purpose of the governmental suit normally differs from that of a private suit; the Government seeks to protect the public from competitive injury, while private parties are primarily interested in recovering damages for injuries already suffered. . . .¹⁸

Moreover, [15 U.S.C. § 16\(a\)](#) also articulates the public policy of recognizing the priority of federal antitrust enforcement actions over private antitrust suits. [HNT](#)¹⁹ A finding in favor of the United States in an antitrust enforcement action is *prima facie* evidence of a violation for injured competitors or customers bringing a subsequent private suit.¹⁹ Permitting federal suits to go forward without being burdened by delays that consolidation may cause not only permits more expeditious relief to the public for conduct adjudged illegal, but also makes a judgment [**17]

¹⁶ H.R. Rep. No. 90-1130, at 5, 8, *reprinted in* 1968 U.S.C.C.A.N. at 1902, 1905. The House Report for [§ 1407](#) states:

Subsection (g) excludes from the operation of the bill antitrust actions in which the United States is complainant. This limitation was requested by the Department of Justice and concurred in by the Coordinating Committee and the Judicial Conference of the United States, on the basis that consolidation might induce private plaintiffs to file actions merely to ride along on the government's cases. Government suits would then almost certainly be delayed, often to the disadvantage of those injured competitors who would predicate damages actions on the outcome of the Government's suit. Furthermore, since section 5(b) of the Clayton Act, [15 U.S.C. 16\(b\)](#)) tolls the statute of limitations during the pendency of the Government's action, there is no need for injured competitors to join in the Government's suit.

H.R. Rep. No. 90-1130, at 5, *reprinted in* 1968 U.S.C.C.A.N. at 1902-03.

¹⁷ H.R. Rep. No. 90-1130, at 8, *reprinted in* 1968 U.S.C.C.A.N. at 1905 (letter of Deputy Attorney General Ramsey Clark, incorporated into the Report).

¹⁸ *Id.*

¹⁹ See [15 U.S.C. § 16\(a\) \(1994\)](#).

in favor of the Government available for use in a private suit. In addition to providing private antitrust plaintiffs with a powerful weapon, it also promotes judicial efficiency by fostering settlement.²⁰

[**18] The court holds that Congress, in [28 U.S.C. § 1407\(g\)](#), has expressed a clear public policy of prioritizing prompt resolution of Government antitrust claims to provide expeditious relief to the public over possible efficiencies to be gained from consolidation with private antitrust damages actions. Because of the [§ 1407\(g\)](#) antitrust exemption, Dentsply would not be able to successfully urge the panel on multidistrict litigation to transfer the Government's case for consolidated pretrial proceedings under the multidistrict litigation statute.²¹ Because the purpose of consolidating pretrial proceedings pending within one district under [Rule 42\(a\)](#) is analogous to the overarching purpose of [28 U.S.C. § 1407](#), the court concludes that the public policy underlying [§ 1407\(g\)](#)'s exemption of Government antitrust cases from transfer and consolidation of pre-trial proceedings controls this case. This is not to say that there is a per se ban on consolidation of a Government antitrust case under [Rule 42\(a\)](#). However, in cases where the Government objects to consolidation, as in this case, public policy concerns underlying [28 U.S.C. § 1407](#) [**19] [\(g\)](#) outweigh other considerations in favor of consolidation.²²

[*146] Dentsply insists that in this case permitting consolidation is consistent with Congress's goal of securing prompt relief for the public in Government antitrust actions.²³ It urges no delay will actually [**20] result from consolidation because the parties in each of the three cases are committed to the exact same discovery schedule, with merits discovery scheduled to end on the same date.²⁴ The court will not accept Dentsply's reasoning because it would require consolidation every time a private class action suit is filed following a Government suit if the parties in the private suit initially adopt the discovery schedule of the Government's case.²⁵ Moreover, it is possible that third party witnesses who are also competitors of Dentsply might not object to Government discovery of their proprietary information. However, they would strenuously fight to avoid disclosure of that information to rivals, causing delay that would necessitate lengthening the discovery schedule. Finally, Congress, in carving out

²⁰ The Government also argues that the public policy against consolidating government antitrust enforcement suits with private suits is demonstrated by courts' refusal to permit private parties to intervene in government antitrust suits. See, e.g., [Sam Fox Publishing Co. v. United States](#), 366 U.S. 683, 689, 693, 6 L. Ed. 2d 604, 81 S. Ct. 1309 (1961) (emphasizing the "unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the Government" even where the private litigants are aligned with the Government); [United States v. International Business Machines Corp.](#), 62 F.R.D. 530, 532 n.1 (S.D.N.Y. 1974). While these cases and others discuss generally the different purposes behind antitrust enforcement suits brought by the government and private antitrust suits, they involve different issues and considerations and are otherwise inapposite to the instant consolidation.

²¹ See [28 U.S.C. § 1407\(g\)](#).

²² Neither the court nor any of the parties was able to locate a case in which there was any discussion of this issue much less a case in which a Government antitrust enforcement suit was consolidated for pretrial proceedings, over the Government's objection, with one or more private antitrust suits under [Rule 42\(a\)](#). That there are no such cases is not entirely surprising because such cases would only arise in instances where the Government objects to consolidation. In cases where the Government does not object to consolidation, the court cannot imagine a scenario where the defendants or the plaintiffs in the private damages suit would have convincing reasons to oppose consolidation.

²³ At an October hearing, Dentsply also argued that the multidistrict litigation statute presents a different context than consolidation under [Rule 42\(a\)](#); that is, the multidistrict litigation statute is concerned with transferring cases, and that there is a sense that the concern was to protect the Government's choice of forum. The short answer is there is nothing in the statutory language to support this argument. Moreover, the legislative history regarding the exemption only articulates concerns that permitting transfer and consolidation would encourage private tag-along suits and cause delay to the Government's cases.

²⁴ Class and damages discovery will take place following the conclusion of merits discovery on February 1, 2000.

²⁵ The nature of these tag-along private suits is such that there will always be strong reasons for consolidation under [Rule 42\(a\)](#) because there will be common issues of law and fact and considerable overlap in discovery between the Government action and the private actions.

an exclusion of Government antitrust claims from the multidistrict litigation statute, explicitly excluded these cases from a case-by-case weighing of possible delays versus efficiencies to be gained from coordinating pretrial proceedings. Although there may be some cases in which consolidation would not in fact cause delay to the Government's antitrust case, due to the vagaries of the **[**21]** discovery process there is no way to ensure ahead of time that delay will not occur.

[22]** In this case, the United States filed its suit against Dentsply after substantial investigation in which Dentsply participated. The Hess and Raiber plaintiffs, not being involved in that investigation, have to catch up to the United States and Dentsply in their knowledge of the artificial teeth industry and the particulars of the alleged anticompetitive conduct. In fact, depositions in the Government's case were delayed by three weeks in order to permit counsel for Hess and Raiber to get "up to speed" to meaningfully participate in cross-noticed depositions in the Government's case. In sum, the court cannot ignore the reality that, although the parties are currently on the same ambitious discovery schedule, the potential for delay caused by discovery disputes in the private actions is omnipresent.²⁶

III. Conclusion

There is a strong articulated congressional public policy concern that **[**23]** permitting consolidation of Government antitrust suits with private damages suits might encourage private plaintiffs to file tag-along damages suits. Congress has made the decision that inefficiencies and inconvenience to antitrust defendants are trumped by an unwillingness to countenance delay in the prosecution of Government antitrust litigation. An order will be entered denying Dentsply's motion to consolidate pretrial proceedings in the Government action with the Hess and Raiber actions.²⁷

End of Document

²⁶ While it did not result in any meaningful delay, one such dispute has already arisen between Hess and Dentsply.

²⁷ Dentsply did not move in the alternative to consolidate only the Hess and Raiber actions, and neither Hess nor Raiber has requested consolidation. The court assumes without knowing that the litigants concluded there was nothing to be gained by a partial consolidation.

Ess Tech. v. Pc-Tel, Inc.

United States District Court for the Northern District of California

November 2, 1999, Decided ; November 4, 1999, Filed; November 9, 1999, Entered in Civil Docket

NO. C-99-20292 RMW

Reporter

1999 U.S. Dist. LEXIS 23227 *; 1999 WL 33520483

ESS TECHNOLOGY, INC., a California Corporation, Plaintiff, v. PC-TEL, INC., a Delaware Corporation, Defendant.

Subsequent History: Motion denied by [ESS Tech., Inc. v. PC-Tel, Inc., 2001 U.S. Dist. LEXIS 26348 \(N.D. Cal., Nov. 27, 2001\)](#)

Disposition: [*1] Defendant's motion to dismiss granted in part and denied in part.

Core Terms

patents, antitrust, license, modem, specific performance, declaratory relief, infringing, alleges, actual controversy, customers, antitrust violation, defense motion, non-discriminatory, facilities, argues, unfair

LexisNexis® Headnotes

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

[HN1](#) **Private Actions, Standing**

To be a proper antitrust plaintiff, a plaintiff must allege that it was actually harmed in some way by defendant's alleged antitrust violation.

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

[HN2](#) **Private Actions, Standing**

An antitrust plaintiff must show injury to competition in the relevant market, not just injury to the plaintiff.

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

[HN3](#) **Private Actions, Remedies**

The United States Court of Appeals for the Ninth Circuit states that the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service

that the second firm must obtain in order to compete with the first. There are four elements to the essential facilities doctrine: (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. A facility is essential if it is controlled by one firm which also has the power to eliminate competition in the downstream market.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Contracts Law > Standards of Performance > General Overview

Contracts Law > Remedies > Specific Performance

HN4 [down arrow] **Conveyances, Licenses**

Under California law, a court can enforce a contract even if some of the terms are not provided. Moreover, courts should seek to uphold the enforcement of contracts and avoid finding that contracts are unenforceable due to uncertainty.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

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

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

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > Remedies > General Overview

HN5 [down arrow] **Judgments, Declaratory Judgments**

In order to state a claim for declaratory relief under [28 U.S.C.S. § 2201](#), a plaintiff must show that an actual controversy exists based on the totality of the circumstances. The Federal Circuit has developed a two-part test to determine if an actual controversy exists as to a declaration of patent non-infringement or invalidity: (1) the accused infringer must show that it is prepared to produce or has actually produced the alleged infringing products; and (2) the patentee's conduct must create an objectively reasonable apprehension on the part of the accused infringer that the patentee will initiate suit if the allegedly infringing activity continues.

Counsel: For ESS Technology, Inc, PLAINTIFF: Ian N Feinberg, Gary, Cary, Ware & Freidenrich, Palo Alto, CA USA. Wayne P Sobon, Gray, Cary, Ware & Freidenrich, Palo Alto, CA USA. David R Stevens, Gary, Cary, Wary & Freidenrich, Palo Alto, CA USA. James Pooley, Milbank, Tweed, Hadley & McCloy, LLP, Palo Alto, CA USA.

For PC-Tel, Inc, DEFENDANT: Steven M Levitan, Skjerven, Morrill, MacPherson, Franklin & Friel, LLP, San Jose, CA USA. Richard F Cauley, Skjerven, Morrill, MacPherson, Franklin & Friel, LLP, San Jose, CA USA. Teague I Donahey, Skjerven, Morrill, MacPherson, Franklin & Friel, LLP, San Jose, CA USA. Craig I Donahey, Skjerven, Morrison, MacPherson, Franklin & Friel, LLP, San Jose, CA USA, Philip L Judson, Skjerven, Morrill, MacPherson, Franklin & Friel, LLP, San Jose, CA USA. Craig J Bristol, Skjerven, Morrill, MacPherson, Franklin & Friel, LLP, San Jose, CA USA.

For PC-Tel, Inc, COUNTER-CLAIMANT: Steven M Levitan, Skjerven, Morrill, MacPherson, Franklin, & Friel, LLP, San Jose, CA USA. Richard F Cauley, Skjerven, Morrill, MacPherson, Franklin & Friel, LLP, San Jose, CA USA. Teague I Donahey, Skjerven, Morrill, MacPherson, Franklin & Friel, LLP, San Jose, CA USA. Craig I Donahey, Skjerven, Morrison, MacPherson, Franklin & Friel, LLP, San Jose, CA USA, Philip L Judson, Skjerven, Morrill, MacPherson, Franklin & Friel, LLP, San Jose, CA USA. Craig J Bristol, Skjerven, Morrill, MacPherson, Franklin & Friel, LLP, San Jose, CA USA.

For ESS Technology, Inc, COUNTER-DEFENDANT: Ian N Feinberg, Gary, Cary, Ware & Freidenrich, Palo Alto, CA USA. Wayne P Sobon, Gray, Cary, Ware & Freidenrich, Palo Alto, CA USA. David R Stevens, Gary, Cary, Ware & Freidenrich, Palo Alto, CA USA. James Pooley, Milbank, Tweed, Hadley & McCloy, LLP, Palo Alto, CA USA.

Judges: RONALD M. WHYTE, United States District Judge.

Opinion by: RONALD M. WHYTE

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

[Docket No. 21]

Defendant's motion to dismiss pursuant to [Rules 12\(b\)\(1\)](#) and [12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) was submitted on the papers without oral argument. The court has read the moving and responding papers. For the reasons set forth below, the court grants the motion as to Counts I and V and denies it as to Counts II, III and IV. Plaintiff is given twenty (20) days leave to amend.

I. BACKGROUND

Plaintiff ESS Technology, Inc. manufactures and sells modem semiconductor chipsets and associated modem software drivers for use in personal computers. Plaintiff's First Amended Complaint ("FAC"), P8. ESS does not sell its modem chipsets or completed systems directly to end-users, but rather to intermediate manufacturers, original equipment manufacturers, systems integrators, and retail distributors who package complete modem boards. *Id.*

Defendant PC-TEL, Inc. holds patents that are necessary for modem producers [*2] to comply with the V.34 and V.90 standards established by the International Telecommunications Union ("ITU"). FAC, PP9 & 12. The V.34 and V.90 are the latest modem standards in wide use in the computer industry and allow for high speed communications. FAC, P10. Defendant acquired the patents at issue when it purchased and merged with General DataComm, Inc. ("GDC"), the original assignee of the patents. FAC, P12. Plaintiff claims that defendant, and formerly GDC, represented to the ITU that its patents claimed at least part of the V.34 and V.90 standards and they agreed to the ITU patent policy 2.2, which requires patentees of ITU standards to negotiate licenses to competitors on a non-discriminatory basis and on reasonable terms and conditions. FAC, P13.

Plaintiff alleges that in 1996, GDC offered plaintiff two license options for the V.34 patents. FAC, P15. Although the offers were reasonable at the time, plaintiff had not yet entered the V.34 market. In September 1997, GDC again offered plaintiff two license options. FAC, P16. However, while the proposed royalty payments may have been appropriate when chipsets sold for approximately \$ 50 per unit, chipsets were selling for approximately [*3] \$ 10 per unit by March 1998. FAC, P17. Accordingly, plaintiff alleges that due to the changed modem market, the proposed royalty payments were unreasonably expensive and did not allow for new market entrants to compete with existing market participants. FAC, PP16-18. Plaintiff and GDC continued to negotiate through much of 1998 and nearly reached an agreement. FAC, P19.

Before plaintiff and GDC could resolve all their differences, defendant PC-TEL acquired GDC toward the end of 1998. FAC, P20. Plaintiff alleges that defendant then reversed course and started demanding increasingly unreasonable and discriminatory terms for licensing the V.34 and V.90 patents. FAC, P20-22. Plaintiff further alleges that defendant sent plaintiff two proposed license agreements for the V.34 and V.90 patents which were more onerous than any other proposal, including the original 1997 offer from GDC. FAC, P23. Plaintiff asserts that defendant's agent, William Conway, represented to plaintiff that the proposal was a "take-it-or-leave-it-offer," that defendant's only recourse was to "go for a cease and desist order" and would have to "go to court and let them decide." FAC, P23. Plaintiff claims that defendant [*4] then began contacting plaintiff's customers and informing them that if they continued to purchase products from plaintiff without acquiring licenses for the V.34 and V.90 patents, they would face patent infringement actions. FAC, P26.

On April 9, 1999, plaintiff filed its original action in this court. On July 2, 1999, defendant moved to dismiss. Plaintiff then voluntarily dismissed its original action, and on July 20, 1999, filed the FAC. In the FAC, plaintiff sets forth five claims: (1) antitrust violation pursuant to section 2 of the Sherman Act; (2) declaratory judgment that defendant misused the patents at issue; (3) declaratory judgment that defendant is estopped from asserting the patents; (4) specific performance of defendant's agreement with the ITU; and (5) unfair competition violation pursuant to both the common law and [section 17200 of the California Business and Professions Code](#).

On August 12, 1999, defendant filed the motion to dismiss currently before the court. In the motion, defendant asserts that plaintiff has failed to state an antitrust claim, an unfair competition claim, and a claim for specific performance. Defendant also argues that plaintiff has failed to [*5] show that an actual controversy exists for this court to exercise jurisdiction over the declaratory relief claims.

II. ANALYSIS

A. First Claim for Antitrust Violation Under Sherman Act Section 2

Defendant moves to dismiss plaintiff's first claim, the antitrust claim, on the grounds that plaintiff has failed to allege actual injury, that plaintiff lacks antitrust standing, and that plaintiff has failed to sufficiently plead an "essential facilities" antitrust claim.

1. Actual Injury

HN1[To be a proper antitrust plaintiff, a plaintiff must allege that it was actually harmed in some way by defendant's alleged antitrust violation. See [Associated General Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#). Defendant argues that ESS has not alleged facts that it has lost business as a result of defendant's conduct. "ESS's general allegations, for example, do not state that ESS has lost sales or customers." Defendant's Motion to Dismiss, p.5:10-16. However, the court finds defendant's arguments unavailing. Plaintiff has clearly alleged that it has lost sales and customers as a result of [*6] defendant's alleged antitrust violations. "ESS, upon information and belief, has suffered or will suffer antitrust injury as a result of PC-TEL's actions in that ESS has lost or will lose sales and customers . . ." FAC, P37. Thus, the court finds that plaintiff has adequately alleged that it has suffered actual injury as a result of defendant's alleged antitrust violations.

2. Antitrust Standing and Essential Facilities Claim

Defendant also argues that plaintiff has failed to sufficiently allege that defendant caused an injury that the antitrust laws were designed to protect, i.e. antitrust injury. Specifically, **HN2**[] an antitrust plaintiff must show injury to

competition in the relevant market, not just injury to plaintiff. See *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996); and *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 811-13 (9th Cir. 1988).

The court finds that plaintiff has failed to sufficiently allege injury to competition beyond the impact on plaintiff. Plaintiff's allegations that defendant's "unfair business practices unfairly discriminate against latecomers to the V.34 and V.90 modem market, in favor of earlier [*7] market entrants" (FAC, P27) and that "market entry has been foreclosed and consumer choice has been diminished" (FAC, P36) does not show injury to competition. There is no allegation that consumers have been forced to pay higher prices or that the quality of the choices available to them has been adversely affected.

Plaintiff claims it has adequately alleged antitrust injury under the "essential facilities" doctrine. [HN3](#)[↑] The Ninth Circuit has stated that the "essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991). There are four elements to the essential facilities doctrine: (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. See *City of Anaheim v. Southern Cal. Edison*, 955 F.2d 1373, 1380 (9th Cir. 1992). [*8] A facility is essential if it is controlled by one firm which also has the power to eliminate competition in the downstream market. *Id. at 1380 n.5*.

In the current case, plaintiff has alleged that defendant holds the patents that are essential to comply with the V.34 and V.90 standards, that plaintiff cannot produce modems that comply with the V.34 and V.90 standards without infringing defendant's patents, and that plaintiff cannot compete in the relevant market due to defendant's refusal to license its patents in a reasonable and non-discriminatory way. FAC, P29-37. However, these allegations are not enough to show anti-trust injury, actual harm to competition.

B. Fifth Claim for Unfair Competition

Defendant essentially argues that plaintiff fails to state a claim for unfair competition pursuant to *California Business and Professions Code section 17200* because plaintiff fails to adequately set forth a violation of *antitrust law* or harm to competition. The court agrees. Plaintiff has not adequately alleged that defendant's conduct threatens the incipient violation of an anti-trust law or violates the policy or spirit of one of those laws or otherwise significantly [*9] harms or threatens competition. See *Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 973 P.2d 527, 83 Cal. Rptr. 2d 548 (1999).

C. Fourth Claim for Specific Performance

Defendant contends that even assuming that plaintiff is a third party beneficiary to defendant's agreement with the ITU to license its patents on a non-discriminatory basis and on reasonable terms and conditions, the agreement is too vague to support a claim for specific performance, since it does not provide any express terms of the contract. However, [HN4](#)[↑] under California law, a court can enforce a contract even if some of the terms are not provided. See *Martin v. Baird*, 124 Cal. App. 2d 598, 601, 269 P.2d 54 (1954) (holding that a court can imply terms from the usual and reasonable conditions of such a contract). Moreover, courts should seek to uphold the enforcement of contracts and avoid finding that contracts are unenforceable due to uncertainty. *Goodwest Rubber Corp. v. Munoz*, 170 Cal. App. 3d 919, 921, 216 Cal. Rptr. 604 (1985) (holding that "fair market value," "reasonable value," and "current market value" are sufficiently certain price terms to support [*10] specific performance).

At this stage of the proceedings, the court declines to hold as a matter of law that plaintiff cannot state a claim for specific performance under any circumstances. While none of the cases cited by the parties deal with a similar factual scenario, where no terms of the contract are expressly agreed upon, the court finds that if it is able to rely on defendant's other contracts to determine what is fair, reasonable and non-discriminatory, under California law it must try to enforce the contract. See *Goodwest Rubber*, 170 Cal. App. 3d at 921. Toward that end, the court can

envision a scenario where a defendant has offered nearly identical licensing agreements to all other competitors. In such a situation, the court could easily determine what a fair and non-discriminatory contract would be. Additionally, the court observes that determining the customs and practices of defendant and the modem industry would appear to be factual matters outside the scope of the pleadings. Therefore, resolving any doubts in plaintiff's favor, the court finds plaintiff may be able to support a claim for specific performance. Accordingly, defendant's motion to dismiss [*11] the specific performance claim is denied.

D. Second and Third Claims for Declaratory Relief

Defendant argues that this court lacks subject matter jurisdiction over plaintiff's declaratory relief claims because no actual controversy exists as to these patent law claims. Alternatively, defendant asserts that even if an actual controversy exists, the court should exercise its discretion and dismiss the declaratory relief claims.

HN5 [↑] In order to state a claim for declaratory relief under [28 U.S.C. § 2201](#), a plaintiff must show that an actual controversy exists based on the totality of the circumstances. [Spectronics Corp. v. H.B. Fuller Co., 940 F.2d 631, 633-34 \(Fed. Cir. 1991\)](#). The Federal Circuit has developed a two-part test to determine if an actual controversy exists as to a declaration of patent non-infringement or invalidity: (1) the accused infringer must show that it is prepared to produce or has actually produced the alleged infringing products; and (2) the patentee's conduct must create an objectively reasonable apprehension on the part of the accused infringer that the patentee will initiate suit if the allegedly infringing [*12] activity continues. [Id. at 634](#).¹

In the current case, defendant does not dispute that plaintiff has been producing allegedly infringing products. With respect to the second prong, the court finds that plaintiff has adequately alleged that it had an objectively reasonable apprehension that defendant would initiate a lawsuit. Plaintiff indicates that the final offer made by defendant was more onerous than the previously unacceptable offers and that defendant stated that it was a "take-it-or-leave-it offer." FAC, P23. Certainly, if true, such an offer leaves no room for [*13] further negotiations. Moreover, plaintiff alleges that defendant stated that defendant's only recourse was to "go for a cease and desist order" and to "go to the court and let them decide." *Id.* Plaintiff's apprehension of suit is also supported by the allegation that defendant contacted plaintiff's customers and warned them that if they did not acquire licenses for the V.34 and V.90 patents, they would face infringement actions. Taken together, defendant's actions establish an actual controversy which supports the court's jurisdiction to hear plaintiff's declaratory relief claims of patent misuse and estoppel.

Moreover, the court notes that plaintiff's declaratory relief claims arise from and are related to defendant's alleged improper conduct giving rise to plaintiff's other claims for relief. Therefore, judicial economy is best served by allowing plaintiff to pursue its declaratory relief claims together with its other claims for relief. Thus, the court currently declines to exercise its discretion and dismiss these claims.

III. ORDER

Based on the foregoing, the court grants defendant's motion to dismiss as to Counts I and V and denies it as to Counts II, III and IV. [*14] Plaintiff is given twenty (20) days leave to amend.

DATED: 11/2/99

RONALD M. WHYTE

¹ The court observes that plaintiff does not seek a declaration that the patents are invalid or that its products do not infringe defendant's patents. However, since at this stage of the proceedings the court finds that plaintiff did allege an objective apprehension of immediate suit by defendant, the court need not address whether such a finding is required for plaintiff's patent misuse and estoppel declaratory relief claims.

United States District Judge

End of Document



Caldera, Inc. v. Microsoft Corp.

United States District Court for the District of Utah, Central Division

November 3, 1999, Decided ; November 3, 1999, Filed

Case No. 2:96-CV-645 B

Reporter

72 F. Supp. 2d 1295 *; 1999 U.S. Dist. LEXIS 18393 **; 1999-2 Trade Cas. (CCH) P72,703

CALDERA, INC., Plaintiff, vs. MICROSOFT CORP., Defendant.

Disposition: [**1] Plaintiff's "Motion to Strike Microsoft's Partial Summary Judgment Briefs Relating to Substantive Antitrust Violations" DENIED, and defendant's Motions for Partial Summary Judgment on "Plaintiff's Claim of Predisclosure," "Plaintiff's Claim of Perceived Incompatibilities," "Plaintiff's Claim of Intentional Incompatibilities," and "Plaintiff's Claim of Technological Tying" DENIED.

Core Terms

Windows, MS-DOS, incompatibilities, technological, products, operating system, integrated, IBM, alleges, beta, anticompetitive, competitor, argues, users, plaintiff's claim, asserts, message, partial summary judgment, software, detected, license, monopolist, antitrust, tying arrangement, install, monopoly, Sherman Act, marketing, anticompetitive conduct, compatible

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > 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

HN1[] Regulated Practices, Price Fixing & Restraints of Trade

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > Scope > General Overview

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

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Antitrust & Trade Law > Sherman Act > General Overview

[HN2](#)[] Sherman Act, Scope

Despite the broad language of [15 U.S.C.S. 1](#), the Sherman Act prohibits only those restraints of trade that are unreasonable.

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

The doctrine of per se violations covers those business relationships that 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 cause or the business excuse for their use.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN4](#)[] Regulated Practices, Monopolies & Monopolization

See [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN5](#)[] Conspiracy to Monopolize, Sherman Act

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 a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN6](#)[] Monopolies & Monopolization, Attempts to Monopolize

Antitrust laws are designed to protect and foster competition even when the competitor is a monopolist.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN7](#)[] Regulated Practices, Monopolies & Monopolization

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In general, a monopolist is free to market its products, engage in research and development to improve its products, and engage in any other business practice that is procompetitive.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN8 [+] **Regulated Practices, Monopolies & Monopolization**

If smaller businesses find themselves unable to compete on the merits of their products against a procompetitive monopolist, there is nothing in the antitrust laws to protect them.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN9 [+] **Regulated Practices, Monopolies & Monopolization**

Antitrust laws protect the competitive process; they do not protect individual competitors.

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

HN10 [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

15 U.S.C.S. § 2 proscribes a monopolist from engaging in business practices that are anticompetitive or exclusionary.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Torts > Business Torts > Trade Libel > General Overview

HN11 [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

Anticompetitive conduct describes a wide variety of behavior including espionage, sabotage, predatory pricing, fraud, price discrimination, price-fixing, bid-rigging, illegal tying arrangements, product disparagement and a host of other activities that improperly stifle competition.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN12 [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

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[15 U.S.C.S. § 2](#) prohibits a monopolist from engaging in anticompetitive practices that are designed to deter potential rivals from entering the market or from preventing existing rivals from increasing their output, no matter how flagrant or subtle the violation.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[HN13](#) [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

A monopoly may not improperly wield its resulting power to tighten its hold on the market.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[HN14](#) [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

The clearest way to explain what a monopolist may legally do is to say that the monopolist may engage in all of the same procompetitive activities that allow it to become a legal monopolist in the first place. These would include building a better or less expensive product, engaging in better public relations, employing effective (and honest) advertising campaigns, and developing aggressive and effective marketing techniques. If these activities result in even more market share, and drive competitors out of the market, the monopolist is nevertheless fully entitled to such expansion, and its conduct is not a violation of the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN15](#) [+] **Regulated Practices, Monopolies & Monopolization**

Nothing in the relevant law that prevents a plaintiff from asserting one overarching claim of a [15 U.S.C.S. § 2](#) violation. Conversely, to allow defendant to carve plaintiff's complaint into seven discreet claims that plaintiff never intended to allege as independent claims not only appears to offend the purpose behind [§ 2](#), but also turns basic civil procedure principles on their head.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

[HN16](#) [+] **Entitlement as Matter of Law, Appropriateness**

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Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact, and, therefore, is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). The court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party.

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

[**HN17**](#) **Summary Judgment, Entitlement as Matter of Law**

In considering whether there exist genuine issues of material fact, the court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[**HN18**](#) **Regulated Practices, Monopolies & Monopolization**

While each separate fact used to support plaintiff's [15 U.S.C.S. § 2](#) claim may not by itself legally support the claim, the overall effect may be prohibited anticompetitive conduct.

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

[**HN19**](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

Among the purposes of [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), is to encourage competition in the marketplace by prohibiting monopolists from acting in anticompetitive ways.

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

[**HN20**](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

Generally a corporation may keep its innovations secret from competitors. This may foster competition. However, this is not always the case and when a monopolist acts in an anticompetitive manner it is proscribed by [15 U.S.C.S. § 2](#).

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Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[**HN21**](#) [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

A monopolist may not eradicate its competitors through anticompetitive means.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN22**](#) [down] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is an agreement by a party to sell one product--the tying product--only on condition that the buyer also purchase a second product--the tied product--or at least agree not to buy that product from another supplier.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN23**](#) [down] **Tying Arrangements, Clayton Act**

A tie-in constitutes a per se [15 U.S.C.S. § 1](#) violation 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 product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

[**HN24**](#) [down] **Price Fixing & Restraints of Trade, Tying Arrangements**

The law forbids a manufacturer who has market power in a certain area to gain advantage in another area by requiring consumers to buy another product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN25**](#) [down] **Price Fixing & Restraints of Trade, Tying Arrangements**

Every refusal to sell two products separately cannot be said to restrain competition.

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

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[**HN26**](#) [blue icon] Tying Arrangements, Clayton Act

Upon meeting certain criteria, a tying arrangement may constitute a per se [15 U.S.C.S. § 1](#) violation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN27**](#) [blue icon] Tying Arrangements, Sherman Act Violations

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product that the buyer either did not want at all, or might have preferred to purchase elsewhere 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. In sum, tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN28**](#) [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

A company should be allowed to build a better mousetrap, and the courts should not deprive a company of the opportunity to do so by hindering technological innovation. Yet, antitrust law has developed for good reason, and just as courts have the potential to stifle technological advancements by second guessing product design, so too can product innovation be stifled if companies are allowed to dampen competition by unlawfully tying products together and escape antitrust liability by simply claiming a "plausible" technological advancement.

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

[**HN29**](#) [blue icon] Tying Arrangements, Per Se Rule

The following elements are necessary in order to find a per se tying violation: (1) two separate products, (2) a tie--or conditioning of the sale of one product on the purchase of another, (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market. In determining whether the first prong of its analysis is satisfied, the Tenth Circuit states that the Supreme Court makes clear that the test for determining whether two components are separate products turns not on their function, but on the nature of any consumer demand for them. In essence the Tenth Circuit requires an inquiry as to whether the market wants two separate products.

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

[**HN30**](#) [blue icon] Tying Arrangements, Clayton Act

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If the evidence shows that a valid, not insignificant, technological improvement is achieved by the integration of two products, then in essence a new product is created, and a defendant is insulated from [15 U.S.C.S. § 1](#) tying liability.

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

[HN31](#) [] **Tying Arrangements, Clayton Act**

A product improvement motivation--at least without something more, such as demonstrated efficiencies--will not save an otherwise illegal tying arrangement under [15 U.S.C.S. § 1](#). Accordingly, the technological improvements demonstrate efficiencies. This is more than just a plausible claim that brings some advantage.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[HN32](#) [] **Price Fixing & Restraints of Trade, Tying Arrangements**

In determining whether a technological advance essentially creates a new product through integration, the two products that are integrated must be joined for technological reasons. This analysis requires the integration to be driven by technology rather than by marketing. Evidence that consumers prefer an integrated product may not be enough, especially where the two previous products essentially cease to exist as separate commodities.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[HN33](#) [] **Price Fixing & Restraints of Trade, Tying Arrangements**

Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, 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. The alleged fact that defendant could have produced the products separately is not enough. There must be sufficient consumer demand so that it is efficient for a firm to provide separately its products.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[HN34](#) [] **Antitrust & Trade Law, Sherman Act**

Illegal tie-ins under [15 U.S.C.S. § 1](#) may also qualify as anticompetitive conduct for [15 U.S.C.S. § 2](#) purposes.

Counsel: For Plaintiff's: Stephen D. Susman, Charles R. Eskridge III, Harry P. Susman, James T. Southwick, SUSMAN GODFREY L.L.P, Houston, Texas.

For Plaintiff's: Ralph H. Palumbo, Matthew R. Harris, Lynn M. Engel, Philip S. McCune, Lawrence C. Locker, SUMMIT LAW GROUP PLLC, Seattle, Washington.

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For Plaintiff's: Parker C. Folse III, Timothy K. Borchers, SUSMAN GODFREY L.L.P., Seattle, Washington.

For Plaintiff's: Max D. Wheeler, Stephen J. Hill, Ryan E. Tibbitts, SNOW, CHRISTENSEN & MARTINEAU, Salt Lake City, Utah.

For Microsoft Corporation, Defendant: Richard J. Urowsky, Richard H. Klapper, Steven L. Holley, Richard C. Pepperman, II, Jay Holtmeier, SULLIVAN & CROMWELL, New York, New York.

For Microsoft Corporation, Defendant: Michael H. Steinberg, SULLIVAN & CROMWELL, Los Angeles, California.

[**2] For Microsoft Corporation, Defendant: James S. Jardine, Mark M. Bettilyon, John W. Mackay, RAY, QUINNEY & NEBEKER, Salt Lake City, Utah.

For Microsoft Corporation, Defendant: William H. Neukom, Thomas W. Burt, David A. Heiner, Jr., Steven J. Aeschbacher, MICROSOFT CORPORATION, Redmond, Washington.

For Microsoft Corporation, Defendant: James R. Weiss, PRESTON GATES ELLIS & ROUVELAS MEEDS, Washington, D.C.

Judges: Dee Benson, United States District Judge.

Opinion by: Dee Benson

Opinion

[*1296] MEMORANDUM OPINION & ORDER

I. INTRODUCTION

Presently before the Court are four motions for partial summary judgment brought by defendant, Microsoft Corporation. In its complaint, plaintiff, Caldera, Inc., alleges that Microsoft engaged in anticompetitive conduct in violation of [§§ 1](#) and [2](#) of the Sherman Antitrust Act, [15 U.S.C. §§ 1, 2](#), as well as § 3 of the Clayton Act, [15 U.S.C. § 14](#). Microsoft has attempted to separate what it believes are [*1297] Caldera's individual claims by filing the following nine motions for partial summary judgment on: (1) "Plaintiff's Preannouncement Claim," (2) "Plaintiff's Product Disparagement Claim," (3) "Plaintiff's [*3] Claim Regarding Microsoft's Licensing Practices," (4) "Plaintiff's Perceived Incompatibilities Claim," (5) "Plaintiff's Intentional Incompatibilities Claim," (6) "Plaintiff's 'Predisclosure' Claim," (7) "Plaintiff's Technological Tying Claim," (8) "Plaintiff's European & Japanese Claims," and (9) "Plaintiff's State Law Tortious Interference Claims." In addition to responding to each of Microsoft's motions for partial summary judgment, Caldera filed its own "Motion to Strike Microsoft's Partial Summary Judgment Briefs Relating to Substantive Antitrust Violations."

In its Memorandum Opinion and Order dated June 28, 1999, the Court denied three of Microsoft's motions for partial summary judgment. The motions denied were "Plaintiff's Product Preannouncement Claim," "Plaintiff's Product Disparagement Claim," and "Plaintiff's Claim Regarding Microsoft's Licensing Practices." Additionally, the Court denied from the bench defendant's motion for partial summary judgment on "Plaintiff's Japanese and European Claims," as memorialized in its Order dated July 27, 1999. With respect to "Plaintiff's State Law Tortious Interference Claims," the Court continues to take the matter under advisement. [**4] This Opinion addresses defendant's motions for partial summary judgment on "Plaintiff's Claim of Intentional Incompatibilities," "Plaintiff's Claim of Predisclosure," "Plaintiff's Claim of Perceived Incompatibilities," and "Plaintiff's Claim of Technological Tying," as well as plaintiff's motion to strike.

The Court heard oral argument regarding defendant's present motions for partial summary judgment and plaintiff's motion to strike on June 8, 10, 29, and July 6, 8, 1999. Based on the motions presently before the Court, the memoranda, exhibits submitted by both parties, and the statements presented in oral argument, the Court makes the following findings and issues this Memorandum Opinion and Order.

II. BACKGROUND & DESCRIPTION OF PLAINTIFF'S CLAIMS

This case finds its genesis in the mid-1970s with the advent of the personal computer. Critical to the evolution of the personal computer was the development of the computer operating system. An operating system functions as the control center of the computer. It controls the computer's interaction with peripheral hardware such as keyboards, modems, and printers and also serves as the underlying support structure for software [**5] applications. An operating system functions as the interface between the computer and the software applications. Independent software vendors (ISVs) write software application programs, such as games, spreadsheets, and wordprocessors, that rely for their operation on certain general functions written into the operating system.

As the computer age dawned, new and old companies alike scrambled to pioneer the emerging frontier. Founded in 1976 by Gary Kildall, Digital Research, Inc. (DRI) developed one of the first operating systems for personal computers, known as CP/M (Control Program for Microprocessors). According to plaintiff, CP/M was the dominant operating system for 8-bit personal computers in the late 1970s and early 1980s. CP/M operated much the same as a disc operating system (DOS) operates today. Both CP/M and DOS are character based, requiring the user to direct the computer to perform desired operations by using specific keystrokes.

At the same time DRI was making inroads into the operating systems market, a new start-up partnership called Microsoft was formed which focused on programming languages. In July 1980, IBM approached Microsoft about designing 16-bit versions [**6] of its most popular products to be used with IBMs forthcoming personal computer, which at the time was still undisclosed [*1298] to the public. IBM was also looking for an operating system to install onto its personal computers. At that time, DRI had preliminary designs for a 16-bit version of CP/M. IBM contacted DRI about obtaining a license of this 16-bit version, known as CP/M-86, but the parties were unable to reach an agreement.

Microsoft also began exploring the possibility of developing or acquiring its own operating system. In 1981, Microsoft first licensed and later purchased for a reported \$ 50,000 a 16-bit CP/M clone from Seattle Computer Products, a small original equipment manufacturer (OEM). This system, named QDOS (Quick and Dirty Operating System), mirrored the functionality of CP/M. Thereafter, IBM obtained a license from Microsoft for QDOS. When IBM launched its personal computer in August 1981, this operating system was installed on each computer, offered as PC-DOS 1.0 to IBM's direct customers, and offered by Microsoft as MS-DOS 1.0, to all other OEMs. IBM's personal computer incorporated the Intel x86 microprocessor. Other OEMs were able to use this same microprocessor [**7] to essentially clone the IBM personal computer, and MS-DOS was compatible with all of these clones. Accordingly, literally millions of Microsoft's operating systems were installed worldwide. By 1985, MS-DOS was the prevalent operating system in the world for personal computers using Intel x86 microprocessors. As a result, Microsoft enjoyed enormous financial success. By 1988 Microsoft had obtained a monopoly position in the DOS market. For purposes of the present motions, Microsoft does not dispute the contention that it has such a monopoly in the operating systems market.

By the mid-1980s, the computer industry began exploring alternatives to DOS, which were considered by many to be difficult to use because they required the user to type in commands in order to operate the computer. As a result, graphical user interfaces (GUIs) were developed, which replaced some of the character-based commands of DOS with graphical commands that users could execute through the use of point-and-click technology. In using a GUI, the user operates a "mouse" that controls an arrow on the screen and enables the user to control the computer by pointing at screen icons and clicking on them. GUIs were initially [**8] utilized by Apple Computer, Inc. In the early 1980s Apple developed the Macintosh microprocessor, which, unlike the IBM personal computer, ran on the Motorola 68000 microprocessor chip. However, unlike Microsoft's GUI, called Windows, Apple's GUI was a complete operating system. Windows had the appearance of running the computer as its own operating system, but

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it was in essence merely operating on top of DOS, unable to function without the underlying DOS program. Notwithstanding, Microsoft's Windows gained widespread popularity due to the dominance of the Intel x86 microprocessor chip. Since its inception in 1985, Windows has maintained a monopoly position in the GUI market.

Despite the dominant market position of MS-DOS, DRI continued development of its operating system. In 1987, DRI developed DR DOS, an operating system that competed directly with MS-DOS and was compatible with software written for use with MS-DOS. In May of 1988, DRI launched DR DOS 3.31. Plaintiff claims DR DOS was a better product than MS-DOS, as it included features MS-DOS did not have, operated at a faster speed, and was less expensive. Plaintiff contends that DR DOS's superiority over MS-DOS was due in part [**9] to Microsoft's assumption that the new operating system it was developing with IBM, called OS/2, would replace DOS as the preferred operating system. Therefore, according to plaintiff, Microsoft spent little time in further developing or improving MS-DOS.

Contrary to Microsoft's and IBM's projections, computer users did not switch to OS/2 at the rate anticipated, and DOS continued to be the preferred operating system. In July 1990, DRI launched DR DOS 5.0, an updated and improved version [*1299] of DR DOS 3.31. Nicknamed "the Leopard," DR DOS 5.0 received positive reviews from several trade magazines as well as computer industry awards.¹ In an internal Microsoft e-mail sent to Phil Barrett, a Microsoft executive, from one of his subordinates, DR DOS 5.0 received similar high praise when compared to MS-DOS:

Last Thursday you asked me for a user's view of DR DOS 5.0. . . . I used DR DOS 5.0 with a HUGE number of apps. I found it INCREDIBLY superior to MS DOS 3.31 and IBM DOS 4.01.

1) DOS compatibility

The most important reason to use ANY version of DOS is to run DOS apps. DR DOS 5.0 runs every DOS app I know. DR DOS 5.0 works successfully with Windows (2.11, Win 386 2.11 and [**10] Windows 3.0 and 3.0a).

....

CONCLUSION:

DR DOS is vastly superior to MS dos 5.0. Both have nearly identical features . . . I don't see any real 'cutting edge' advantage of one over the other.

(Pl.'s Exhibit 123).

[**11] Caldera claims that Microsoft, alarmed at this positive reception of DR DOS 5.0 the computer industry and concerned about losing its DOS monopoly, began to engage in a series of practices to eliminate the threat DR DOS posed to Microsoft's market dominance. Initially, rather than competing with DRI, Microsoft attempted to bargain for DRI's exit out of the market. In essence, as plaintiff alleges, Microsoft offered DRI a certain amount of money for the use of DR DOS technology. Microsoft was proposing that DRI market MS-DOS instead of DR DOS and that each company license rights in the other's product. DRI, uninterested in a long-term relationship with Microsoft, offered DR DOS technology to Microsoft for \$ 30 to \$ 40 million. Microsoft refused.

¹ For example, in August 1990, *BYTE* magazine stated:

The latest incarnation of DR DOS, Digital Research's MS-DOS clone, is an innovative and intriguing operating system that's thoughtfully designed. Version 5.0 is also packed with the extra features that Microsoft's own operating system should have (and might eventually have if the long-rumored MS-DOS 5.0 becomes a reality). As the people at DRI make very clear, it's not pronounced Doctor DOS, although the analogy isn't far off the mark, since it indeed cures many (but not all) of MS-DOS's shortcomings.

Stan Miastkowski, *A Cure for What Ails DOS*, *BYTE*, Aug. 1990, at 107 (Pl.'s Exhibit 69). *PC Magazine* wrote on January 15, 1991:

Digital Research is the microcomputer operating system company that predates Microsoft. As if to prove it hasn't lost its touch, DR DOS 5.0 does all the things you wish MS-DOS did. Its features include . . . full compatibility with MS DOS. . . . Everybody's DOS should be this advanced.

Bill Machrone, *7th Annual Awards for Technical Excellence*, *PC Magazine*, Jan. 15, 1991, at 100 (Pl.'s Exhibit 106).

Plaintiff alleges that beginning in approximately the latter half of 1990 with the introduction of DR DOS 5.0 into the marketplace, Microsoft began its improper campaign to eliminate DR DOS as a competitor and to illegally maintain its operating systems monopoly. By this time, DR DOS had captured approximately six percent of the operating systems worldwide market. Among the first of these allegedly improper actions was Microsoft's use of preemptive [**12] false and misleading announcements of forthcoming, competitive MS-DOS and Windows products. This practice of preannouncing upcoming products is known in the industry as "vaporware." Caldera claims that beginning in April 1990, Microsoft began making knowingly false and misleading preannouncements relating to the forthcoming MS-DOS 5.0, an allegedly comparable product to DR DOS 5.0. Plaintiff claims Microsoft knowingly mislead the public by stating MS-DOS 5.0 would be available to OEMs by September 1990, a full nine months before it was actually on the market.

Following DRI's April 26, 1990 announcement at an England trade show that DR DOS 5.0 would be available in eight weeks, Microsoft immediately announced [*1300] to the trade press its development of MS-DOS 5.0. An e-mail sent by Mark Chestnut, then a product manager of MS-DOS 5.0, to a number of Microsoft executives on May 2, 1990, stated:

On the PR side, we have begun an "aggressive leak" campaign for MS-DOS 5.0. The goal is to build an anticipation for MS-DOS 5.0 and diffuse potential excitement/momentum from the DR DOS 5.0 announcement. At this point, we are telling the press that a major new release from Microsoft is coming [**13] this year which will provide significant memory relief and other important features. This was picked up by the major weeklies in the U.S. and was the page 1 story in PC Week on 4/30.

Additionally, Chestnut himself flew to several countries, meeting with dozens of OEMs and telling them that they could expect MS-DOS 5.0 by September 1990. Plaintiff alleges that Chestnut's representations caused these OEMs to postpone any decision to switch to DR DOS.

Caldera argues that the purpose behind Microsoft's preannouncements was to prevent OEMs from entering into licensing agreements with DR DOS 5.0. and that Microsoft knew it could not possibly comply with the schedule it was announcing to the public. Caldera's expert states that such an aggressive schedule was objectively unattainable. For one thing, a release date of September 1990 would only allow for a three-month beta test cycle, which, according to Caldera, is an unacceptably short beta testing period.² Plaintiff argues that by the end of 1990, however, Microsoft was aware that its tactics were working. In a performance self-evaluation, Chestnut wrote "virtually all of our OEMs worldwide were informed about DOS 5, which diffused [**14] DRI's ability to capitalize on a window of opportunity with these OEMs." (Pl.'s Exhibit 62).

[**15] By mid-October 1990, the media became concerned about the veracity of Microsoft's preemptive remarks directed at DR DOS 5.0. Such media pressure was not taken lightly. Following an interview with *PC Week*, a trade magazine, regarding the release of MS-DOS 5.0, Chestnut wrote to other Microsoft employees on October 17, 1990:

I'm afraid that this guy [Paul Sherer of *PC Week*] is going to write that we are being open about DOS 5 beta because we are trying to pre-empt DR DOS 5 sales. I tried real hard to present a different point of view, but I don't think he bought it. I'm concerned that this article may make us look bad. Can you guys follow up and see if we need to do some damage control?

This was the toughest interview I've ever done, I felt like Richard Nixon giving his "I am not a crook" speech. (Pl.'s Exhibit 87).

² A "beta" or "beta version" refers to unreleased software still under development. Beta testing is both a common and necessary practice in the computer software industry. It involves allowing software users and manufacturers of other software that is compatible with the beta product to test the new product. Beta testers provide the software manufacturer with needed feedback on its product including potential problems with operating the software. It also allows the makers of compatible software the opportunity to work out any incompatibilities between their product and the beta version before its commercial release. Ordinarily, this is a mutually beneficial arrangement between the beta manufacturer and the maker of the compatible software. The arrangement allows the compatible software manufacturer to cure incompatibilities while making the beta product more marketable since upon its release it would be compatible with an assortment of software programs.

In addition to Microsoft's "vaporware" strategies, Caldera alleges that following the launch of DR DOS 5.0 Microsoft refined and dramatically expanded a campaign of "fear, uncertainty, and doubt" (FUD) against DRI and all of its forthcoming versions of DR DOS.³ Plaintiff alleges [*1301] that account managers were directed to share purported "serious [**16] problems" with OEMs considering a switch to DR DOS 5.0. Caldera asserts that Microsoft deliberately withheld from these same OEMs independent tests confirming DR DOS 5.0 compatibility with MS-DOS and Windows, while creating its own tests to give the appearance of "incompatibility."

In addition to its improper vaporware and FUD campaigns, Caldera alleges that Microsoft also forced OEMs away from [**17] DR DOS 5.0 by what plaintiff refers to as the "licensing triple-whammy," which refers to (1) per processor licenses, (2) minimum commitments subject to forfeiture, and (3) increased license duration. Per processor licensing agreements required an OEM to pay Microsoft a royalty on every machine the OEM shipped regardless whether the machine contained MS-DOS or a different operating system. This is in contrast to a per system licensing agreement, which required OEMs to pay a royalty on only those computers shipped with MS-DOS installed. The use of per processor agreements is argued by plaintiff to be Microsoft's most effective single weapon against DR DOS. Plaintiff alleges that DRI had no realistic chance to license DR DOS to OEMs under a per processor license with Microsoft. It would make no sense for an OEM to install DR DOS when it had already paid for MS-DOS on every machine. Microsoft contends that OEMs were free to depart from the per processor licensing scheme, and that price differentials between license types were "relatively minor." However, plaintiff points to the depositions of several OEM executives who testified that even slight price differentials between the per processor [**18] and per system licenses meant that only the per processor license was financially viable.

Plaintiff also asserts that Microsoft's use of minimum commitments with prepaid balances raised the costs to OEMs who may have wanted to switch to an alternative operating system. As alleged, during the life of a Microsoft contract, OEMs could find themselves over-committed with respect to units of Microsoft products. Plaintiff claims that given the nature of Microsoft's mandatory, nonrefundable minimum commitment payments, OEMs faced the prospect of either forfeiting their prepaid balance or signing a new agreement with Microsoft to partially recoup the prepaid balance. The rationale, plaintiff asserts, behind Microsoft's minimum commitments policy was not just to provide an OEM an opportunity to recoup the prepaid balance, but rather to sign a new license agreement so that the OEM would continue to distribute only MS-DOS.

Microsoft's final licensing tactic aimed at DR DOS, as plaintiff alleges, was increased license duration. Microsoft began increasing its licensing agreements from two-year to three-year terms and gave OEMs a small price break for agreeing to the longer term. Caldera claims [*19] that the increased licensing time was implemented only after DR DOS became a threat to MS-DOS's monopoly position, and that Microsoft deliberately increased the term length as part of its illegal scheme to drive DRI from the market. The strategy, plaintiff alleges, foreclosed DR DOS from effectively competing for existing OEM business.

On July 17, 1991, DRI announced its intent to merge with Novell. The result of this announcement intensified the threat DR DOS posed to Microsoft. The potential merger was a concern on more than one level. One Microsoft executive, Jim Allchin, expressed: "I thought about it all night. Since I came here I said there were two things that concerned me related to Novell: one Novell partnering with IBM and two Novell coming to us at the [*1302] desktop. Both fears have now come true." (Pl.'s Exhibit 148). One of Microsoft's MS-DOS's product managers, Richard Freedman, expressed:

The offensive scenario presumes Novell is actively developing products to compete with Win Peer and NT, and ultimately plans to enter the standalone OEM DOS business. It is this worst-case scenario we're focusing on.

³ As alleged by plaintiff, a FUD campaign is meant to attack or alter perceptions regarding software compatibility. The purpose of a FUD campaign is to raise an artificial barrier to entry by a competitor. Caldera alleges that Microsoft knew of the effect an effective FUD campaign could have on a competitors and offers as evidence the following statement by a Microsoft official, Jeremy Butler, made in September 1989:

It only takes a couple of reports about non-compatibility to give the kiss of death to a PC: we've seen that on the hardware side as well as in the operating system area.

....

This scenario assumes Novell aims to own the [**20] desktop, both server and workstation, and assumes they'll attempt to do this first by integrating Netware and DR DOS, and then, having legitimized DR DOS, by going after OEM business. IBM licensing DR DOS is a major X factor in this scenario.

(Pl.'s Exhibit 153). Plaintiff alleges that these and other excerpts indicate that Microsoft was alarmed at not only the prospect of Novell competing in the MS-DOS arena, but also that an alliance between IBM and Novell would make DR DOS a much larger threat. On September 23, 1991, IBM officially endorsed DR DOS 6.0, which was scheduled to be released to the public in September or October of the same year. Plaintiff alleges that in response to IBM's endorsement and in anticipation of an IBM/Novell alliance, Bill Gates publicly threatened retaliation against IBM should it choose DR DOS. Caldera claims that as a result of the threatened retaliation and intense FUD concerning DR DOS incompatibility with Windows, IBM withdrew its consideration of DR DOS.⁴

[**21] In late September 1991, Novell released DR DOS 6.0. Plaintiff alleges with this release, Microsoft adhered to the same pattern of attack, vaporware, FUD, and per processor licensing agreements, but with more intensity. Microsoft executives were aware of the threat Novell/DRI and the new DR DOS 6.0 posed. Jim Allchin wrote on September 9, 1991:

We must slow down Novell. . . . As you said Bill, it has to be dramatic We need to slaughter Novell before they get stronger.

(Pl.'s Exhibit 175). On March 26, 1993, Allchin also wrote:

I still don't think we take them as serious as is required of us to win. This isn't IBM. These guys are really good; they have an installed base; they have a channel; they have marketing power; they have good products. AND they want our position. They want to control the APIs, middleware, and as many desktops as they can in addition to the server market they already own.

We need to start thinking about Novell as THE competitor to fight against--not in one area of our business, but all of them.

If you want to get serious bout stopping Novell, we need to start understanding this is war-nothing less. That's how Novell views [**22] it. We better wake up and get serious about them or they will eventually find a way to hurt us badly.

(Pl.'s Exhibit 349). Plaintiff alleges that with this mind-set, Microsoft intensified its improper FUD campaign against DR DOS. Specifically, plaintiff asserts that Microsoft attempted to convince OEMs that DR DOS would be incompatible with the upcoming Windows 3.1, when in fact Microsoft knew that DR DOS was, or with minor adjustments could be, compatible with Windows. On April 6, 1992, Windows 3.1 was launched worldwide. Following this release, plaintiff claims users immediately bombarded Microsoft with requests regarding problems setting up Windows 3.1 over DR DOS. Microsoft's standard response, according to plaintiff, was to tell the users that Windows was only tested [*1303] with MS-DOS, not DR DOS, and that using a system other than MS-DOS puts the user at his own risk. When confronted with the issue of compatibility between Windows and DR DOS, Microsoft's marketing staff was instructed to respond, "we only test windows on Microsoft supported operating systems, so there's really no way to know in the future what will work and what will not." (Pl.'s Exhibit 176). Recognizing [**23] the damage that its FUD campaign could have on DR DOS, Microsoft stated: "We need to create the reputation for problems and incompatibilities to undermine confidence to drdos6; so people will make judgments against it without knowing details or facts." (Pl.'s Exhibit 227).

To assure DR DOS's incompatibility with Windows, plaintiff alleges that Microsoft placed DRI on a "beta blacklist." According to plaintiff, Microsoft knew that if the DR DOS development team had access to a Windows 3.1 beta, it would allow them to make DR DOS compatible and consequently allay public fears of incompatibility. DRI submitted

⁴ During this same time period, and in response to the Novell/DRI merger plaintiff argues, Gates called Ray Noorda, Novell's CEO and Chairman, and proposed a merger between Novell and Microsoft. According to plaintiff, the only prerequisite for Gates was that "DRI's got to go." Plaintiff now asserts that Gates' proposal was "a ploy to hobble the development of DR DOS as a competitor." Microsoft asserts it was done in good faith.

a formal request to become a beta site. The request was denied on August 2, 1991. Being placed on Microsoft's beta blacklist had an alleged direct effect on DR DOS sales.⁵ One corporation notifying DRI of its decision to reject DR DOS 6.0, stated that

the most important factor, however, is the rift developing between Digital Research and Microsoft. By this I mean Microsoft not allowing you to beta test Windows 3.1. Since the users who would be most inclined to switch to DR DOS are also using Windows, this one factor is of particular concern.

(Pl.'s Exhibit 266). [**24]

According to Caldera, Microsoft continued its attacks on DRI by intentionally making Windows 3.1 incompatible with DR DOS, not for any technologically significant reason, but for the sole purpose of eliminating DR DOS as a competitor. Caldera supports its claim with internal Microsoft statements, such as these written by David Cole and Phil Barrett on September 30, 1991, respectively: "It's pretty clear we need to make sure Windows 3.1 only runs on top of MS DOS or an OEM version of it," and "the approach we will take is to detect dr 6 and refuse to load. The error message should be something like 'Invalid device driver interface.'" (Pl.'s Exhibits 205 and 206). Microsoft developers discussed reliable DR DOS detection mechanisms, and allegedly incorporated "Bambi," Microsoft's code name for its updated disc cache utility, which among other things detects DR DOS and [**25] refuses to load, in Windows 3.1.

In addition to Bambi, Microsoft added a version check known as the extended memory specifications (XMS) to the Windows 3.1 SETUP program. The XMS made it impossible for Windows to install on a DR DOS system. When it detected DR DOS the user was told:

The XMS driver you have installed is not compatible with Windows. You must remove it before SETUP can successfully install Windows.

Caldera alleges that there was no valid competitive purpose for this version check, and that this message was not just misleading, but wrong, and that the DR DOS XMS driver was compatible with Windows 3.1. Caldera further alleges that Microsoft introduced a computer "bug," known as the nested task flag, that would cause a fatal error when users tried to run Windows 3.1 with DR DOS. Additionally, it is alleged that Microsoft installed "software locks" in the Korean version of Windows causing Windows to malfunction when it operated with DR DOS. Caldera claims that Microsoft knew about these problems, knew the cause of the problems, knew how to fix them, yet did nothing. Finally, Caldera complains of Microsoft's insertion of a line of code in a beta version of [**26] Windows 3.1. The code was designed to detect the presence of MS-DOS. In the [*1304] event that MS-DOS was not detected, the following message was displayed:

Non-fatal error detected: Error number [varied]. Please contact Windows 3.1 beta support. Press enter to exit or C to continue.

Through Microsoft's alleged use of vaporware, per processor licensing agreements, FUD, beta blacklisting, and the insertion of incompatibilities between Windows and DR DOS, Caldera claims that Microsoft was essentially forcing OEMs to purchase both MS-DOS and Windows. By this method Microsoft, Caldera asserts, was using its monopoly in the GUI (i.e. Windows) market, to illegally maintain its monopoly in the operating systems market. One OEM, an alleged leading proponent of DR DOS, stated: "[Microsoft] just said they had changed the way in which they market the product, instead of it being available as two separate packages it now came as an integrated package, which was DOS and Windows 3.11 or DOS and Windows for Workgroups 3.11, take it or leave it." (Harvey Depo. at 33).

According to plaintiff, Microsoft's desire to combine MS-DOS and Windows extended beyond simply forcing the sale of the two [**27] products. Since September 1991, and as reflected in an e-mail sent by Jim Allchin, Microsoft had been exploring the possibility of integrating Windows with DOS, creating a "common install," and "making it so there is no reason to try DR DOS to get Windows." (Pl.'s Exhibit 175). Acting on this desire, Microsoft took steps to implement its combined product. By early 1992, Microsoft developed "Janus," which was designed to provide first-time Windows 3.1 purchasers who were using some older version of DOS, with an upgrade to MS-DOS 5.0. For the

⁵ Caldera further alleges that Microsoft's beta blacklist of Windows 3.1 extended to ISVs that expressed an interest in continuing to use DR DOS.

first time, Windows 3.1 and MS-DOS 5.0 were together in the same package. Each component, however, could still be purchased separately. Janus was not a success, and Microsoft estimated its failure to be the result of only providing an upgrade of one of the products. Therefore, Microsoft focused on the concept of releasing upgraded MS-DOS and Windows versions simultaneously. This project, labeled "Chicago," ultimately led to the creation of Windows 95. According to Caldera, one of Microsoft's stated objectives in developing Chicago was to block out Novell. In a June 16, 1992, strategy document Microsoft declared Novell as its biggest threat, and [**28] stated that Microsoft "must respond in a strong way by making Chicago a complete Windows operating system, from boot-up to shut-down." (Pl.'s Exhibit 309). Microsoft continued, "there will be no place or need on a Chicago machine for DR-DOS (or any DOS)." (Id.).

While Microsoft was developing Chicago, Novell continued to develop DR DOS. In December 1993, Novell introduced its final upgrade to DR DOS, Novell DOS 7.0, which, according to plaintiff, offered innovative features and received industry praise. Plaintiff claims that Microsoft illegally attempted to eliminate Novell's momentum by continuing its FUD campaign, beta-blacklisting, and spreading vaporware. For example, in August 1993, Microsoft announced the forthcoming release of MS-DOS 7.0 to coincide with Novell DOS 7.0. However, MS-DOS 7.0 was never released. Additionally, Caldera alleges that further vaporware and FUD was being spread in relation to Chicago. Specifically, Microsoft leaked information that Chicago would be released in 1993 or 1994, and that Novell's DOS would not run on Chicago. Finally, Caldera claims that shrouded in the fog of such vaporware and as a result of years of Microsoft's illegal anticompetitive [**29] conduct, Novell announced in September 1994 that it would withdraw from active development and marketing of further versions of DOS. On the heels of Novell's exit from the market, Microsoft announced on December 20, 1994, that Chicago, now officially termed "Windows 95," may not be available until August 1995.

In August 1995, Microsoft released Windows 95. For ten years prior thereto, Microsoft had sold MS-DOS and Windows separately. However, Windows 95 combined [*1305] the functions of Windows and DOS into one product. Microsoft touts Windows 95 as one of the most popular software products in history, selling within four months after its release nearly eleven million copies through OEM channels and nearly five million copies through retail channels. After its release, virtually all new personal computers came with Windows 95 preinstalled by OEMs. With the release of Windows 95, users of the Intel-based personal computer had a totally integrated (from boot-up to shutdown) graphical operating system for the first time. Microsoft claims that Windows 95 offered many new features of functionality over that provided by the combination of MS-DOS 6.0 and Windows 3.0 when those products were installed [**30] separately on a personal computer. Caldera, however, alleges that in reality Windows 95 is not an integrated software product, but rather two products--MS-DOS 7.0 and Windows 4.0, which Caldera asserts are merely updated versions of both MS-DOS 6.22 and Windows 3.1--packaged together using a common installation program with blue cloud graphics to make them appear to be a single product. Plaintiff claims that MS-DOS 7.0 and Windows 4.0 can be easily isolated and sold as separate products. Since the release of Windows 95, updated versions of Windows and MS-DOS were not sold separately. Plaintiff claims Novell would have been able to compete with Microsoft but for Microsoft's prior conduct and ultimately this illegal tying arrangement of Windows 95, which plaintiff argues was the *coup de grace* for DR DOS.

On July 23, 1996, Caldera acquired DRI from Novell. Included in the purchase was the right to bring this lawsuit against Microsoft. Based on the foregoing, Caldera filed its complaint against Microsoft, alleging the improper use and maintenance of monopoly power in violation of § 2 of the Sherman Act and for the illegal restraint of trade in violation of § 1 of the Sherman Act. [**31] Caldera supports its § 1 claim by arguing that Windows 95 constitutes an illegal tie of two separate products formerly sold as MS-DOS and Windows. Caldera supports its § 2 claim, as aforementioned, by alleging that Microsoft engaged in an anticompetitive scheme, the factual components of which consist of, improper licensing arrangements, improper preannouncements, improper intentional and perceived incompatibilities, beta blacklisting, the improper creation of fear, uncertainty, and doubt, and the illegal tying together of its products. Caldera acknowledges that each instance of alleged misconduct taken alone may not amount to a violation of § 2. However, when viewed in totality, Caldera asserts that Microsoft has engaged in an unlawful, anticompetitive scheme to illegally maintain its monopoly in the operating systems market.

III. DISCUSSION

In 1890, Congress passed the Sherman Antitrust Act in an effort to protect competition and prevent monopolies. Section 1 of the Sherman Act prohibits "every contract, combination . . . , or conspiracy, in restraint of trade or commerce." [HN1](#) [HN2](#) [15 U.S.C. § 1](#). Despite this broad language, almost from its inception the [**32] Sherman Act has been read to prohibit only those restraints of trade that are unreasonable. [Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 \(1918\)](#) (recognizing that because every agreement involving trade is a restraint on trade in some form, the proper inquiry is whether the restraint suppresses or destroys competition). [HN3](#) Courts have also developed a doctrine of per se violations to cover those business relationships that "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." [Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). Section 2 of the Sherman Act condemns "every person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several [*1306] States or with foreign nations." [HN4](#) [HN5](#) [15 U.S.C. § 2](#). The Supreme Court has determined that "the offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the [**33] 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, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#).

Although by enacting the Sherman Act Congress expressed an inherent distrust of monopolies and their possible adverse effects on competition, it did not declare monopolies illegal per se. [HN6](#) Antitrust laws are designed to protect and foster competition, even when the competitor is a monopolist. [HN7](#) In general, a monopolist is free to market its products, engage in research and development to improve its products, and engage in any other business practice that is procompetitive. [HN8](#) If smaller businesses find themselves unable to compete on the merits of their products against a procompetitive monopolist, there is nothing in the antitrust laws to protect them. [HN9](#) Antitrust laws protect the competitive process; they do not protect individual competitors.

Notwithstanding, § [HN10](#) 2 does proscribe a monopolist from engaging in business practices that are anticompetitive or exclusionary. Congress, recognizing that "it is difficult [**34] to define in legal language the precise line between lawful and unlawful combination[.]" left to the courts the responsibility of defining the parameters of anticompetitive conduct. 21 Cong. Rec. 2460 (1890). [HN11](#) Anticompetitive conduct describes a wide variety of behavior including espionage, sabotage, predatory pricing, fraud, price discrimination, price-fixing, bid-rigging, illegal tying arrangements, product disparagement and a host of other activities that improperly stifle competition. [HN12](#) Section 2 prohibits a monopolist from engaging in anticompetitive practices that are designed to deter potential rivals from entering the market or from preventing existing rivals from increasing their output, no matter how flagrant or subtle the violation. [HN13](#) A monopoly may not improperly "wield [its] resulting power to tighten its hold on the market." [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 \(2d Cir. 1979\)](#). Perhaps [HN14](#) the clearest way to explain what a monopolist may legally do is to say that the monopolist may engage in all of the same procompetitive activities that allowed it to become a legal monopolist in the first place. These would include building a better [**35] or less expensive product, engaging in better public relations, employing effective (and honest) advertising campaigns, and developing aggressive and effective marketing techniques. If these activities result in even more market share, and drive competitors out of the market, the monopolist is nevertheless fully entitled to such expansion, and its conduct is not a violation of the Sherman Act. Conversely, a monopolist may not engage in any activities other than those that are procompetitive, as generally described above.

A. Plaintiff's Motion to Strike

As mentioned at the outset of this Opinion, in response to Caldera's allegations that Microsoft violated § 2 by willfully maintaining its monopoly position through anticompetitive means, Microsoft filed nine separate motions for partial summary judgment. Seven of the nine motions relate to specific conduct Caldera claims against Microsoft. Caldera objected to these motions by filing a motion to strike the partial summary judgment motions as improper.

Caldera argues that Microsoft has artificially created seven discreet claims out of Caldera's singular claim that Microsoft violated [§ 2](#) of the Sherman Antitrust Act. Caldera [[**36](#)] requests that the Court strike the seven partial summary judgment motions as improper and allow Caldera to present evidence of Microsoft's alleged anticompetitive behavior to a jury. The jury would in turn consider whether, based on the aggregate effect of the anticompetitive [[*1307](#)] behavior presented, defendant unlawfully maintained a monopoly.

Microsoft objects to plaintiff's motion to strike for two reasons. First, Microsoft asserts that a motion to strike is a procedurally improper challenge to motions for summary judgment, and second, Microsoft contends that each allegation of anticompetitive conduct must be examined separately to determine if a [§ 2](#) violation has occurred. Defendant argues that if specific anticompetitive conduct fails by itself to support a [§ 2](#) claim then such conduct may not later be considered in determining whether a [§ 2](#) violation has occurred based on the totality of the circumstances.

Microsoft relies on *Southern Pac. Communications Corp. v. AT&T*, 556 F. Supp. 825 (D.D.C. 1982), in support of its position. Microsoft claims that in *Southern Pacific* the court considered and rejected the idea that a plaintiff can assert one overarching [§ 1](#) [[**37](#)] [2](#) claim. However, a careful reading of that case shows that the court there found it unnecessary to decide the issue and considered it only in dicta. The D.C. district court wrote:

The Court is satisfied that nothing in *Continental Ore* requires a conclusion that a defendant that has not engaged in an unlawful conspiracy, and has committed no acts in themselves violative of the Sherman Act, could be found guilty of antitrust violations on some theory that the acts have "synergistic effects" that convert lawful conduct into violations of law. Such a doctrine, with its potential for converting entirely innocent conduct into violations of law, *would at the very least demand careful and sparing application*. . . . Fortunately, it is not necessary for the Court to decide whether plaintiffs' expansive reading of *Continental Ore* can be justified.

Id. at 888 (emphasis added).⁶ Moreover, the court in *Southern Pacific* did not reject the idea, as defendant claims, that plaintiff should not be allowed to present its antitrust case based on the totality of defendant's conduct when none of the conduct alone could support a separate and independent [[**38](#)] antitrust claim. Rather, the court stated that such a theory would "at the very least demand careful and sparing application."

[[**39](#)] Defendant also asserts that the Supreme Court "tacitly rejected" plaintiff's theory in [*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-86, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#). In *Matsushita*, the Supreme Court addressed the issue of the appropriate standard for summary judgment in cases involving conspiracies to monopolize. However, defendant does not elaborate on how the Supreme Court tacitly rejected plaintiff's theory, nor can this Court, after its own reading of the case, find such a rejection. In fact, *Matsushita* seems to support plaintiff's synergy theory rather than reject it. On the same pages cited by defendant, the Supreme Court in *Matsushita* found that of the numerous conspiracies [[*1308](#)] to monopolize alleged, only the conspiracy to monopolize the American market through predatory pricing could support respondent's claim of antitrust injury. However, the Court noted that evidence of the other conspiracies would be considered if "in context

⁶ In [*Continental Ore, Co. v. Union Carbide and Carbon, Corp. et al.*, 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 \(1962\)](#) the plaintiff brought suit under [§ 1](#) and [2](#) of the Sherman Antitrust Act alleging that the defendants had violated the Sherman Act "by conspiring to restrain, by monopolizing, and by attempting and conspiring to monopolize, trade and commerce" in various metals that both parties mined. *Id.* at 693. A jury trial was held in which a verdict was returned in favor of the defendants. The plaintiff appealed the verdict to the United States Court of Appeals for the Ninth Circuit.

On appeal, instead of considering whether the defendants had illegally attempted or conspired to monopolize the industry, the Ninth Circuit considered each defendants conduct separately and affirmed the determination made in the district court. The Supreme Court granted certiorari and vacated the judgment of the court of appeals, remanding the case to the district court. The Court held, it is apparent . . . that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Id.* at 698-99.

evidence of these 'other' conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy." *Id. at 586*. The Court found that although the "other" conspiracies could not [**40] alone support an antitrust claim, they could be used to bolster the remaining conspiracy claim when viewed in context. This Court reads nothing in *Matsushita* that limits, either explicitly or tacitly, the aggregation of evidence to conspiracy to monopolize cases.

In support of its position, Caldera relies primarily on *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984)*, which was affirmed on appeal to the Supreme Court in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. That case involved two owners of ski resorts in Aspen, Colorado. The plaintiff owned one of four ski resorts located in Aspen. The defendant owned the remaining three. From the 1962 ski season through the 1971 ski season, the parties offered a joint multi-day lift ticket which could be used at any one of the four ski resorts. After a one-year reprieve, the multi-day lift ticket was reinstated in 1973 through the end of the 1976 season. The revenues from the tickets were divided based on a percentage of the actual use of each facility. For the 1977-78 season, defendant offered to continue the multi-day lift ticket but only if [**41] plaintiff agreed to a fixed percentage of the revenues. Plaintiff requested that the parties continue to base the revenue sharing on actual usage but ultimately agreed to 15% of the revenues. In the 1978-79 ski season defendant offered to continue the joint ticket if plaintiff would agree to accept 12.5% of the revenues from ticket sales. Plaintiff again requested that the parties return to their previous arrangement. However, because the parties were unable to agree on a method of dividing the revenues, the multi-day lift ticket was discontinued.

Plaintiff brought suit under the Sherman Antitrust Act and the Clayton Act. After the close of evidence at trial, the defendant moved for a directed verdict. The district court granted the motion on all claims except the claims of unlawful monopolization and conspiracy to restrain trade. On both of the remaining claims, the jury found for the plaintiff. On appeal to the Tenth Circuit, defendant argued that "there was insufficient evidence to present a jury issue of monopolization because, as a matter of law, the conduct at issue was pro-competitive conduct that a monopolist could lawfully engage in." *738 F.2d at 1516-17* (citations omitted). [**42] Defendant further argued that each of the six things the plaintiff relied on to support its § 2 claim must support the claim independent of each other and may not be considered in the aggregate to determine if a violation of § 2 has occurred.⁷ The Tenth Circuit rejected this argument, stating, "defendant's argument would require that we view each of the 'six things' in isolation. To do this, however, would be contrary to the Supreme Court's admonition that an antitrust plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny" [*1309] of each." *Id. at 1522 n. 18* (citing *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*). The Tenth Circuit continued by adding, "plaintiff's evidence should be viewed as a whole. Each of the 'six things' viewed in isolation need not be supported by sufficient evidence to amount to a § 2 violation. It is enough that taken together they are sufficient to prove the monopolization claim." *Id.*

[**43] Microsoft attempts to distinguish this case by highlighting the fact that the *Aspen Highlands* court allowed the plaintiff the benefit of the synergistic effect of its evidence to prove that the defendant monopolist had refused to deal with the plaintiff in violation of § 2. Whereas here, Microsoft argues, Caldera is requesting that all the evidence be considered in determining whether defendant violated § 2 without alleging any specific claim other than the defendant engaged in anticompetitive behavior. However, this distinction is immaterial. The Supreme Court's directive in *Continental Ore* that a plaintiff should not be denied the "full benefit of its proof" is equally applicable

⁷ The "six things" relied on by the plaintiff were:

(1) forcing plaintiff out of the four-area ticket by requiring that revenues be divided below plaintiff's market share; (2) substituting defendant's three area ticket for a four area ticket; (3) marketing and advertising its three mountains in a manner designed to convince consumers that Aspen had only three mountains, not mentioning Aspen Highlands; (4) making an agreement with a tour operator to sell defendant's tickets to the exclusion of plaintiff's; (5) refusing to accept plaintiff's coupons during the 1978-79 season; and (6) raising ticket prices for a single-day lift ticket thus eliminating plaintiff's ability to offer a multi-area ticket.

here. The Court finds [HN15](#) nothing in the relevant law that prevents a plaintiff from asserting one overarching claim of a [§ 2](#) violation. Conversely, to allow defendant to carve plaintiff's complaint into seven discreet claims that plaintiff never intended to allege as independent claims not only appears to offend the purpose behind [§ 2](#), but also turns basic civil procedure principles on their head.

Caldera claims that Microsoft is a monopolist that engaged in anticompetitive conduct to preserve [\[**44\]](#) its monopoly. The alleged anticompetitive conduct is set forth in general terms in the foregoing background portion of this opinion. Plaintiff's entire case is based on the synergy of all of this conduct to demonstrate anticompetitive intent and effect. Plaintiff has not averred a separate claim of product disparagement, or a "refusal to deal" claim, or any other independent claim in support of its overall [§ 2](#) claim. Consequently, the Court sees no reason why plaintiff should now be required to submit to Microsoft's reclassification of its claim and to independently support each of the seven "claims" as classified by Microsoft as an independent legal claim upon which relief could be granted and liability could be independently based, in order to survive summary judgment. Such an exercise is not appropriate as a matter of summary judgment, though it may have some value in allowing the parties and the Court to focus on the plaintiff's proposed evidence in an effort to minimize evidentiary problems at trial.

In full agreement with *Aspen Highlands*, the Court finds no bar to allowing Caldera to present all of its evidence of Microsoft's alleged anticompetitive conduct to a fact finder [\[**45\]](#) in support of its [§ 2](#) claim. However, as a procedural matter, the Court agrees with the defendant that a motion to strike the partial summary judgment motions is improper. Therefore, the Court denies plaintiff's motion to strike, and entertains each of the remaining four motions in the following discussion. Consistent with the foregoing, however, what follows is generally more in the nature of evidentiary analysis.

B. Microsoft's Motions for Partial Summary Judgment

The Court now addresses Microsoft's motions for partial summary judgment regarding (1) "Plaintiff's Claim of Intentional Incompatibilities," (2) "Plaintiff's Claim of Predisclosure," (3) "Plaintiff's Claim of Perceived Incompatibilities," and (4) "Plaintiff's Claim of Technological Tying." [HN16](#) Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact, and, therefore, is entitled to judgment as a matter of law. See [FED. R. CIV. P. 56\(c\)](#). The court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party. See [HN17](#) *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. [\[*1310\]](#) 1348 (1986); [\[**46\]](#) *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991). In considering whether there exist genuine issues of material fact, the court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented. See [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir. 1991).

1. Intentional Incompatibilities

Caldera alleges that in an effort to eliminate competition in the operating systems market, Microsoft introduced intentional incompatibilities between Windows and DR DOS. Caldera maintains that these incompatibilities, in connection with other anticompetitive behavior such as Microsoft's exclusion of DRI from beta testing Windows 3.1 and Microsoft's campaign to spread fear, uncertainty, and doubt about Windows' compatibility with DR DOS, amounted to a violation of [§ 2](#) of the Sherman Act. In response to this allegation, Microsoft seeks summary judgment on Caldera's claims of intentional incompatibilities.

Caldera originally complained of seven technological incompatibilities existing between DR DOS [\[**47\]](#) and Microsoft Windows: (1) Nested Task Flag, (2) XMS Version Check, (3) AARD Code, (4) Korean Incompatibilities, (5) PROTMAN.DOS in Windows for Workgroups, (6) VSERVER.386 in Windows for Workgroups, and (7) Windows 95. At oral argument, plaintiff stated that it would no longer pursue any claims relating to PROTMAN.DOS or VSERVER.386. At the same hearing, Microsoft objected to Caldera's introduction of yet another technological incompatibility, known as "Bambi" which Caldera raised for the first time in its opposition brief to defendant's motion

for partial summary judgment on plaintiff's intentional incompatibilities claim. Defendant objected to the introduction of any evidence relating to Bambi based on the fact that discovery had closed and defendant did not have an opportunity to depose plaintiff's expert witness on the subject. The Court held a separate hearing on this matter at which time it determined that the Bambi incompatibility issue and that the declaration of Caldera's expert witness, Dr. Hollaar, would be allowed. Therefore, the Court will address incompatibilities relating to Bambi, nested task flag, XMS version check, and Korean incompatibilities. The Court will address [**48] the AARD Code and Windows 95 in the "Perceived Incompatibilities" and "Technological Tying" portions of this Opinion. The Court will first briefly describe each technological incompatibility before turning to the applicable law.

Caldera asserts that Microsoft intentionally created a nested task flag incompatibility between DR DOS and Windows 3.1. A nested task flag allows a microprocessor to execute tasks that require several other tasks to be executed in order for a function to be performed. This layering of tasks is called "nesting." In order to determine if a specific task is nested or not, software is created to detect the numeric value assigned to the nested task flag. If the value assigned to the flag is incorrectly set, the computer may respond in unexpected or even detrimental ways. In the instant case DRI had set the nested task flag value in DR DOS to one. The Intel microprocessor used by Windows 3.1 was set at a default value of zero. Consequently, when Windows 3.1 operated in conjunction with DR DOS, a malfunction occurred. Shortly after Windows 3.1 was released publicly in early April 1992, DRI corrected the problem with a small two-byte modification to the IBMDOS. [**49] COM file in DR DOS. Plaintiff claims that Microsoft intentionally created this unnecessary incompatibility between DR DOS and Windows as part of its illegal anticompetitive scheme. Microsoft was aware of the nested task flag error that occurred when the Windows 3.1 beta version operated with DR DOS and even contemplated a remedy for the problem. Ultimately, however, Microsoft abandoned plans to fix the malfunction. Microsoft [*1311] contends that the decision not to repair the malfunction was made because it required extensive testing to ensure that the remedy did not destabilize Windows.

Caldera next claims that Microsoft intentionally added code to the Windows 3.1 set-up program that operated as a check to determine if an appropriate version of extended memory specifications (XMS) was present. When the check found an unacceptable version of XMS, a message appeared on the monitor instructing the user "to remove the old XMS provider from a configuration file called CONFIG.SYS and to proceed with the installation of Windows 3.1." MS DOS passed the XMS version check. DR DOS did not. The Windows 3.1 set-up program runs in standard (or "protected") mode, which allows the program to be more user-friendly [**50] by adding graphics and other features. In order for the Windows 3.1 set-up program to run in standard mode, Microsoft asserts that a dependable version of the XMS had to be present. However, Caldera asserts that the Windows set-up program never actually used the XMS, which required an internal revision number of 2.6. However, Windows 3.1 required at most an internal revision number of 2.4 to run. Furthermore, Windows 3.1 consists of smaller modules, each containing its own XMS version check. With an internal reversion number of 2.5 DR DOS passed the individual modules checks but failed the Windows set-up XMS check. Caldera asserts that the only purpose for the XMS check was to prevent DR DOS from loading with Windows 3.1.

Next Caldera alleges that Microsoft intentionally placed a detection device known as Bambi to detect DR DOS and refuse to load Windows 3.1 if DR DOS was detected. Bambi was Microsoft's code name for SMARTDRV, a Windows 3.1 module. Caldera claims that Microsoft included code located within the Bambi module in at least one beta release of Windows 3.1 that checked for DR DOS. Once DR DOS was detected, an error message appeared on the computer monitor and Windows refused [**51] to run. Caldera claims that the incompatibility was intentionally inserted and that there was no technological reason or value to adding the error message. Caldera offers the declaration of its expert witness Dr. Hollaar, in support of its allegations.

Caldera finally asserts that somewhere between 1990 and 1991, Microsoft put "software locks" into three of its software programs produced for the Korean market. These software locks prevented users from operating Microsoft software with DR DOS. In support of its assertion, Caldera offers the testimony of Richard Dixon, DRI's vice-president for Far-Eastern OEM sales. Apparently, Mr. Dixon observed Korean versions of Microsoft Word, Works, and Excel being loaded onto DR DOS. When attempting to run these Microsoft software programs on DR DOS, an error message appeared which read, "application terminated." Mr. Dixon observed previous versions of these same Microsoft applications load onto DR DOS and function properly. Caldera also submits internal Microsoft e-mail

which it argues shows that the software locks were intentionally inserted by Microsoft to prevent the software from operating with DR DOS. One e-mail concerns an inquiry by a [**52] member of the Korean Windows 2.10 project who wanted to know how the U.S. version of Windows handled MS-DOS clones and how the Korean version should handle clones. Along the chain of responsive e-mails, the discussion noted that Bill Gates, the CEO of Microsoft Corp., wanted all business units to detect all MS-DOS clones and show a warning message indicating that the MS-DOS clone was not tested and that the program might not work correctly.⁸ The e-mail directed the [*1312] Korean Windows 2.1 project member to individuals who could provide code for a checking routine that would display a warning message when an operating system other than MS-DOS was detected. Caldera also asserts that the Korean version of Windows, known as "Hangeul Windows," contained diagnostic checks to determine if Windows was operating on a system other than MS-DOS. The diagnostic check was contained in both the 3.0 and 3.1 version of Windows and was coupled with a message located in the WIN.CNF file. In the 3.0 version the message read: "Hangeul Windows 3.0 should be executed on Hangeul MS-DOS. For correct execution, please run Hangeul MS-DOS." In the Hangeul Windows 3.1 version the message read, "Warning: Your DOS [**53] is not compatible with MS-DOS. You may have some problems when you use Hangeul Windows 3.1."

Microsoft contends that in order for Caldera to succeed on its claim it must first show that each of the alleged incompatibilities between DR DOS and Windows "had no purpose other than to preclude competition from DRI." (Def's Reply Mem. at 12). In support of this heavy burden, Microsoft relies on *Transamerica Computer Co., Inc. v. I.B.M. Corp., (In re IBM Peripheral EDP Devices Antitrust Litig.)*, 481 F. Supp. 965 (N.D. Cal. 1979). In *Transamerica*, the plaintiffs were [**54] manufacturers of peripheral computer equipment such as key boards and printers that were compatible with IBM personal computers. The plaintiffs brought suit for antitrust violations when IBM redesigned its central processing unit (CPU) to make it incompatible with any peripheral product not made by IBM. Defendant IBM maintained that the redesign had technological value and therefore the resulting incompatibilities could not support a § 2 claim.

Microsoft asserts in its reply brief that the court in *Transamerica* "held that a plaintiff must prove, in addition to intent, that the design decision was devoid of technical merit and had a significant effect on competition." (Def's Reply Mem. at 11) (citation omitted). Microsoft also adds that "the court [in *Transamerica*] expressly stated that design conduct violates § 2 of the Sherman Act only if the 'design changes had *no purpose and effect* other than the preclusion of . . . competition.'" (*Id. at 12*) (citing *Transamerica*, 481 F. Supp. at 1002-03). Applying this standard to the instant case, Microsoft argues that Caldera cannot show that even one of the alleged incompatibilities had as its only purpose [**55] the preclusion of competition or that the incompatibilities were devoid of technological merit. Therefore, defendant argues, plaintiff's claims fail as a matter of law.

Applying this standard, the Court may agree that plaintiff has not met its burden. However, Microsoft has grossly misrepresented the holding of *Transamerica*. Particularly offensive to the Court is the assertion that "the court [in *Transamerica*] expressly stated that design conduct violates § 2 of the Sherman Act only if the 'design changes had *no purpose and effect* other than the preclusion of . . . competition.'" (*Id.*) This is simply not true.

It appears that Microsoft scanned the *Transamerica* opinion for language favorable to its position and then quoted that language entirely out of context with the intent of leading this Court to believe that the court in *Transamerica* held something it did not. What the *Transamerica* court did say is

had IBM responded to [the manufacturers of peripheral equipment's] inroads on its assumed monopoly by changing the System/360 interfaces with such frequency that [peripheral equipment manufacturers] would have been unable to attach and unable [**56] to economically adapt their peripherals to the ever-changing interface designs, and if those interface changes had *no purpose and effect other than the preclusion of [these manufacturers] from competition*, this Court would not hesitate to find that such conduct was predatory.

⁸The e-mail reads: "Bill Gates ordered to all application business units to include checking routines of operating environments and if it is Microsoft DOS, nothing will happen. But if it is non MS-DOS (such as DR-DOS), application will display messages saying that 'This application has been developed and tested for MICROSOFT MS-DOS. Since you use a different environment, this application may not work correctly.'" (Pl.'s Exhibit 30).

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Transamerica, 481 F. Supp. at 1002-03 (emphasis added). The *Transamerica* [*1313] court was attempting to provide a hypothetical illustration of what would undeniably be predatory conduct. The court did not maintain that IBM had engaged in such conduct let alone intend to announce a standard that a plaintiff must meet in order to succeed on a technological incompatibility claim. The *Transamerica* court went on to add, "it is more difficult to formulate a legal standard for design conduct than it is to imagine clearly illegal situations." *Id.* at 1003.

Finally, the *Transamerica* court stated the standard by which it would evaluate the changes IBM made to the CPU design:

A more generalized standard, one applicable to all types of otherwise legal conduct by a monopolist, and one recently adopted by the Ninth Circuit, must be applied to the technological design [**57] activity here. If the design choice is unreasonably restrictive of competition, the monopolist's conduct violates the Sherman Act. This standard will allow the fact finder to consider the effects of the design on competitors; the effects of the design on consumers; the degree to which the design was the product of desirable technological creativity; and the monopolist's intent, since a contemporaneous evaluation by the actor should be helpful to the fact finder in determining the effects of a technological change.

Id. (citations omitted). The standard actually applied by the *Transamerica* court contemplates the effect the design choice has on competition. It does not impose the much heavier burden on a plaintiff of demonstrating that a design choice is entirely devoid of technological merit.

In addition, in the instant case plaintiff has not alleged a separate intentional incompatibility claim upon which a finding of liability is sought. As previously discussed, Caldera's claim of unlawful predatory conduct is based on the aggregate effect of all of Microsoft's anticompetitive behavior. **HN18**[¹⁸] While each separate fact used to support Caldera's § 2 claim may not by itself [**58] legally support the claim, the overall effect may be prohibited anticompetitive conduct.

Accordingly, it would be inappropriate to view these alleged incompatibilities in isolation and out of the context in which they occurred. Contemporaneous with the appearance of these incompatibilities, several internal Microsoft memoranda were sent between Microsoft executives discussing possible plans to make Windows 3.1 incompatible with DR DOS. One such memorandum sent September 27, 1991 by Brad Silverberg, a top Microsoft executive, to Jim Allchin, another Microsoft executive, discussed the possible partnership between IBM and Novell involving DR DOS and how Microsoft would respond. The e-mail reads:

after IBM announces support for dr-dos at comdex, it's a small step for them to also announce they will be selling netware lite, maybe sometime soon thereafter. but count on it.

We don't know precisely what ibm is going to announce. my best hunch is that they will offer dr-dos as the preferred solution for 286, os 2 2.0 for 386. they will also probably continue to offer msdos at \$ 165 (drdos for \$ 99). drdos has problems running windows today, and I assume will have more problems [**59] in the future Allchin responded, "You should make sure it has problems in the future.:-)" (Pl.'s Exhibit 197).

The same day this exchange occurred, Silverberg sent another e-mail to Phil Barrett, who was in charge of the Windows 3.1 project, inquiring:

can you tell me specifically what we're going to do to bind ourselves closer to ms dos? since you haven't been replying to my messages, I don't know how to interpret your silence. Let me emphasize the importance; ibm is going to announce the drdos deal at comdex (almost certain).

OK?

Barrett responded:

Sorry for the silence - don't interpret it as ignoring you. The approach that [*1314] ralph and I have discussed is to use a vxd to 'extend' dos by patching it. . . . We would not patch unknown OSs [operating systems] and, most likely, would only patch MS DOS 5.x. The big advantage here is that it provides a legitimate performance improvement. However, it wont prevent us from running on foreign OSs (unless we explicitly decide to refuse to run) - they just wont run as fast.

Is this the approach you want to take? Or would you prefer a simple check and refuse to run? Thats a lot easier but clearly quite [**60] defeatable. I'll come talk to you about it.

Silverberg responded, "let's talk." (Pl.'s Exhibit 198).

Perhaps the most direct evidence offered by plaintiff that suggests the incompatibilities were intentionally placed by Microsoft for the purpose of eliminating DR DOS as a competitor, and not for procompetitive purposes, comes from a series of e-mails sent between Charles Stevens, Phil Barrett, and Brad Silverberg on September 29, and 30, 1991 relating to the Bambi incompatibility. Stevens writes:

I tracked down a serious incompatibility with DR-DOS 6 - They don't use the 'normal' device driver interface for >32M partitions. Instead of setting the regular *T SECTOR field to Offffh and then using a brand new 32-bit field the way MS-DOS has always done, they simply extended the start sector field by 16 bits.

This seems like a foolish oversight on their part and will likely result in extensive incompatibilities when they try to run with 3rd party device drivers.

I've patched a version of Bambi to work with DRD6, and it seems to run Win 3.1 without difficulty. This same problem may have caused other problems with Win 3.1 and swapfile under DRD6

It is possible [**61] to make Bambi work, assuming we can come up with a reasonably safe method for detecting DRD6.

(Pl.'s Exhibit 208). The day after Barrett received this e-mail he responded: "The approach we will take is to detect dr 6 and refuse to load. The error message should be something like 'Invalid device driver interface.' mike, tom, mack - do you have a reliable dr6 detection mechanism?" That same day Barrett also sent an e-mail to Brad Silverberg which read: "heh, heh, heh . . . my proposal is to have bambi refuse to run on this alien os. comments?" (Pl.'s Exhibits 205 and 207).

Each of these incompatibilities arose at a time when Microsoft had excluded DRI from beta testing DR DOS with the new Windows version 3.1 before its public release. Consequently, any incompatibility which arose, intentionally placed there by Microsoft or not, could not be detected or remedied before Windows' public release. Moreover, it is alleged Microsoft was aware of both the Bambi and nested task flag incompatibilities and knew that DR DOS6 could be altered and made to work with Windows 3.1 with relatively minor modifications. However, Caldera asserts that Microsoft continued to create the illusion that [**62] DR DOS was incompatible with Windows by inserting error messages conveying to the user that either DR DOS was incompatible with Windows or that MS-DOS was the only environment in which Windows could properly function. While technically this may not be false, a fact finder could reasonably conclude that laid against this backdrop there existed an anticompetitive campaign to eliminate competition in the DOS market in violation of [§ 2](#).

Caldera has presented sufficient evidence that the incompatibilities alleged were part of an anticompetitive scheme by Microsoft. Accordingly, defendant's Motion for Partial Summary Judgment on Plaintiff's Alleged Intentional Incompatibilities is denied.

2. Predisclosure

Before the release of Windows 3.1, Microsoft had always included DR DOS in its beta testing. However, in July 1991, Microsoft elected to exclude all competitors in the operating system market, including [*1315] DR DOS, from beta testing Windows 3.1. Plaintiff offers this fact as further evidence of Microsoft's anticompetitive conduct. Plaintiff asserts that by refusing to allow DR DOS to beta test Windows 3.1, which it had allowed previously, it created the impression that DR DOS [**63] would not be compatible with Windows 3.1. Caldera argues that because Windows has monopoly power in the GUI (Windows) market, any operating system perceived as incompatible with Windows would suffer a serious disadvantage. Caldera also argues that the use of per processor licensing agreements by Microsoft, used in connection with excluding DR DOS from beta testing, had both the effect and purpose of eliminating DR DOS from competition in the operating systems market. Plaintiff maintains that by creating the impression that DR DOS was incompatible with Windows, OEMs were likely to sign licensing agreements with Microsoft to minimize the risk of incompatibility. With the use of two and three year per processor licensing

agreements, it was extremely difficult and highly unlikely that an OEM could or would switch to a different operating system after the release of Windows. Thus, the cure of any incompatibilities between Windows and DR DOS, no matter how quickly the incompatibilities were remedied after Windows market release, would be ineffective. Caldera maintains that this conduct along with Microsoft's alleged campaign to cause fear, uncertainty, and doubt in the computer industry [**64] about DR DOS' compatibility with Windows was anticompetitive conduct in violation of § 2.

In response to these allegations, Microsoft filed a motion for partial summary judgment which it styled, "Defendant's Motion for Partial Summary Judgment on Plaintiff's 'Predisclosure' Claim." In its memorandum in support of the motion, Microsoft argues that a corporate decision not to allow DRI access to beta versions of Windows 3.1, does not constitute predatory conduct as contemplated by the Sherman Act. Defendant asserts that "[a] claim of unlawful monopolization under § 2 has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power through 'predatory conduct,' as distinguished from 'growth or development as a consequence of superior product, business acumen, or historic accident.'" (Def. Mem. Supp. at 1) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)). Microsoft contends that because failure to disclose technological information to a competitor prior to the market release of a new product is not anticompetitive as a matter of law, plaintiff fails to satisfy the second [**65] prong of the *Grinnell* test.

The gravamen of defendant's position is that "antitrust laws impose no affirmative duty or obligation on a firm--even a firm with monopoly power--to assist its competitors by providing predisclosure of its technological innovations prior to market release." (Def. Mem. Supp. at 2) (citations omitted). Defendant further adds that "courts considering this issue have consistently refused to impose such a duty." (*Id.*). Microsoft lists several cases which it maintains stand for the proposition that defendant had no duty to predisclose its technological innovations to DRI.⁹ In particular, Microsoft relies heavily on *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979). That case involved an antitrust action brought by Berkey Photo, Inc. (Berkey) against Eastman Kodak Company (Kodak). The two parties were competitors in camera, film and photofinishing markets in which Kodak possessed monopoly power. The dispute in question arose with the advent of 110 Instamatic [*1316] cameras first designed and marketed by Kodak in the early 1970's. Because the cameras were significantly smaller and took comparable photographs to the larger cameras [**66] on the market, they were immediately popular among amateur photographers and a financial success for Kodak. However, because of the 110 system's diminished size, the film then on the market was unsuitable for use in connection with the new camera. Therefore, Kodak developed a film called Kodacolor II which was designed specifically for use with the 110 system.

Prior to the release of the [**67] 110 system, "Kodak followed a checkered pattern of predisclosing innovations to various segments of the industry." *603 F.2d at 279*. Kodak initially elected not to predisclose information relating to the 110 system. However, in an apparent effort to stave off litigation, Kodak agreed to prerelease information on its 110 system to photographic equipment manufacturers for a fee. Plaintiff Berkey did obtain the prerelease information but less than two months before Kodak released the 110 system to the public and in too little time to develop film that would be compatible with the new 110 system. As a result of this and other conduct, Berkey brought suit under the Sherman Antitrust Act, claiming that Kodak's willful maintenance of monopoly power caused Berkey "to lose sales in the camera and photofinishing markets and to pay excessive prices to Kodak for film, color print paper, and photofinishing equipment." *Id. at 267-68*. After a six-month trial on the issue of liability, a jury returned a verdict favorable to Berkey on virtually every allegation and awarded more than \$ 87 million in damages.

⁹ Defendants cite to the following cases: *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978); *Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980); *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979); *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir. 1975); *The David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728 (S.D. Tex. 1998); *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203 (S.D.N.Y. 1981).

Kodak promptly appealed the decision on numerous grounds including the jury instruction concerning [**68] the plaintiff's claim that Kodak's refusal to predisclose information concerning the 110 system was an exclusionary practice in violation of the Sherman Antitrust Act. The challenged jury instruction read:

Standing alone, the fact that Kodak did not give advance warning of its new products to competitors would not entitle you to find that this conduct was exclusionary. Ordinarily a manufacturer has no duty to predispose its new products in this fashion. It is an ordinary and acceptable business practice to keep one's new developments a secret. However, if you find that Kodak had monopoly power in cameras or in film, and if you find that this power was so great as to make it impossible for a competitor to compete with Kodak in the camera market unless it could offer products similar to Kodak's, you may decide whether in the light of other conduct you determine to be anticompetitive, Kodak's failure to predisclose was on balance an exclusionary course of conduct.

Id. at 281. The Second Circuit held that the "instruction was error and that, as a matter of law, Kodak did not have a duty to predisclose information about the 110 system to competing camera manufacturers. [**69] " *Id.*

Microsoft relies heavily upon the Second Circuit's invalidation of this jury instruction. First, Microsoft asserts that *Berkey* clearly establishes that Microsoft was under no duty to predisclose Windows 3.1 to Caldera. Second, Microsoft argues that *Berkey* precludes Caldera from presenting evidence of predisclosure to a jury in support of its claim that Microsoft engaged in an exclusionary course of conduct when considered in light of other anticompetitive behavior. The Court agrees with Microsoft and the general proposition that a corporation is under no obligation to predisclose its innovations to a competitor. As the court in *Berkey* commented,

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 incentive on which the proper functioning of our competitive [*1317] economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits [**70] of those endeavors, this incentive would very likely be vitiated.

Id.

However, the question currently before the Court is not whether Microsoft was under a duty to include DRI in beta testing, but rather whether excluding DRI from beta testing, in which it had previously been included, was predatory conduct under the attenuating circumstances. [HN19](#)[¹⁹] Among the purposes of § 2 of the Sherman Act is to encourage competition in the marketplace by prohibiting monopolists from acting in anticompetitive ways. Although Microsoft was under no duty to predisclose information to DRI, it could not do so as part of an overall anticompetitive plan to eliminate DRI from the DOS market. It is a very different thing to impose an affirmative duty on a monopolist to prerelease sensitive corporate information or innovations to a competitor under all circumstances than it is to prohibit a corporation from acting in an anticompetitive manner. As previously discussed, [HN20](#)[²⁰] generally a corporation may keep its innovations secret from competitors. This may foster competition. However, this is not always the case and when a monopolist acts in an anticompetitive manner it is proscribed by § 2. While this [**71] Court does not intend to announce a new rule that monopolists have a duty to predisclose innovations to a competitor, the Court does intend to uphold the basic antitrust principle that [HN21](#)[²¹] a monopolist may not eradicate its competitors through anticompetitive means.

In *Berkey*, the plaintiff urged the court to find that a duty to predisclose existed and that failure to predisclose was exclusionary. Berkey argued that because Kodak had monopoly power in both the camera and film markets, Kodak had a duty to disclose the new format in which it was manufacturing film because failure to do so unlawfully enhanced its power in the camera market. In rejecting this argument the Second Circuit stated:

The first firm, even a monopolist, to design a new camera format has a right to the lead time that follows from its success. The mere fact that Kodak manufactured film in the new format as well, so that its customers would not be offered worthless cameras, could not deprive it of that reward. Nor is this conclusion altered because Kodak not only participated in but dominated the film market. Kodak's ability to pioneer formats does not

depend on it possessing a film monopoly. Had the firm [**72] possessed a much smaller share of the film market, it would nevertheless have been able to manufacture sufficient quantities of 110-size film either Kodacolor X or Kodacolor II to bring the new camera to market.

Id. at 283.

This Court is of a similar opinion. Had Microsoft simply desired to keep Windows 3.1 a secret from DOS competitors to gain the natural advantage of releasing a comparable DOS version with the release of Windows, the Court would find nothing anticompetitive about such conduct and would simply require that competitors "play catch up on the strength of their own endeavors." However, this is not the case Caldera alleges. Caldera asserts a single § 2 claim and offers as evidence multiple anticompetitive activities engaged in by Microsoft. Caldera claims as part of its anticompetitive scheme that Microsoft excluded DRI from beta testing. Caldera does not claim that Microsoft had a duty to predisclose Windows 3.1 to DRI or even that failure to disclose was exclusionary conduct which by itself amounts to an antitrust violation. Rather, Caldera claims that Microsoft engaged in a clandestine campaign to eliminate DR DOS from the market by a variety of tactics, [**73] none of which alone supports a Sherman Act violation but the aggregation of which results in prohibited predatory conduct.

[*1318] Caldera asserts that the beta blacklisting of Novell/DRI was essential to the success of the falsely represented incompatibilities created by Microsoft as discussed in the previous section of this Opinion and in the section immediately following. Although standing alone, failure to include DRI in beta testing does not give rise to a violation of § 2, (and an appropriate limiting instruction to that effect may be necessary to give to the jury to avoid any misunderstanding at trial) but when viewed in context with Caldera's other anticompetitive allegations the fact that DRI was blacklisted may be considered by the fact finder along with other alleged predatory conduct to determine if a § 2 violation has occurred. Therefore, defendant's partial summary judgment motion relating to plaintiff's predisclosure claims is denied.

3. Perceived Incompatibilities

Microsoft also seeks partial summary judgment on Caldera's allegations of anticompetitive conduct relating to a routine, known as the AARD code, contained in one of the beta versions of Windows 3.1. [**74] The AARD code was designed to detect the presence of MS-DOS in the computer onto which the Windows beta was loaded. When the AARD code detected a foreign DOS system, a message was displayed which read:

Non-fatal error detected: Error number [varied]. Please contact Windows 3.1 beta support. Press enter to exit or C to continue.

Caldera argues that this error message was false as no error had actually occurred. In fact, all that had occurred was that MS-DOS had not been detected and therefore, another operating system was present. Caldera further contends that the AARD code was an intentional incompatibility created by Microsoft and was part of Microsoft's campaign to create doubts about the compatibility between DR DOS and Windows.

Microsoft counters Caldera's allegations by asserting that because the AARD code was not technically an incompatibility between DR DOS and Windows, it is inappropriate to evaluate it under the rubric of an intentional incompatibility claim as previously discussed. Rather, Microsoft argues that because Caldera claims that the error message resulted in economic harm by making it appear as though DR DOS was incompatible with Windows, Caldera's [**75] claim is really one of product disparagement.

Microsoft submits that in order to succeed on a product disparagement claim, Caldera must show as a preliminary matter that a "significant and more-than-temporary harmful effect[] on competition (and not merely upon a competitor or customer) before these practices can rise to the level of exclusionary conduct." (Def. Mem. Supp. at 2) (citing *American Prof. Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal and Prof'l. Pub., Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997)). In the event that Caldera can make this preliminary showing, Microsoft argues Caldera must then demonstrate that the error message: "(1) was clearly false, (2) was clearly material, (3) was clearly likely to induce reasonable reliance, (4) was made to consumers having little understanding of the subject matter, (5) continued for extended time periods, and (6) was not readily susceptible to counter statement, explanation, or other

neutralizing effort or offset." (Def. Mem. Supp. at 2) (citing *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 749 (S.D.Tex 1998) (internal quotations omitted). As to the requisite preliminary showing, [**76] Microsoft claims that Caldera fails to demonstrate that there was a significant effect on competition. Microsoft further claims Caldera fails to establish any of the elements to succeed on a claim of product disparagement. Caldera objects to Microsoft's characterization of its claim as one of product disparagement but argues that even if the Court determines that the product disparagement standard is applicable, plaintiff has satisfied the test as outlined in *Aldridge*.

[*1319] The Court does not agree that Caldera has satisfied the test under *Aldridge*. The bulk of plaintiff's evidence relates to efforts by DR DOS to dissuade consumers from using DR DOS and not to disparagement of the product. In fact, plaintiff's evidence of disparagement appears extremely limited. This is not surprising as plaintiff did not assert a separate claim of product disparagement. In its complaint, Caldera uses evidence of the AARD code only in support its broad § 2 claim. The beta version containing the AARD code was sent out to over 12,000 test sites and was considered to be a beta that would preview the final commercial release of Windows 3.1. Caldera claims this final beta version was as much a marketing [**77] tool to build demand for the product as it was an opportunity to further test Windows. While Microsoft claims that valid business reason existed for the code, Caldera presents evidence that casts doubt on the validity of the code. In an e-mail sent from Andy Hill, a Microsoft employee, to David Cole, the group manager of Windows 3.0, Mr. Hill writes:

Janine has brought up some good questions on how we handle the error messages that the users will get if they aren't using MS-DOS.

- The beta testers will ask questions. How should the techs respond: Ignorance, the truth, other?
- This will no doubt raise a stir on Compuserve. We should either be proactive and post something up there now, or have a response already constructed so we can flash it up there as soon as the issue arises so we can nip it in the bud before we have a typical CIS snow-ball mutiny.

(Pl.'s Exhibit 262). Mr. Cole responded: "Let's plead ignorance for a while. We need to figure out our overall strategy for this. I'm surprised people aren't flaming yet, maybe they won't." (Id.). Furthermore, Mr. Cole sent an e-mail to Brad Silverberg regarding the AARD code and the suggestion that a less severe [**78] message be installed than the one currently under contemplation.

A kind-gentle message in setup would probably not offend anyone and probably won't get the press up in arms, but I don't think it serves much of a warning. BillP made an excellent point, what is the guy supposed to do?

With a TSR, the solution is to just remove it. With DR-DOS, or any others, I doubt the user is in a position of changing. He will no doubt continue to install. When he finds problems, he will call PSS. We will get a lot of calls from Dr DOS users. Perhaps a message in the phone system for Windows. It would say something like "if you are not using MS-DOS or an OEM version of MS-DOS, then press # # ". Then give them the message.

(Pl.'s Exhibit 277). Mr. Silverberg replied: "what the guy is supposed to do is feel uncomfortable, and when he has bugs, suspect that the problem is dr-dos and then go out to buy ms-dos. or decide to not take the risk for the other machines he has to buy for in the office." (Pl.'s Exhibit 278).

While it may very well be that Microsoft had a legitimate business reason to include the AARD code in its final beta version, a reasonable fact finder could conclude [**79] that the code was inserted to make DR DOS appear incompatible with Windows. This may not give rise to a claim of product disparagement or, standing alone, a § 2 violation. However, inserting the code with such a purpose is certainly not competition on the merits and viewed in context with other alleged anticompetitive behavior may give rise to a § 2 violation. Plaintiff is entitled to present the AARD code as evidence of anticompetitive behavior in establishing its § 2 claim. Accordingly, defendant's motion for partial summary judgment on Plaintiff's Claim of Perceived Incompatibilities is denied.

4. Technological Tying

Caldera next alleges pursuant to §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act that Microsoft's development of Windows 95 as an integrated, graphical [*1320] operating system constitutes an illegal tying arrangement of products formerly sold as MS-DOS and Windows. Microsoft contends, however, that Windows 95 is

far from a tied together version of MS-DOS and Windows, but rather a new product with vast technological improvements over the prior products. Accordingly, Microsoft argues that the requirements for an unlawful "technological tying" arrangement [**80] have not been satisfied and should be dismissed as a matter of law.

"A [HN22](#)[[↑]] tying arrangement is an agreement by a party to sell one product--the 'tying product'--only on condition that the buyer also purchase a second product--the 'tied product'--or at least agree not to buy that product from another supplier." [*Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Pubs., Inc.*](#), 63 F.3d 1540, 1546 (10th Cir. 1995) (citing [*Eastman Kodak Co. v. Image Tech. Servs., Inc.*](#), 504 U.S. 451, 461-462, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)). In the instant case, Caldera alleges that Microsoft is involved in an illegal tying arrangement by tying Windows 4.0, the tying product, and MS-DOS 7.0, the tied product, together and selling them as one product known as Windows 95. This allegation is based on the claim that Microsoft used its monopoly power in the Windows market to force consumers to use MS-DOS by tying these products together into one product. "A [HN23](#)[[↑]] tie-in constitutes a per se [section 1](#) violation 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 product." *Id.* For purposes [**81] of this motion, Microsoft concedes that it has monopoly power in the personal computer operating system market.

Several economic reasons exist for outlawing anticompetitive tying. Indeed, [HN24](#)[[↑]] the law forbids a manufacturer who has market power in a certain area to gain advantage in another area by requiring consumers to buy another product. See [*Jefferson Parish Hospital v. Hyde*](#), 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). If market "power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures. This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product." *Id. at 14*. The Supreme Court captured Congress' concern about the anticompetitive character of tying arrangements when it recognized that tying arrangements have the power to "completely shut[] out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice." *Id. at 10 n.14* (quoting H.R. Rep. No [**82] 63-627, 63d Cong. 2d Sess., 12-13 (1914) and noting that congressional findings "concerning the competitive consequences of tying is illuminating, and must be respected").

The Supreme Court has recognized that "every [HN25](#)[[↑]] refusal to sell two products separately cannot be said to restrain competition." *Id. at 11-12* (finding that "buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively"). Nevertheless, the Supreme Court has established that [HN26](#)[[↑]] upon meeting certain criteria, a tying arrangement may constitute a per se [§ 1](#) violation. "The [HN27](#)[[↑]] essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Id. at 12*. The Court continued: "When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Id. at 12*. In sum, "tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases [**83] that would not otherwise be made." *Id. at 27*.

[*1321] a. Caldera's Standing to Bring a Tying Claim

As a preliminary manner, the Court first addresses Microsoft's argument that Caldera lacks standing to raise any tying claim concerning Windows 95 because neither Caldera nor its predecessors, DRI or Novell, ever produced a substitute for the allegedly tied product that would have enabled Caldera to compete with Microsoft. Specifically, Microsoft contends that Caldera was not an actual or potential participant in the business from which Caldera alleges they were foreclosed from competition.

While acknowledging that Novell stopped its development work on DR DOS in 1994 and never developed a Windows-like (GUI) program, Caldera argues that it cannot be precluded from bringing a claim on the basis of standing. Caldera claims that it could not participate because Microsoft foreclosed the competition in the DOS market by tying together in Windows 95 two functionally distinct products, Windows 4.0 and MS-DOS 7.0. Through this tie, Caldera argues, Microsoft used its monopoly power in the Windows market to effectively prevent further

competition in the DOS market by completely **[**84]** closing that market to outside competition. Consequently, any further development of a DOS program would have been futile since Windows was no longer sold separately. Caldera's claim is based on the fact that after 1995 consumers could not buy Windows 4.0 alone. The fundamental premise of Caldera's tying claim is that it and its predecessors would have, and could have, made a version of DR DOS that would have been compatible with Windows 4.0 and fully competitive with MS-DOS 7.0.

Caldera alleges that Microsoft developed Windows 95 as an attempt to destroy its DOS competition. Such allegations are supported by internal Microsoft documents. For example, in a 1992 internal strategy document, Microsoft, referring to Windows 95 by its code name "Chicago," stated:

Novell is after the desktop. As you know, they have acquired Digital Research and are now working hard to tightly integrate DR-DOS with Netware. We should also assume they are working on a Windows clone and/or that they are working on a virtualized DOS environment which will run standard mode Windows as a client. This is perhaps our biggest threat. We must respond in a strong way by making Chicago a complete Windows operating **[**85]** system, from boot-up to shut-down. There will be no place or need on a Chicago machine for DR-DOS (or any DOS).

(Pl.'s Exhibit 309). Caldera argues that Microsoft did exactly as it planned, and were it not for Microsoft's tying Windows to DOS, Caldera would still be a viable competitor in the DOS business. Indeed, as inferred from the following e-mail, Caldera asserts that but for Microsoft's deliberate anticompetitive conduct aimed at Novell, DR DOS would still be alive. In 1993, Microsoft executives further stated: "If you're going to kill someone there isn't much reason to get all worked up about it and angry--you just pull the trigger. . . . We need to smile at Novell while we pull the trigger." (Pl.'s Exhibit 384).

Caldera has alleged facts sufficient to persuade the Court that Caldera has standing as an actual and potential competitor to bring its tying claim. Novell was an actual competitor to Microsoft in the DOS market in 1994. Novell ceased its active development and marketing of its DOS product based on the imminent release of Windows 95, which eliminated the need for a separate DOS program. Additionally, Caldera has alleged sufficient facts that it had the financial **[**86]** resources, the engineering talent, and the marketing capability to continue upgrading Novell DOS, as it had done in the past with DR DOS, so that it would continue to be a marketable component to Windows. See *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir. 1982) (holding that a **[*1322]** potential competitor may have standing under the antitrust laws "if he has manifested an intention to enter the business and has demonstrated his preparedness to do so"). Certainly Caldera has demonstrated that it was foreclosed from a market in which it would otherwise have competed. It is hard to imagine that Caldera does not have standing to sue under these alleged facts. Accordingly, the Court finds that as an actual competitor to MS-DOS 6.22, and as a potential competitor to the allegedly tied product, MS-DOS 7.0, Caldera has the requisite standing to pursue its tying claim against Microsoft.

b. Technological Tying Arrangements

Microsoft contends that so long as the integrated design of Windows 95 offers any technological benefit, its design is immune to judicial review under the antitrust laws. Because the tying cases that are binding upon this Court involve **[**87]** nontechnical products such as bar review courses, *Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Pubs., Inc.*, 63 F.3d 1540 (10th Cir. 1995), and medical services, *Jefferson Parish Hospital Dist. v. Hyde*, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984), Microsoft argues that the Court should apply the reasoning used by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Microsoft, Corp.*, 331 U.S. App. D.C. 121, 147 F.3d 935 (D.C. Cir. 1998). Microsoft relies heavily on this case in support of its present motion, premising its argument on the contention that technically integrated products are immune from per se § 1 liability. As with the case at bar, the case before the D.C. Circuit arose from Microsoft's practices in marketing Windows 95. In that case, the D.C. Circuit considered whether the district court erred in entering a preliminary injunction prohibiting Microsoft from requiring computer manufacturers who license its operating system software to license its internet browser, Internet Explorer, as well. 147 F.3d at 938. The preliminary injunction turned on the court's interpretation of a consent decree **[**88]** between the Department of Justice (DOJ) and Microsoft, which in relevant part reads:

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).

[331 U.S. App. D.C. at 125](#) (quoting section IV(E) of the Consent Decree). Although both Microsoft and the DOJ characterize section IV(E) of the decree as an "anti-tying" provision, the court found that "the decree does not embody either the entirety of the Sherman Act or even all 'tying' law under the Act." [147 F.3d at 946](#). Nevertheless, the court stated that "the consent decree emerged from antitrust claims, unresolved as they were, so that we must keep procompetitive goals in mind in the interpretive task." *Id.* It is in this perspective that the court began its analysis in attempting to interpret the consent decree consistent with the antitrust laws. While the court stated that it would keep antitrust "goals in mind," in essence [\[**89\]](#) the court's task was "to discern the bargain that the parties struck" in the consent decree. [Id. at 946](#). Not only is the D.C. Circuit's opinion nonbinding on the proceedings before this Court, but also it is even less persuasive due to the context in which it arose. Nevertheless, due to Microsoft's heavy reliance on this case, the Court will review the D.C. Circuit's analysis as it may apply to the instant case.

After debating whether Windows 95 and its Internet Explorer were an "integrated product" under the consent decree, the D.C. Circuit determined that it should ask the question "not whether the integration is a net plus but merely whether there is a plausible claim that it brings some advantage." [Id. at 950](#). Microsoft now urges [\[*1323\]](#) the Court to adopt this standard and reject Caldera's challenge to Microsoft's integrated product design of Windows 95 so long as Microsoft has a plausible claim of technological improvement that brings some advantage. Upon announcing this standard the D.C. Circuit acknowledged that "whether or not this is the appropriate test for antitrust law generally, we believe it is the only sensible reading of § IV(E)(i)." *Id.* This Court finds that [\[**90\]](#) such a test is not the appropriate standard to determine whether an illegal tie has taken place under antitrust law. Simply determining whether a "facially plausible benefit" has been ascribed to justify an integrated product that is alleged to constitute an illegal tying arrangement falls short of satisfying the antitrust laws, as well as existing antitrust authority. This Court agrees with Judge Wald's dissenting opinion in *Microsoft*, that the majority's standard allows Microsoft "too safe a harbor with too easily navigable an entrance." [Id. at 957](#). Just as the dissent recognized that Microsoft could require OEMs to install "integrated" software without fear of running aground on the main prohibition of section IV(E)(i) so long as Microsoft has created a design to combine functionality in a way that offers the ultimate user some "plausible" advantage otherwise unavailable, this Court finds that if the same standard were applied in the case at bar, Microsoft could similarly avoid [§ 1](#) violations and tie whatever products it wanted by simply pointing to some "plausible advantage." Furthermore, as Judge Wald stated: "It is difficult to imagine how Microsoft could not conjure [\[**91\]](#) up some technological advantage for any currently separate software product it wished to 'integrate' into the operating system." [Id. at 961](#). Were this Court to adopt in this case the standard the D.C. Circuit articulated in the narrow context of the D.C. case, the Court would be adopting a broad standard of allowing a showing of "plausible" product improvement functionality, whatever that means, as an absolute defense to a [§ 1](#) tying claim. The Court is not willing to do so and would find such a standard to be inconsistent with existing legal precedent. See, e.g., [Eastman Kodak Co. v. Image Technical Services, Inc.](#) 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992); [Jefferson Parish Hospital Dist. v. Hyde](#), 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984); [Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Publs., Inc.](#), 63 F.3d 1540 (10th Cir. 1995).

This is a case dealing with technology, and the Court recognizes the need to promote pro-competitive conduct in the technology world. Indeed, technological innovation is an important defense in defending antitrust allegations. As the D.C. Circuit noted, "antitrust scholars have long recognized the undesirability of having [\[**92\]](#) courts oversee product design, and any dampening of technological innovation would be at cross-purposes with antitrust law." [Microsoft](#) [147 F.3d at 948](#). Thus, acknowledging the importance of promoting technological innovation, the Court is cautious in completely relying on the analysis contained in cases such as *Jefferson Parish* and *Multistate Legal Studies*, which involved medical services and bar-review courses. However, the Court finds that the D.C. Circuit has given too much deference to the technology argument and not enough to current antitrust law. [HN28](#)  Certainly a company should be allowed to build a better mousetrap, and the courts should not deprive a company of the

opportunity to do so by hindering technological innovation. Yet, **antitrust law** has developed for good reason, and just as courts have the potential to stifle technological advancements by second guessing product design, so too can product innovation be stifled if companies are allowed to dampen competition by unlawfully tying products together and escape antitrust liability by simply claiming a "plausible" technological advancement.

Microsoft requests the Court do as other courts have and apply [**93] a more deferential [*1324] standard to technically integrated products. See, e.g., [Response of California, Inc. v. Leasco Response, Inc.](#), 537 F.2d 1307, 1330 (5th Cir. 1976) (holding that an antitrust "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"); [Data Processing, Inc. v. IBM](#), 585 F. Supp. 1470, 1476 (D.N.J. 1984) (finding that the integration of a "dump-restore" utility into mainframe operating system was a lawful package of technologically interrelated components); [ILC Peripherals Leasing Corp. v. IBM](#), 448 F. Supp. 228 (N.D. Cal. 1978) (finding that disk drives and head/disk assembly combination were lawful), aff'd per curiam sub nom., [Memorex Corp. v. IBM](#), 636 F.2d 1188 (9th Cir. 1980); [Telex Corp. v. IBM](#), 367 F. Supp. 258, 347 (N.D. Okla. 1973) (denying a claim that IBM's integration of additional memory and control functions into its CPU constituted unlawful tying), rev'd on other grounds, 510 F.2d 894 (10th Cir. 1975). [**94] These cases, upon which Microsoft relies, arose from an era when IBM was accused of tying its central processing unit to various peripheral devices such as disk drives. The courts addressing this issue generally concluded that IBM's integrations did not amount to illegal tying arrangements due to the fact that the computers were considered a single product, and the integration of related devices could not be regarded as predatory within the contemplation of antitrust policy. See [Telex](#), 367 F. Supp. at 342. However, as noted by the D.C. District Court, on remand in the Internet Explorer case, Microsoft has taken an additional step beyond the defendants in the *IBM* cases by not only bundling two products together, but also by prohibiting the unbundling of the two. See [United States v. Microsoft Corp.](#), 1998 U.S. Dist. LEXIS 14231, No. Civ. A. 98-1232, 1998 WL 614485 at *8-*9 (D.D.C. Sept. 14 1998). In the instant case, unlike the *IBM* cases, Microsoft ceased selling Windows and DOS separately after the release of Windows 95. Furthermore, Caldera argues that the Court should not look to these cases because they were decided prior to the Supreme Court's decisions in *Jefferson Parish* [**95] and *Eastman Kodak* and have been preempted by the Court's "separate product analysis."

Although not "technology" cases, *Jefferson Parish* and *Eastman Kodak* both involved integrated products and services where the defendants claimed that a functionally integrated package of services existed. In order to determine whether an unlawful tying arrangement had taken place, the *Jefferson Parish* Court considered whether anesthesiological services, which a hospital had required patients to take only from certain anesthesiologists, were in fact separate 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 its analysis the Court asked the fundamental question: Are there two separate products? This was not a question of function, but rather one assessing whether there was a market for two separate products. [Id. at 21](#) (holding that "a tying arrangement cannot exist unless two separate product markets have been linked"). The Court found that no tying arrangement could exist unless there was sufficient demand for the purchase of anesthesiological [**96] services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services. [Id. at 21-22](#). The *Jefferson Parish* test is actually consistent with the *IBM* cases in that the market should determine whether an integration is desirable--not Microsoft. The market can only make that decision if the two integrated products are, as a practical matter, available individually, as they were in the *IBM* cases.

The Tenth Circuit has also applied the *Jefferson Parish* tying analysis in [Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Pubs., Inc.](#), 63 F.3d 1540 (10th Cir. 1995). The court was faced with the task of determining [*1325] whether an unlawful tying arrangement was created when a bar review provider bundled its multistate bar review workshop with its full-service bar review course and required customers to purchase the workshop if they wanted the full-service course. In making such a determination, the Tenth Circuit articulated that [HN29](#) [+] the following elements were necessary in order to find a per se tying violation: "(1) two separate products, [**97] (2) a tie-or conditioning of the sale of one product on the purchase of another, (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market."

Id. at 1546. In determining whether the first prong of its analysis was satisfied, the Tenth Circuit stated that "the Supreme Court has made clear that the test for determining whether two components are separate products turns not on their function, but on the nature of any consumer demand for them." Id. at 1547. In essence the Tenth Circuit requires an inquiry as to whether the market wants two separate products. In its analysis the court held "there must be sufficient consumer demand so that it is efficient for a firm to provide [one] separate from [the other]." *Id.* (quoting *Eastman Kodak Co. v. Image Technical Services, Inc.* 504 U.S. 451, 462, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)).

It is against this backdrop of precedent that the Court must determine what standard should govern whether an unlawful "technological tying" arrangement has taken place from the alleged integration of Windows and DOS into Windows 95. Therefore, the Court embarks [*98] on its own analysis in applying a standard that is consistent with established antitrust tying authority, yet appropriate for cases involving technological innovations. The Court finds that HN30[[↑]] if the evidence shows that a valid, not insignificant, technological improvement has been achieved by the integration of two products, then in essence a new product has been created, and a defendant is insulated from § 1 tying liability. If Microsoft could meet such a standard with uncontested evidence, its present motion would be granted. Thus, the Court must determine whether the present state of the record support the proposition that Windows 95 consists of Microsoft's prior products simply upgraded and packaged together as illustrated below in Figure 1, or rather whether legitimate technological improvements were achieved, thereby technologically integrating the prior products into an entirely new product as illustrated below in Figure 2.

The Court's standard is consistent with what the Tenth Circuit said when it stated that "a HN31[[↑]] product improvement motivation--at least without something more, such as demonstrated efficiencies--will not save an otherwise illegal tying arrangement under § 1." [*99] *Multistate*, 63 F.3d at 1551 n.9 (citing *Jefferson Parish*, 466 U.S. at 25 n.41). Accordingly, the technological improvements must have demonstrated efficiencies. This is more than just a "plausible claim that brings some advantage."

[SEE FIGURE 1 IN ORIGINAL]

[SEE FIGURE 2 IN ORIGINAL]

[*1326] Microsoft, 147 F.3d at 950. Any other standard would have the potential to allow illegal tying arrangement to deter, or even eliminate, effective competition, which in turn could hurt consumers not just because of higher prices, but because of a lack of technologically improved products.

HN32[[↑]] In determining whether a technological advance has essentially created a new product through integration, the two products that have been integrated must be joined for technological reasons. In other words, in the spirit of *Jefferson Parish*, this analysis requires the integration to be driven by technology rather than by marketing. See *Jefferson Parish*, 466 U.S. at 21. Evidence that consumers prefer an integrated product may not be enough, especially where the two previous products have essentially ceased to exist as separate commodities, [*100] as is the case here. Caldera asserts that the Windows 95 package consists of two separate products to which the link is no stronger than it was between the prior products and can be easily separated. (Pl.'s Expert, Dr. Hollaar's Report at 20-26). When asked about the integration of Windows and DOS in Windows 95, one of Microsoft's software engineers acknowledged that DOS and Windows were basically "stuck together with baling wire and bubble gum." (Barrett Depo. at 60-61). Based on this contention, Caldera argues that Microsoft's decision to combine them into Windows 95 turned on marketing decisions (and anticompetitive ones) rather than technological reasons. For example, Caldera again cites to the 1992 internal strategy document, where Microsoft, referring to Windows 95 by its code name "Chicago," stated:

While Chicago is being developed as a single integrated Windows operating system, it's being designed and built so that 3 specific retail products can be packaged up and sold separately. Which products actually ship other than full Chicago is a marketing issue.

(Pl.'s Exhibit 309). Microsoft never released separate updated versions of DOS or Windows subsequent to [*101] the release of Windows 95. Accordingly, this evidence supports Caldera's contention that Windows 95 consists of

separate DOS and Windows products and was integrated not for technological reasons but rather for marketing reasons to gain market power. Such allegations, together with Dr. Hollaar's report, support Caldera's claim that genuine issues of material fact exist as to any alleged technological advantage of Windows 95.

Microsoft, however, responds with evidence that Windows 95 is more than two separate products tied together and that any integration was done for technological reasons and achieved legitimate technological advantages. Indeed, Microsoft argues that incorporating a real-mode DOS component into Windows 95 resulted in several significant benefits, including the benefit of integration itself, sparing users the uncertainties of combining two products from different companies and giving users more confidence in the product, as well as the benefit of a single installation program, requiring users to only install one software program rather than two. Additionally, Microsoft argues that the integration provided several technological benefits that were not present in MS-DOS [**102] 6.22 or Windows 3.1, including the ability to (1) use long file names; (2) protect against incompatible utilities; (3) support plug-and-play devices so that notebook computers using docking stations will function properly; (4) use a "safe mode" boot-up process to determine if the boot-up process was completed properly, and if not, shift the computer into safe mode when the computer is restarted; (5) detect incompatible device drivers; and (6) obscure boot noise with an blue cloud image so users do not see the series of confusing messages that appear on the screen during the DOS boot-up sequence.

There appears to be no question that Windows 95, as Microsoft argues, is greater than the sum of Windows 3.1 and MS-DOS 6.22 and contains features that the previous products did not contain. However, [*1327] the question that must be addressed is whether the technological improvements were in reality improvements to the prior products, ultimately creating Windows 4.0 and MS-DOS 7.0, under the guise of a new technologically advanced product, Windows 95. Caldera claims that none of the improvements offered in Windows 95 required--or even resulted from--the MS-DOS/Windows integration. Caldera's expert, [**103] Dr. Hollaar, argues this position. (Hollaar Report at 21-26). Dr. Hollaar claims that no shared software code exists between the underlying products in Windows 95 and that the two products can be easily separated and work properly once separated. See *id.* Thus, Caldera contends that the relationship between MS-DOS 7.0 and Windows 4.0 in Windows 95 is the same relationship that existed between Windows 3.1 and MS-DOS 6.22. Furthermore, Caldera alleges that but for Microsoft's anticompetitive conduct, Caldera would have and could have produced a DOS system that would support Windows 4.0, and thus would have all of the same technological benefits advanced by Windows 95.

The Supreme Court has instructed that "any [HN33](#)[] inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact." [Jefferson Parish, 466 U.S. at 18](#). Thus, the Court explained, "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](#). The alleged [**104] fact that Microsoft could have produced the products separately is not enough. "There must be sufficient consumer demand so that it is efficient for a firm to provide separately [its products]." [Eastman Kodak v. Image Tech. Services, 504 U.S. 451, 462, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#). Caldera argues that there exists a demand for separate Windows and DOS products. Certainly a demand existed prior to the release of Windows 95, when for ten years DOS and Windows were marketed separately. Caldera claims that some OEMs would prefer Windows and DOS to still be offered separately. Indeed, in a 1991 PC User interview when asked about giving GUI users a single operating system, Microsoft executive Steve Ballmer stated:

we'll certainly be providing OEMs with an installation program that installs DOS and Windows as if they were one product. But not all hardware vendors want to sell Windows and not all end-users want to run Windows. And there is nothing we give up technically by offering Windows and DOS separately.

(Engel Declaration, Exhibit 3). Caldera's claim that there is a demand for separate products is further buttressed by the fact that Microsoft continued to sell old versions [**105] of MS-DOS and Windows separately. While these sales are relatively small and relate largely to obsolete products, they illustrate that some level of consumer demand exists even after the introduction of Windows 95.

Based on the fact that Caldera's expert has opined that Windows 95 is in reality nothing more than updated versions of Windows and MS-DOS, that these products could be separated, that any improvements in Windows 95

did not result from the integration of its underlying products, and that but for the tying of Windows 95 a market would exist for other DOS products, this Court finds that drawing all inferences in the light most favorable to the nonmoving party, genuine issues of material fact exist as to whether a valid, not insignificant, technological improvement have been advanced by integrating Windows and DOS into what would constitute one superior technological product. While in the end Microsoft may be able to satisfy a jury that Windows 95 constitutes a significant technological improvement over the prior products, at this point, based on Caldera's expert testimony and on Microsoft's own admissions, the Court will allow these factual disputes to [*1328] be presented to a fact [**106] finder. Indeed, this is not the time to assess the strength of Caldera's case, but the time to determine whether there is enough evidence to allow a jury to make such an assessment. Even the D.C. District Court upon remand from the D.C. Circuit found that under the D.C. Circuit's rigid standard there were enough disputed facts that summary judgment should be denied in relation to the alleged tie of Microsoft's Internet Explorer to Windows 98, the latest update of Windows 95. See [United States v. Microsoft Corp., 1998 U.S. Dist. LEXIS 14231](#), No. Civ. A. 98-1232, 1998 WL 614485 at *10 (D.D.C. Sept. 14 1998). Based on these findings the Court concludes that Microsoft's motion for partial summary judgment on its "technological tying" claim must fail. Accordingly, Caldera will be allowed to present its § 1 tying claim to a jury.

c. Caldera's § 2 Tying Claim

Furthermore, in addition to presenting its § 1 tying claim to the jury, Caldera will be allowed to present to the jury Microsoft's alleged unlawful tying arrangement of Windows 4.0 and MS-DOS 7.0 as part of Caldera's evidence in support of its § 2 claim for anticompetitive conduct. "Illegal [HN34](#)[↑] tie-ins . . . under [section 1](#) may also [**107] qualify as anticompetitive conduct for [section 2](#) purposes." [Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Pubs., Inc., 63 F.3d 1540, 1550 \(10th Cir. 1995\)](#).

IV. CONCLUSION

For the foregoing reasons, the Court finds that plaintiff's "Motion to Strike Microsoft's Partial Summary Judgment Briefs Relating to Substantive Antitrust Violations" is DENIED, and defendant's Motions for Partial Summary Judgment on "Plaintiff's Claim of Predisclosure," "Plaintiff's Claim of Perceived Incompatibilities," "Plaintiff's Claim of Intentional Incompatibilities," and "Plaintiff's Claim of Technological Tying" are DENIED.

Dated this 3rd day of November 1999

Dee Benson

United States District Judge

Chawla v. Shell Oil Co.

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

November 3, 1999, Decided ; November 3, 1999, Entered

CIVIL ACTION NO. H-99-1711

Reporter

75 F. Supp. 2d 626 *; 1999 U.S. Dist. LEXIS 20352 **; 2000-1 Trade Cas. (CCH) P72,865

MARY CHAWLA, et al., Plaintiffs, v. SHELL OIL COMPANY, MOTIVA ENTERPRISES, L.L.C. and EQUILON ENTERPRISES, L.L.C., Defendants.

Disposition: **[**1]** Defendants' Motion to Dismiss Plaintiffs Tying and Price Discrimination Claims [Doc. # 11] GRANTED as to Plaintiffs' tying claims alleged in Counts I and II of the Plaintiffs' First Amended Complaint. Defendants' Motion to Dismiss Plaintiffs Tying and Price Discrimination Claims [Doc. # 11] GRANTED in part and DENIED in part as to the Robinson-Patman Act claim alleged in Count III of Plaintiffs' First Amended Complaint. Defendants' Supplemental Motion to Dismiss Plaintiffs' Conspiracy Count [Doc. # 46] GRANTED.

Core Terms

gasoline, Plaintiffs', Defendants', jobbers, consumers, retail, Robinson-Patman Act, allegations, amended complaint, stations, dealers, Sherman Act, prices, tying product, tying arrangement, brand, price discrimination, sales, tied product, interstate commerce, market power, commerce, rule of reason, relevant market, lessee-dealers, Clayton Act, trademark, markets, competitors, antitrust

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN1 Heightened Pleading Requirements, Fraud Claims

Fraudulent allegations must be pleaded with particularity in accordance with [Fed. R. Civ. P. 9\(b\)](#).

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

HN2 Motions to Dismiss, Failure to State Claim

Dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#) is appropriate when, taking the facts alleged in the complaint as true, it appears certain that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief.

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Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim
Evidence > Judicial Notice > General Overview

HN3 Motions to Dismiss, Failure to State Claim

For purposes of a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion, a court must limit its inquiry to the facts stated in the complaint and the documents either attached to or incorporated into the complaint; however, courts may also consider matters of which they may take judicial notice.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim
Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN4 Regulated Practices, Private Actions

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 > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN5 Regulated Practices, Private Actions

In factually complex antitrust cases, district courts may require that facts be pleaded with reasonable particularity in order to permit an inference that a federal antitrust claim is cognizable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6 Price Fixing & Restraints of Trade, Tying Arrangements

A tying arrangement is one under which a seller agrees to sell one product, the tying product, only on the condition that the buyer also purchase a second product, the tied product, or that the seller sells the tying product only on the condition that the buyer agrees that he will not purchase the product from any other supplier.

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 > Scope > General Overview

HN7 Tying Arrangements, Clayton Act

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Not every tying arrangement is illegal. 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 > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Contracts Law > Defenses > Illegal Bargains

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

[**HN8**](#) **Price Fixing & Restraints of Trade, Tying Arrangements**

To show that a tying agreement is illegal, a plaintiff must demonstrate that the tie is either per se illegal or invalid under the rule of reason.

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

[**HN9**](#) **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To establish per se illegality of a tying arrangement, a plaintiff must show: (1) two separate products, as opposed to components of a single product; (2) that are tied together or the customers are coerced into buying; (3) the supplier possesses substantial economic power over the tying product; (4) the tie has an anti-competitive effect on the tied market; and (5) the tie affects a not insubstantial volume of commerce.

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**

If a plaintiff is unable to satisfy the per se illegality test, the plaintiff nevertheless may be able to show that a tying arrangement is invalid under the "rule of reason." Under this latter approach, a plaintiff has the burden of demonstrating that the tying arrangement unreasonably restrained competition.

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

[**HN11**](#) **Private Actions, Remedies**

A key element in most antitrust claims is ultimate harm to consumers.

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN12**](#) [] **Price Fixing & Restraints of Trade, Tying Arrangements**

To analyze a tying claim, the relevant product market for both the tying and tied products must be identified.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Franchising & Marketing

[**HN13**](#) [] **Price Fixing & Restraints of Trade, Tying Arrangements**

There is nothing inherently anti-competitive about packaged sales. Only if buyers are forced to purchase the tied services as a result of the seller's market power would the arrangement have anti-competitive consequences.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

[**HN14**](#) [] **Private Actions, Remedies**

Economic power derived from contractual arrangements such as franchises has nothing to do with market power, ultimate consumers' welfare, or antitrust.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN15**](#) [] **Price Fixing & Restraints of Trade, Tying Arrangements**

Market power is a necessary prerequisite to an illegal tie.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN16**](#) [] **Market Definition, Relevant Market**

In order to show market power, a plaintiff first must define the relevant market. While the exact contours of the relevant market depend upon factual determinations, the antitrust plaintiff in a tying claim at a minimum must allege a relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN17**](#) [] **Regulated Practices, Market Definition**

A key in determining the relevant market includes an analysis of the cross-elasticity of demand for the product in question and all of its potential substitutes. In other words, 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.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[HN18](#) **Regulated Practices, Market Definition**

A single product, rarely constitutes a market for antitrust purposes, even if that product is a trademarked product.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Trademark Law > Subject Matter of Trademarks > General Overview

[HN19](#) **Regulated Practices, Market Definition**

A prestigious trademark is not itself persuasive evidence of economic power because a trademark, unlike a patent, protects only the name or symbol and not the product itself.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[HN20](#) **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement must link two distinct markets for products that are distinguishable in the eyes of buyers.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Processing & Refining > General Overview

[HN21](#) **Price Fixing & Restraints of Trade, Tying Arrangements**

There can be no tying arrangement unless there is a distinct demand for the tied product. One indicator of this distinct demand for the tied product is whether consumers make specific requests for it.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[HN22](#) **Regulated Practices, Price Fixing & Restraints of Trade**

Offering convenience to the consumer does not demonstrate an unreasonable restraint on competition.

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

[HN23](#) **Price Fixing & Restraints of Trade, Tying Arrangements**

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Tying claims that do not state a per se violation are analyzed under the rule of reason.

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

HN24 [] **Price Fixing & Restraints of Trade, Tying Arrangements**

In a case involving the rule of reason, the plaintiff must demonstrate that the defendants' behavior unreasonably restrained competition or suppressed competition. In a tying case, the rule of reason test requires an additional inquiry into the actual effect of the tying arrangement on competition in the market for the tied good.

Antitrust & Trade Law > Clayton Act > General Overview

HN25 [] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 14](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN26 [] **Tying Arrangements, Clayton Act**

Section 3 of the Clayton Act, [15 U.S.C.S. § 14](#), applies only when both the tying and tied products are goods. Tying arrangements that involve services are not governed by [§ 3](#).

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN27 [] **Antitrust & Trade Law, Robinson-Patman Act**

See [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN28 [] **Robinson-Patman Act, Claims**

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In order to establish secondary-line price discrimination under § 2(a) of the Clayton Act as amended by the Robinson-Patman Price Discrimination 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.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

[HN29](#) [] **Robinson-Patman Act, Claims**

The Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#) has a stringent interstate commerce requirement.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

[HN30](#) [] **Robinson-Patman Act, Claims**

Sales that merely affect interstate commerce do not meet the "in commerce" standard of the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

Antitrust & Trade Law > Sherman Act > General Overview

[HN31](#) [] **Robinson-Patman Act, Claims**

In contrast with the Sherman Act, in which Congress exercised the utmost extent of its Constitutional power in restraining trust and monopoly agreements, the distinct "in commerce" language of the Clayton and Robinson-Patman Acts denotes only persons or activities within the flow of interstate commerce, the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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Governments > State & Territorial Governments > Boundaries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[**HN32**](#) **Robinson-Patman Act, Claims**

Claims under the Robinson-Patman Act must be predicated on the occurrence of an interstate sale of the relevant commodity.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

[**HN33**](#) **Coverage, Commerce Requirement**

Retail goods delivered from out of state to an in-state buyer who then re-sells the goods to retail customers generally cease to be in the flow of interstate commerce when the goods reach the in-state retailer.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

[**HN34**](#) **Antitrust & Trade Law, Robinson-Patman Act**

Retail goods remain part of the flow of commerce in only three situations: (1) the goods are purchased upon the order of a customer with the definite intention that the goods are to go at once to the customer; (2) the goods are purchased by the retailer to meet the needs of a specified customer pursuant to some understanding with the customer; and (3) the goods are purchased by the retailer based on the anticipated needs of a specific customer.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

[**HN35**](#) **Robinson-Patman Act, Claims**

Under the terms of [section 13\(a\)](#) of the Robinson-Patman Act at least one of the sales alleged to be discriminatory must actually be in interstate commerce.

[Antitrust & Trade Law > Robinson-Patman Act > Claims](#)

[Antitrust & Trade Law > Robinson-Patman Act > General Overview](#)

[Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview](#)

[Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement](#)

[HN36](#) [Robinson-Patman Act, Claims](#)

In order to come within the provisions of the Robinson-Patman Act, the plaintiff must demonstrate that the discriminatory sales were in commerce. Thus, the Robinson-Patman Act is applicable only where the allegedly discriminatory transactions took place in interstate commerce. That is, at least one of the two transactions which, when compared, generate a discrimination must cross a state line.

[Antitrust & Trade Law > Robinson-Patman Act > Claims](#)

[Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors](#)

[Antitrust & Trade Law > Robinson-Patman Act > General Overview](#)

[Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction](#)

[HN37](#) [Robinson-Patman Act, Claims](#)

The mere interstate transportation of ingredients used to make a product that is sold intrastate does not satisfy the jurisdictional requirements of the Robinson-Patman Act.

[Antitrust & Trade Law > Robinson-Patman Act > Claims](#)

[Antitrust & Trade Law > Robinson-Patman Act > General Overview](#)

[Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview](#)

[HN38](#) [Robinson-Patman Act, Claims](#)

The primary purpose of the Robinson-Patman Act is to protect the competitive process, not individual competitors.

[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

[**HN39**](#) [L] **Robinson-Patman Act, Claims**

There are three types of violations actionable under the Robinson-Patman Act. First, in a primary-line case, the plaintiff must show that the defendant's price discrimination adversely affects the defendant's competition with its own competitors. In a secondary-line case, the plaintiff may demonstrate that the defendant's price discrimination injures competition among the defendant's customers, presumably, the plaintiff's competitors. Finally, a tertiary or third line violation occurs when the probable impact of the price discrimination is on the customers of either of the favored or disfavored buyers.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[**HN40**](#) [L] **Robinson-Patman Act, Claims**

A third or tertiary-line violation of the Robinson-Patman Act is explained as follows: Although the purchasers of the discriminating seller do not compete directly, their customers compete within a unified market region.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[**HN41**](#) [L] **Antitrust & Trade Law, Robinson-Patman Act**

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 > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[**HN42**](#) [L] **Robinson-Patman Act, Claims**

The existence of functional competition between competitors who may, at first blush, seem to compete on different levels is determined through a factual inquiry rather than a blanket legal rule.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

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Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN43 [] **Robinson-Patman Act, Claims**

The Robinson-Patman Act contains no express reference to functional discounts. It does contain two affirmative defenses that provide protection for two categories of discounts: those that are justified by savings in the seller's cost of manufacture, delivery, or sale, and those that represent a good faith response to the equally low prices of a competitor.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN44 [] **Robinson-Patman Act, Claims**

A Robinson-Patman Act plaintiff must allege, and eventually prove, that either it competed on the same functional level, i.e., as a wholesaler or retailer, with the allegedly favored buyer of the defendant's product or, if competing on a different functional level from the allegedly favored buyers, the plaintiff must prove that putative functional discounts offered by the defendant to the latter were in fact subterfuges to avoid the Robinson-Patman Act restrictions.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN45 [] **Robinson-Patman Act, Claims**

A Robinson-Patman Act plaintiff must allege facts that demonstrate a reasonable possibility that competition has been harmed as a result of the price differential.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

HN46 [] **Antitrust & Trade Law, Robinson-Patman Act**

An injury to competition may be inferred from evidence that some purchasers had to pay their supplier substantially more for their goods than their competitors had to pay.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN47 [] **Robinson-Patman Act, Claims**

Evidence of a price differential alone is insufficient to impose liability on the defendant on the primary-line price discrimination cause of action.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN48 [] **Robinson-Patman Act, Claims**

Under the Robinson-Patman Act, the plaintiff must allege facts to support the proposition that competitive injury has occurred. This pleading burden is met if a plaintiff alleges facts that demonstrate a reasonable possibility that a price difference may harm competition.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN49 [] **Pleadings, Amendment of Pleadings**

Allegations in a response to a motion are not sufficient to amend the complaint.

Antitrust & Trade Law > Sherman Act > General Overview

HN50 [] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN51 [] **Antitrust & Trade Law, Sherman Act**

In order to state a claim for a violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must allege (1) the existence of a conspiracy (2) affecting interstate commerce (3) that imposes an unreasonable restraint of trade.

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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 > Per Se Rule & Rule of Reason > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN52 [] **Per Se Rule & Rule of Reason, Per Se Violations**

There are two possible theories for a violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#). Per se violations of [§ 1](#) involve those agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable. Per se violations are held to be illegal without any inquiry into the actual effect on the relevant market. If a violation is not per se illegal, it is analyzed according to the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > 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

HN53 [] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

In order to determine whether a particular conspiracy is illegal per se, the court must determine whether it represents a horizontal or a vertical restraint of trade. If the alleged conspiracy is horizontal, it is per se illegal and plaintiffs need not allege market effects. On the other hand, if the alleged conspiracy is vertical, then generally it should be analyzed under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN54 [] **Price Fixing & Restraints of Trade, Vertical Restraints**

There is an exception to the general rule that vertical restraints be analyzed under the rule of reason. Vertical restraints involving price maintenance or price levels are per se illegal.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN55 [] **Antitrust & Trade Law, Sherman Act**

A corporation cannot conspire or combine with its own officers, employees, or wholly owned sales divisions and outlets in violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

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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

[**HN56**](#) [blue icon] Price Fixing & Restraints of Trade, Vertical Restraints

When a manufacturer acts of its own, in pursuing its own marketing strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

[**HN57**](#) [blue icon] Price Fixing & Restraints of Trade, Vertical Restraints

When a producer elects to market its good through distributors, the latter are not, in an economic sense, competitors of the producer even though the producer also markets some of its goods itself; rather, the distributors are agents of the producer, employed because the producer has determined that it can supply its goods to consumers more efficiently by using distributors than it can by marketing them entirely by itself.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN58**](#) [blue icon] Sherman Act, Claims

Under § 1 of the Sherman Act, [15 U.S.C.S. § 1](#), to prove a conspiracy violation under rule of reason analysis, plaintiffs must show that defendants' activities caused an injury to competition.

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

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

[**HN59**](#) [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A key element of any rule of reason analysis is a definition of the appropriate product and geographic markets.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN60**](#) [blue icon] Antitrust & Trade Law, Sherman Act

Failure to define a legally cognizable market is usually fatal to a conspiracy claim under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN61[] **Regulated Practices, Market Definition**

Courts generally employ the cross-elasticity method of determining relevant product markets. Under this method, a product market is defined as the product at issue and all other commodities reasonably interchangeable by consumers for the same purposes.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN62[] **Regulated Practices, Market Definition**

A single product brand generally cannot constitute a relevant market, even if that product bears a trademark.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

HN63[] **Relevant Market, Product Market Definition**

Generally, in order to define a relevant market under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must refer to the lack of product interchangeability.

Counsel: For MARY CHAWLA, STEPHEN A BOYER, HERMAN SCIENEAUX, KRISHANA SYAL, JOHN S PLATTS, NICK FRANTZESKAKIS, LAURA DIMAKOPOULOS, JACK J VARCADOS, KEN PEACOCK, MICHAEL G GRIVON, GEORGE VARCADOS, ISHAN ABDEL KHALIQ, THEOFILOS PAPAVASILIOU, FIVOS KAZILAS, JOHN MOROS, RAFAT N NEMRY, NAIM N NEMRY, HANNA KOBORSI, DIONYSSIOS MOUSTAKIS, MOSHE SHUMLAK, MARK AMBROZIAK, BRUCE J SIRCHIO, JAY PRAKASH PATEL, HASSAN A KHALEO, HAKAM A KHALEO, MUHSEN A KHALEQ, J T MCLEMORE, SAMIH ALSHAWA, STEVE DAOUD, STEVE KOUMOULOS, ABBOTT KHORDAJI, CARLOS DIAZ, KELLY GRAYSON, MARK CUMMING, TOM ZEBIS, MOHAMMED SALEEM KHATANI, ADAM KHORDAJI, MAGED M ABUZAID, DIAMANDI GRANNOUPOULOS, RIGOBERTO F SUAZO, GEORGE [**2] EZANIDIS, RASHID MUSA, MUSTAFA RASOOL, MOHAMMED M BEHRANG, HUNG VO, A TONY EZANIDIS, GHANEM AKSHAR, NICK C ARGYRIOU, MICHAEL D PEARLMAN, GEORGE B PEREZOUS, JOHN A ORR, LLOYD CORSO, KIRIT C PATEL, ECONOMIDES INC, BRIAN D PORTER, plaintiffs: Michael L O'Brien, Attorney at Law, Bruce B Kemp, George M Fleming, Fleming & Associates, Russell Todd Abney, Fleming Hovenkamp & Grayson, Houston, TX.

For LOLA KERNAN, JOSEPH R EISERLOH, plaintiffs: Michael L O'Brien, Attorney at Law, Russell Todd Abney, Fleming Hovenkamp & Grayson, George M Fleming, Fleming & Associates, Houston, TX.

For MARY CHAWLA, LOLA KERNAN, JOSEPH R EISERLOH, STEPHEN A BOYER, HERMAN SCIENEAUX, KRISHANA SYAL, JOHN S PLATTS, NICK FRANTZESKAKIS, LAURA DIMAKOPOULOS, JACK J VARCADOS, KEN PEACOCK, MICHAEL G GRIVON, GEORGE VARCADOS, ISHAN ABDEL KHALIQ, THEOFILOS PAPAVASILIOU, FIVOS KAZILAS, JOHN MOROS, RAFAT N NEMRY, NAIM A NEMRY, HANNA KOBORSI, DIONYSSIOS MOUSTAKIS, MOSHE SHUMLAK, MARK AMBROZIAK, BRUCE J SIRCHIO, JAY PRAKASH PATEL, HASSAN A KHALEO, HAKAM A KHALEO, MUHSEN A KHALEQ, J T MCLEMORE, SAMIH ALSHAWA, STEVE DAOUD, STEVE KOUMOULOS, ABBOTT KHORDAJI, CARLOS DIAZ, KELLY GRAYSON, MARK CUMMING, TOM ZEBIS, MOHAMMED SALEEM KHATANI, ADAM KHORDAJI, MAGED M ABUZAID, DIAMANDI GRANNOUPOULOS, RIGOBERTO F SUAZO, GEORGE [**2] EZANIDIS, RASHID MUSA, MUSTAFA RASOOL, MOHAMMED M BEHRANG, HUNG VO, A TONY EZANIDIS, GHANEM AKSHAR, NICK C ARGYRIOU, MICHAEL D PEARLMAN, GEORGE B PEREZOUS, JOHN A ORR, LLOYD CORSO, KIRIT C PATEL, ECONOMIDES INC, BRIAN D PORTER, plaintiffs: Michael L O'Brien, Attorney at Law, Bruce B Kemp, George M Fleming, Fleming & Associates, Russell Todd Abney, Fleming Hovenkamp & Grayson, Houston, TX.

CUMMING, TOM ZEBIS, MOHAMMED SALEEM [**3] KHATANI, MAGED M ABUZAID, DIAMANDI GRANNOUPOULOS, RIGOBERTO F SUAZO, GEORGE EZANIDIS, RASHID MUSA, MUSTAFA RASOOL, MOHAMMED M BEHRANG, HUNG VO, A TONY EZANIDIS, GHANEM AKSHAR, NICK C ARGYRIOU, MICHAEL D PEARLMAN, GEORGE B PEREZOUS, JOHN A ORR, LLOYD CORSO, KIRIT C PATEL, ECONOMIDES INC, BRIAN D PORTER, plaintiffs: Jonathan S Massey, Attorney at Law, Washington, DC.

For SHELL OIL COMPANY, MOTIVA ENTERPRISES LLC, EQUILON ENTERPRISES L L C, defendants: J Gregory Copeland, J Michael Baldwin, Baker & Botts, Houston, TX.

Judges: NANCY F. ATLAS, UNITED STATES DISTRICT JUDGE.

Opinion by: NANCY F. ATLAS

Opinion

[*629] MEMORANDUM OPINION AND ORDER

Pending before the Court are the Defendants' Motion to Dismiss the Tying, Price Discrimination, and Fraud Counts of Plaintiffs' First Amended Complaint ("Defendants' Motion") [Doc. # 11] and Defendants' Supplemental Motion to Dismiss Plaintiffs' Conspiracy Count [Doc. # 46]. The parties have fully briefed the issues.¹ The Court has considered all the parties' submissions, all matters of record, and the applicable authorities, and concludes that Defendants' Motion should be granted in part and denied in part, and the Defendants' Supplemental Motion [**4] should be granted.

I. FACTUAL BACKGROUND

Defendants in this case manufacture and distribute Shell brand gasoline. Defendants distribute this gasoline to consumers through three different channels. First, Defendants directly own and operate retail stations, otherwise known as "company-owned stations" or "Shell-owned stations." Second, Defendants sell their fuel to wholesale "jobbers," who supply it to Shell-brand stations owned either by the jobber ("jobber stations") or other individuals under a contractual relationship with [**5] the jobber ("open dealers").² Third, Defendants [*630] own or lease certain real estate and then lease or sub-lease the property to independent business persons who become Shell brand "dealers," known as "lessee-dealers," who operate and run "lessee-dealer stations."

[**6] Plaintiffs in this case consist of seventy-three individuals who, directly or indirectly, are lessee-dealers that now operate or have operated Shell-brand gasoline stations. Each Plaintiff has a contractual relationship contained

¹ See Memorandum in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss ("Plaintiffs' Response") [Doc. # 22]; Plaintiffs' Opposition to Defendants' Supplemental Motion to Dismiss Plaintiffs' Conspiracy Count [Doc. # 51]; Reply by Shell Oil Company to Plaintiffs' Opposition ("Defendants' Reply") [Doc. # 26]; Defendants' Reply to Plaintiffs' Opposition to Defendants' Supplemental Motion to Dismiss ("Defendants' Supplemental Reply") [Doc. # 53].

² The term "jobber stations," as defined by Plaintiffs in the First Amended Complaint, at 10, P 85, is the definition the Court uses throughout this opinion; Plaintiffs are expected to use this definition in the future in this case. The reference to "retail jobber stations" in Count III (see *id.* at 22, P 155), is construed to mean "jobber stations" as defined in P 85. Specifically, "jobber stations" are stations owned and supplied by jobbers. Defendants supply these jobbers with Shell brand gasoline in bulk wholesale transactions. These jobbers and jobber stations therefore are different from Plaintiffs, who also obtain their gasoline directly from Defendants but lease their stations from Defendants and do not distribute to any other dealers. See *id.* at 10, P 85.

in a standard "Dealer Agreement," whereby the lessee-dealer agrees to sell exclusively Shell brand gasoline through the gas station.³

Plaintiffs allege that Defendants' actions have violated federal antitrust laws, as well as state fraud, tort, and contract laws. In their First Amended Complaint, Plaintiffs assert ten causes of action. First, Plaintiffs allege an illegal tying arrangement in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (Count I), and § 3 of the Clayton Act, 15 U.S.C. § 14 (Count II), challenging Defendants' "pay at the pump" program whereby Defendants require Plaintiffs to enable retail consumers to pay for gasoline at the gasoline pump [**7] by using equipment and services mandated by Defendants. Plaintiffs also allege that Defendants have engaged in illegal price discrimination between Plaintiffs and the jobbers with whom they compete in violation of the Robinson-Patman Price Discrimination Act amendment to § 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (Count III). Plaintiffs also contend that Defendants' actions concerning the relative price charged to Plaintiffs and their retail competitors constitute a conspiracy affecting interstate commerce in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (Count IV). Plaintiffs also allege that Defendants fraudulently induced the Plaintiffs to enter into the Dealer Agreements or other agreements with Defendants (Count V). Last, Plaintiffs allege five other state law claims arising from the parties' business relationship.⁴ Defendants do not address Counts VI through X in their Motions. The claims in issue in the pending motions are described below in greater detail.

[8] A. Counts I and II: Alleged Illegal Tying Arrangement in Violation of § 1 of the Sherman Act and § 3 of the Clayton Act**

Plaintiffs challenge Defendants' "pay at the pump" program. Plaintiffs claim they are being coerced by Defendants to lease "Island Card Readers" ("ICRs") and to agree to utilize the bank chosen by Defendants to process the associated credit card transactions. See Plaintiffs' First Amended Complaint, at 17, PP 125, 127. ICRs are the credit card readers placed on the gasoline pumps which allow customers to "pay at the pump." The ICRs are separate from the credit card machines operated by Plaintiffs inside their stations or convenience stores. *Id.* at 16, P 124. The ICRs are operated in connection with banks selected by Defendants to process the transactions. *Id.* at 17, P 127. Thus, the ICRs and Defendants' chosen bank operate together as one credit card processing system. In addition, Plaintiffs allege that Defendants' tying scheme was imposed on "most--if not all--Plaintiffs" only after Plaintiffs signed their Dealer Agreement. *Id.* at 16, P 124.

Plaintiffs complain first about being required to lease ICRs and pay a monthly fee based on [**9] the number of ICRs at each station. *Id.* at 17-18, P 130. Second, Plaintiffs complain that Defendants' fee is higher than the fee allegedly available if Plaintiffs were allowed to obtain the ICRs from another source. *Id.* at 17, P 127. Third, as to the requirement that they use the bank chosen by Defendants to process ICR-related credit card transactions, Plaintiffs claim they could obtain less expensive [*631] financing elsewhere. *Id.* at 18, P 131.

Plaintiffs allege in Count I that Defendants' "practice of coercing Plaintiffs to agree to lease ICRs and forcing Plaintiffs to agree to utilize only Shell's chosen bank to process [these] credit card transactions" creates an illegal tying arrangement in violation of the Sherman Act, § 1. In this tying arrangement, the tying products are Shell brand gasoline and the Shell trademark, and the tied product is Defendants' selected bank for processing of transactions. *Id.* at 19, P 138. Plaintiffs alternatively contend that "Shell's practice of coercing Plaintiffs to effectuate gasoline sales through ICRs and forcing [the use of] only Shell's chosen bank to process [these] credit card transactions" is another illegal tying arrangement. [**10] *Id.* at 19, P 139. Plaintiffs generally allege these tying arrangements affect interstate commerce, because all Shell brand lessee-dealers are required to abide by the same arrangements. *Id.* at 19-20, PP 139, 140. Plaintiffs allege that this tying arrangement harms both lessee-dealers and consumers. Plaintiffs contend that Shell gasoline has unique additives and there is no alternative for consumers of Defendants' gasoline. See *Id.* at 19, P 139. Defendants' tying arrangement thus harms consumers who bear the burden when the increased costs of Defendants' ICR policy is passed on to the consumer in higher

³ Plaintiffs each sue on their own; there are no class action allegations.

⁴ Specifically, Plaintiffs allege tortious interference (Count VI), breach of contract (Counts VII and VIII), breach of duty of good faith and fair dealing (Count IX), and unfair competition (Count X).

priced Shell brand gasoline. *Id.* at 20, PP 139, 142. Plaintiffs deduce that Defendants thus have leverage power in "its branded gasoline and trademark" over Shell dealers because, from the independent lessee-dealers' perspective, there is no alternative to Shell gasoline. *Id.* at 20, P 141.

In Count II, Plaintiffs allege that the tying product is "Shell's unique branded gasoline product, in which Shell has market power, and the tied product is ICRs which travel in commerce. *Id.* at 21, P 147. Plaintiffs claim "Shell makes future sales of its branded gasoline contingent [**11] upon Plaintiffs' use of Shell's ICRs." *Id.* at 21, P 148. Plaintiffs add that Shell has leverage power in its branded gasoline over independent Shell dealers, because from the independent Shell lessee-dealers' perspective, there is no alternative to Shell branded gasoline." *Id.* at 21, P 149. Plaintiffs add that "this harms the ultimate consumer who must endure higher prices to get unique Shell gasoline product . . . because the costs to Plaintiffs are increased. *Id.* at 21, P 150.

The net effect, Plaintiffs allege in Counts I and II, is that the "tying arrangement is forcing Plaintiffs out of business, as they lose money if they accept the higher lease amount without passing the increase on to their customers, or they lose money by making fewer sales as customers frequent competing Shell gasoline stations which have lower gasoline prices and which are not restrained by Shell's illegal tying arrangements." *Id.* at 20-21, P 145; at 22, P 153.

B. Count III: Price Discrimination in Violation of the Robinson-Patman Act

Plaintiffs allege that "beginning at least in 1995 and continuing to the present, Shell has engaged in the practice of giving jobbers a substantial [**12] and preferential discount on the price of Shell gasoline." Plaintiffs' First Amended Complaint, at 14, P 111. Jobbers purchase Shell brand gasoline from the Shell terminal at a predetermined "rack price." *Id.* The independent lessee-dealers, on the other hand, purchase Shell gasoline directly from Shell at a "dealer tank wagon" ("DTW") price, which is greater than Shell's rack price. *Id.* These jobbers, Plaintiffs allege, sell this gasoline to jobber stations at a discounted price, which is lower than the price Shell charges Plaintiffs' stations. *Id.* at 14, P 112. Plaintiffs allege that the difference constitutes a discriminatory sale within the meaning of the Robinson-Patman Price Discrimination Act amendment to § 2(a) of the Clayton Act, [15 U.S.C. § 13\(a\)](#). *Id.* at 23, P 161. Plaintiffs further allege that these discriminatory pricing practices have caused the "substantial lessening of competition" in the retail gasoline market as [**632] between Plaintiffs and Defendants' "favored buyers." Plaintiffs' First Amended Complaint, at 23, P 159. Plaintiffs claim impairment of their "ability to compete with Shell jobbers at the retail level . . . resulting in [**13] lost sales and profits, as well as other damages, including being forced out of the Shell-branded gasoline market." *Id.* at 23, P 160.

C. Count IV: Violation of § 1 of the Sherman Act

In Count IV, the last federal law claim, Plaintiffs contend the Defendants have conspired with unspecified jobbers to keep Plaintiffs from purchasing fuel at competitive wholesale prices. Plaintiffs' factual allegations regarding price discrimination are essentially the same as those outlined above in Count III of Plaintiffs' First Amended Complaint. See *Id.* at 23-34, PP 163-165. In Count IV, however, Plaintiffs explicitly allege that the "relevant product market" is "Shell-branded gasoline." According to Plaintiffs, this product "is unique and defines its own relevant market due to the patented additives" included in this gasoline and due to Defendants' branded "credit cards that allow consumers holding those cards to charge gasoline at Shell stations." Plaintiffs' First Amended Complaint, at 24, P 166. Plaintiffs alternatively argue that the "relevant product market for this cause of action is Shell-branded gasoline from the perspective of independent Shell lessee-dealers." *Id.* [**14] at 24, P 167.

Plaintiffs then argue that the entire continental United States constitutes the relevant geographical market for their relevant product, Shell brand gasoline. *Id.* at 24, P 168. Plaintiffs allege that "other relevant geographic markets, or sub-markets, for this cause of action are the geographic markets of each of the individual Plaintiffs' stations . . ." *Id.* 5

⁵ Plaintiffs also allege that Defendants have "occupied a substantial share of the market and have demonstrated an ability to unreasonably control and unreasonably influence prices available to the consuming public for Shell-branded gasoline." *Id.* at 24,

Plaintiffs complain that Defendants have "sought to obtain or maintain monopoly market power within the U.S. Shell-branded gasoline market as well as each sub-market" (*Id.* at [**15] 25, P 171), and have "used [their] market power to engage in discriminatory pricing of Shell-branded gasoline and to breach its duties owed to Plaintiffs under [their] contracts with Plaintiffs to quash competition and force independent dealers out of the Shell-brand gasoline market." *Id.* at 25, PP 172, 177. Plaintiffs in conclusory fashion allege that Defendants' conduct has "injured the relevant Shell-branded gasoline markets and each plaintiff" (*Id.* at 25, P 170), and have "unreasonably restrained trade in an anti-competitive manner" (*Id.* at 25, P 173). Plaintiffs further contend that Defendants' officers and agents have "conspired" or "acted in concert and have entered into agreements with Plaintiffs, which restrain trade in an anti-competitive manner" (*Id.* at 25, P 175), and have conspired with jobbers to restrain trade (*Id.* at 25, P 176). Plaintiffs' counsel, in oral argument, stated that they assert a horizontal boycott of the lessee-dealers by Shell and the jobbers and, as such, they allege a *per se* violation of [§ 1](#) of the Sherman Act.

D. Count V: Fraudulent Inducement

Plaintiffs allege that Defendants failed to disclose several material [**16] facts ⁶ which, if [*633] disclosed, would have resulted in the lessee-dealers not entering into relationships with the Defendants. See *id.* at 26, P 182. Plaintiffs claim Defendants either knew the assertions were false when made or that they were made recklessly without knowledge of the truth. *Id.* at 26-27, P 182. In addition, Plaintiffs allege that Defendants intended for Plaintiffs to rely on the misrepresentations to their detriment. As a result, Plaintiffs were fraudulently induced to sign the agreements that now govern Plaintiffs' relationships with Defendants. *Id.*

[**17] Defendants argue that Plaintiffs' allegations are merely conclusory and do not satisfy the heightened pleading requirement for fraud allegations. [HN1](#)[] Fraudulent allegations must be pleaded with particularity in accordance with [FED. R. CIV. P. 9\(b\)](#). Defendants note that no specific Plaintiff has alleged what misrepresentations were made to him or her, or specify how any misrepresentation was relied upon by Plaintiff to his or her detriment. Defendants state the purpose of the particularity requirement is to avoid meritless complaints. Defendants claim Plaintiffs' allegations ignore this requirement and therefore the First Amended Complaint should be dismissed.

At the Court's September 17, 1999, pre-trial conference, Plaintiffs did not dispute the lack of specifics as to each Plaintiff but requested time to gather the necessary information. The Court orally ruled that Plaintiffs' fraud claim was insufficiently specific and therefore was legally insufficient as to each separate Plaintiff. Rather than require re-pleading in the complaint *per se*, the Court directed Defendants to serve interrogatories to which each Plaintiff must respond; these interrogatories are to elicit the necessary [**18] details as to each Plaintiff's fraud claims, standing, and other matters. On reflection, and in light of other rulings on Defendants' motions, the Court now concludes that Plaintiffs shall be required to file a second amended complaint with an appendix that addresses the claims of each Plaintiff separately, including *inter alia* the particulars of his or her fraud claim. The Court will address the sufficiency of the fraud claims when and if challenged by summary judgment motion at a later date.

E. Plaintiffs Other State Law Claims

Plaintiffs also allege claims of tortious interference with a contract, breach of contract, breach of the duty of good faith and fair dealing and unfair competition. Defendants have not filed motions concerning these claims and issues concerning their sufficiency are not currently before the Court.

P 169. Moreover, allegedly, "Shell uses its market power to illegally manipulate its contractual relationships with Plaintiffs, thereby preventing competition in the relevant market." *Id.*

⁶ Examples of the allegedly false statements or material omissions, material facts are (1) that lessee-dealers would be allowed to operate as independent business persons able to set up their own "pool margins"; (2) allowing lessee-dealers to purchase Defendants brand of their gasoline from sources other than Shell at a discount; (3) allowing Plaintiffs to seek their own financing for ICRs with lower processing fees than those of Defendants; (4) failing to inform Plaintiffs "that they would be competing with jobbers/OD's and Shell owned and operated stores who can purchase Shell gasoline at wholesale prices while requiring Plaintiffs to purchase the same Shell gasoline at retail prices"; and (5) failing to inform Plaintiffs of the high "pre-printed rent" and/or explain how rent obligations would be calculated. See First Amended Complaint, at 26, P 182.

II. LEGAL STANDARDS FOR MOTIONS TO DISMISS

HN2⁷ Dismissal under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* is appropriate when, taking the facts alleged in the complaint as true, it appears certain that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. See *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); ^{**19} *C.C. Port, Ltd. v. Davis-Penn Mortgage Co.*, 61 F.3d 288, 289 (5th Cir. 1995). ⁷ **HN3**⁸ A court must limit its inquiry to the facts stated in the complaint and the documents either attached to or incorporated into the complaint; however, courts may also consider matters of which they may take judicial notice. *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996). "In **HN4**⁹ antitrust cases in particular, the Supreme Court has stated that 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998) (quoting *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.'" *Id.* (quoting *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)). ^{**20}

III. DISCUSSION

A. Illegal Tying Arrangements

1. Summary

Plaintiffs allege that, in order to continue to supply Shell gasoline to Plaintiffs, Defendants illegally (i) require the use of ICRs, (ii) require the use of Defendants' specified ICRs, and (iii) require the use of Defendants' specified credit processing services for ICR transactions, all of which impose added ^{**21} costs on Plaintiffs (collectively, the "ICR policy"). Plaintiffs consistently allege that the tying products are Shell gasoline and the Shell trademark, and the tied products are Defendants' selected ICRs and/or credit processing services. See Plaintiff's First Amended Complaint, at 19-20, PP 138, 139. The ICR policy, Plaintiffs argue, violates both § 1 of the Sherman Act (Count I) and § 3 of the Clayton Act (Count II).

Defendants argue that Plaintiffs have not alleged all of the necessary elements for an illegal tying claim. First, Defendants argue that Plaintiffs cannot show that Defendants have market power in the tying product, which Defendants contend is gasoline generally. Implicitly, Defendants contend that the "relevant market" is branded gasoline, rather than Shell brand gasoline. Second, Defendants emphasize that relationships arising from the Dealer Agreements at issue in this case do not create market power recognized under the antitrust law. Rather, Defendants contend they have contractual power over Plaintiffs. Last, Defendants contend that Plaintiffs have failed to allege an unreasonable restraint of competition in the tied product.

Plaintiffs respond to Defendants' ^{**22} Motion by contending that they have alleged all the necessary elements of an illegal tying agreement. First, Plaintiffs contend that "Shell-branded gasoline" constitutes the relevant market. Plaintiffs support this contention first by arguing that Shell gasoline, a product protected by the Shell trademark, is a unique product for which consumers are willing to pay a higher price than other gasoline. See Plaintiffs' First Amended Complaint, at 19, P 139. ⁸ Alternatively, Plaintiffs argue that the individual lessee-dealers are "locked in"

⁷ The Supreme Court has indicated that **HN5**⁹ in factually complex antitrust cases, district courts may require that facts be pleaded with reasonable particularity in order to permit an inference that a federal antitrust claim is cognizable. See *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 n.17, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) (finding that in a factually complex antitrust case, "a district court must retain the power to insist upon some specificity in the pleading before allowing a potentially massive factual controversy to proceed.").

by the ICR policy. Plaintiffs point out that they were unaware of Defendants' plan to use ICRs when they entered into their Dealer Agreements, which by their nature are long term agreements. *Id.* at 16, P 124.

[**23] Plaintiffs complain that Defendants' ICR policy invokes antitrust liability under the Supreme Court's rule announced in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 ("Kodak") (1992). Last, Plaintiffs state generally that, if not [**635] coerced by Defendants' tying arrangement, Plaintiffs would choose less expensive ICRs and processing services with more favorable rates. See e.g., Plaintiffs' First Amended Complaint, at 20, P 143. Plaintiffs contend they have sufficiently alleged an anti-competitive effect on the tied market.

The Court concludes that Plaintiffs have failed to state a legally cognizable claim of illegal tying. As to the alleged injury to Plaintiffs' lessee-dealers, the Court concludes that the tying arrangement arises from contractual provisions contained in Defendants' Dealer Agreement, and the *Kodak* doctrine is not applicable. Furthermore, the Court holds that Plaintiffs have failed to allege any anti-competitive effect on the market for the tied products, ICRs and related credit card processing services. As to the alleged injury to the retail gasoline consumers, the Court concludes that, [**24] as a matter of law, Shell gasoline is not a legally cognizable "relevant market." Therefore, Plaintiffs have not alleged that Defendants have market power in the tying product, and cannot state a claim under either the Sherman or Clayton Acts. The Court last concludes that, as to the retail gasoline consumers, Plaintiffs have failed to allege either an anti-competitive effect on the tied market or an illegal tie.

2. Legal Standards Governing Tying Arrangements

Plaintiffs allege that Defendants' ICR policy is an illegal tying arrangement. [HN6](#) A "tying arrangement" is one under which "a seller agrees to sell one product (the 'tying product') only on the condition that the buyer also purchase a second product (the 'tied product')," *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 373 (5th Cir. 1977), or that the seller sells the tying product only on the condition that the buyer "agrees that he will not purchase the product from any other supplier." *Eastman Kodak Co.*, 504 U.S. at 461 (citation omitted). Thus, Defendants' ICR policy is a tie under federal law.

However, [HN7](#) not every tying arrangement is illegal. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 11, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). [**25] "Such an arrangement violates § 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 462 (citation omitted). [HN8](#) To show that a tying agreement is illegal, a plaintiff must demonstrate that the tie is either *per se* illegal or invalid under the rule of reason. See 9 PHILLIP E. AREEDA, *ANTITRUST LAW* § 1719a (1991) ("AREEDA"). [HN9](#) To establish *per se* illegality, a plaintiff must show:

- (1) two separate products (as opposed to components of a single product);
- (2) that are tied together or the customers are coerced into buying;
- (3) the supplier possesses substantial economic power over the tying product;
- (4) the tie has an anti-competitive effect on the tied market; and
- (5) the tie affects a not insubstantial volume of commerce.

⁸ Plaintiffs appear to acknowledge that the case involves only branded gasoline, see Transcript of September 24, 1999 Conference, at 18-19. This concession is appropriate since it is clear that unbranded gasoline is a materially different product. See *C.E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1246 (5th Cir. 1985) (quoting *Brown Shoe v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502, 1523-24, 8 L. Ed. 2d 510 (1962)) (recognizing that "within [a] broad market, well-defined subdivisions may exist which . . . constitute product markets for antitrust purposes")).

United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exchange, 89 F.3d 233, 236 n.2 (5th Cir. 1996) ("United Farmers") (citing AREEDA, § 1702; Kodak, 504 U.S. at 461-62; Hyde, 466 U.S. at 11-28). **HN10**[] If a plaintiff [**26] is unable to satisfy this test, the plaintiff nevertheless may be able to show that a tying arrangement is invalid under the "rule of reason." *Id.* Under this latter approach, a plaintiff has the burden of demonstrating that "the tying arrangement 'unreasonably restrained competition.'" 89 F.3d at 236 n.2 (citing Hyde, 466 U.S. at 29).⁹

[*636] **HN11**[] A key element in most antitrust claims is ultimate harm to consumers. See *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 441 (3rd Cir. 1997) (Scirica, J.) ("Queen City Pizza") (recognizing that "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"); *United Farmers*, 89 F.3d at 236 [**27] (rejecting plaintiff's antitrust claim because it "has nothing to do with . . . ultimate consumers . . ."); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994) ("The antitrust laws protect competition, not competitors. Ultimately, the consumer is the beneficiary.").

3. Lessee-Dealers as Consumers

Plaintiff's Allegations.-- **HN12**[] To analyze a tying claim, the relevant product market for both the tying and tied products must be identified. See *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 479 (3rd Cir. 1992) ("To determine the existence of market power for purposes of the 'per se' test, then, we must first define the relevant tying product market"); *Queen City Pizza*, 124 F.3d at 441 (holding that plaintiffs had failed to adequately allege a tied product market).

Plaintiffs' definitions of the relevant products and markets for Plaintiffs as consumers vary slightly in Counts I and II. As to the *tying product* and markets, Plaintiffs variously allege that Shell gasoline and the associated Shell trademark are the tying products and argue that the relevant market [**28] is retail gasoline sales to the public, i.e. individual retail consumers, either in a national market or in the locale of each individual dealership. See Plaintiffs' First Amended Complaint, at 20, P 142; at 21, P 150. Plaintiffs also complain that in order to obtain continued supply of Shell gasoline, the necessary product for their Shell dealerships, Plaintiffs are locked in to the ICR policy, and have high costs of switching to a new product.¹⁰ See, e.g., id. at 9-10, P 84; at 17, P 128 ("All facts indicate that . . . Shell requires dealers to agree to use the single Shell-approved bank as a condition for continued purchase of Shell-branded gasoline and the use of the Shell trademark."); at 19-20, PP 131, 138, 139, 141; at 21, PP 147, 148, 149. These allegations are surrogates for the theory that Plaintiffs' Shell dealerships (the right to obtain Shell gasoline and use Shell's trademark) established by the Dealer Agreement are the relevant tying products for Plaintiffs as the consumers in issue. See Plaintiffs' First Amended Complaint, at 19, P 138; at 21, P 141; at 21-22, PP 148, 149, 152, 153.

[**29] Plaintiffs allege various theories as to the *tied products* under Defendants' ICR policy. In Counts I and II Plaintiffs allege that the tied product is the ICRs *per se*, since Plaintiffs are required to make monthly payments to Defendants for this equipment which Defendants allegedly require. See First Amended Complaint, at 17, P 128; at 20, P 138; at 21, P 147. Plaintiffs also allege in Count I that the tied product is the bank credit card processing services which Defendants select and require in connection with all ICR transactions. See id. at 20, PP 139, 140.

⁹ Because of its inquiry into market power, this test is actually "located between a per se and a rule of reason inquiry." See *Roy B. Taylor Sales, Inc. v. Hollymatic Corporation*, 28 F.3d 1379, 1382 (5th Cir. 1994).

¹⁰ Plaintiffs' claim under this theory is exactly the same as the claim at issue in *Ajir v. Exxon Corp.*, 1995 WL 429234 (N.D. Cal. 1995). In *Ajir*, independent Exxon dealers brought suit against the manufacturer Exxon alleging that Exxon illegally tied the use of Exxon-owned tanks, lines, and equipment to the purchase of Exxon brand gasoline. Id. at *4. The district court in that case found that the relevant market in that case was the market for gasoline franchises. Id. at *5; see also *Wilson v. Mobil Oil Corp.*, 940 F. Supp. 944, 950 (E.D. La. 1996) (relevant market was fast lube franchises); *Collins v. Int'l Dairy Queen, Inc.*, 939 F. Supp. 875, 880 (M.D. Ga. 1996) (relevant market was soft-serve ice cream franchises).

Sufficiency Under Tying Doctrines Generally.-- Plaintiffs' allegations are insufficient to state a tying claim in which the Shell trademark and right to receive gasoline are the tying products. Plaintiffs have not alleged that Defendants have [*637] market power in the gasoline trademark/franchise market generally. Nor do Plaintiffs allege that other gasoline franchises or branded gasoline are now or ever were available to them from other gasoline suppliers (e.g., Texaco, Mobil or Chevron) without similar constraints. Nor do Plaintiffs allege that selling a different brand of gasoline would cost [**30] them less in general, or cost them less specifically because they could use different ICRs, could obtain different credit processing services, or could avoid ICRs at all.

Effect of Contractual Relationships on Antitrust Analysis.-- Plaintiffs complain as to the ICR policy that Defendants' "tying arrangement is forcing Plaintiffs out of business" because Plaintiffs are "locked in" to the ICR policy in order to continue their supply of Shell gasoline. See *id. at 19-21, PP 138-153*. Plaintiffs and Defendants entered into Dealer Agreements which establish contractual relationships akin to a franchisee/franchisor relationship. As a result of this contract, Plaintiffs are obligated to purchase only Shell gasoline.

The "lock in" theory, insofar as Plaintiffs allege harm to themselves, rests entirely on the Supreme Court's opinion in *Kodak*.¹¹ Plaintiffs contend that the Supreme Court in *Kodak* held that antitrust liability may exist when the purchasers of a unique product demonstrate that they are "locked in" to buying tied products. In *Kodak*, the seller, Eastman Kodak Co., sold both complex copiers (and other expensive equipment), as well as aftermarket parts [**31] and repair services. *504 U.S. at 457*. All the equipment and parts were unique to *Kodak* and could not be "interchanged with other manufacturers' goods." *Id. at 456-57*. In the early 1980s, independent entities ("independent service organizations" ("ISOs")) began to provide aftermarket repair services for *Kodak* equipment. The ISOs purchased parts both from *Kodak* and independent original equipment manufacturers ("OEMs"). In 1985 and 1986, *Kodak* instituted several policies in an attempt to destroy the ISOs. *Id. at 458*. First, *Kodak* agreed to sell its replacement parts only to those owners of its equipment who used *Kodak* repair services. *Id.* Second, *Kodak* entered into agreements with the OEMs to limit sales of aftermarket parts to the ISOs. *Id.* As a result, the cost of aftermarket servicing and repairs rose considerably. *Id.*

[**32] The Supreme Court held that the plaintiff ISOs stated a viable Sherman Act § 1 claim in their allegations that *Kodak*'s tie of aftermarket servicing and repairs to the purchase of *Kodak* equipment was illegal. *504 U.S. at 477*.¹² The Supreme Court held that the ISOs § 1 claim could go to a jury even though defendant *Kodak* did not have market power over the tying product, complex copiers. The Court reasoned that the purchaser of a new *Kodak* copier in effect was "locked in" to the purchase of *Kodak*'s unique replacement parts market, over which *Kodak* had a [*638] 100% monopoly. Through its total control of the replacement parts, *Kodak* had the power to manipulate the market for repair services of its copiers. *Id. at 465*. The Supreme Court thus held that plaintiffs had met their summary judgment burden to raise a fact question. The Court then addressed an alternative argument by *Kodak*, that it lacked market power in the copier market (an alternative tying product). The Court held that the lack of power in the tying product market was not dispositive of the tying claim because its prices for after-market goods were limited by the competitive market for the original equipment; *Kodak* contended [**33] that the increase in profits it could earn from higher prices in the after-markets for parts and service "would be offset by a corresponding loss in profits from lower equipment sales as consumers began purchasing equipment with more attractive service costs."

¹¹ Plaintiffs do not make a serious attempt to make typical tying claim allegations, which include contentions about "cross-elasticity of demand between a given product and its substitutes." *United Farmers*, 89 F.3d at 235, n.3 (citing PHILLIP E. AREEDA & DONALD F. TURNER; **ANTITRUST LAW** P 519a (1991)).

¹² The *Kodak* opinion had two discrete segments that addressed different theories of liability by the plaintiffs as to whether *Kodak* possessed sufficient market power in the tying market to sustain a Sherman Act § 1 claim. These segments form alternative bases for the Court's ultimate holding that summary judgment should not have been granted in favor of defendant *Kodak*. Under the first theory, the tying products were the unique replacement parts for the previously purchased *Kodak* copiers and the tied product was repair services for the *Kodak* copiers. *Id. at 462-63, 464-65*. In the second theory, the Supreme Court addressed *Kodak*'s argument that the *Kodak* copiers, expensive items that were not easily replaceable, were the tying products and the tied product again was the repair service. The Court rejected *Kodak*'s contention that the § 1 claim should fail because the company lacked appreciable market power in the copier equipment market. *Id. at 465-79*.

Id. at 465-66. The Supreme Court rejected this argument because, at the time of the consumer's original equipment purchase, the consumer did not have the information necessary to determine the ultimate cost of the tying good, the purchase price of the complicated copiers plus all maintenance costs (service and repairs) over the life of that equipment. Id. at 476. In addition, the Court noted that evidence established that the cost of the ultimate consumer switching the tying product (the copiers) after the initial purchase was prohibitively high. Id. at 477. Thus, the Court held that it was possible that Kodak's attempt to increase overall profits by tying its monopolistic control of aftermarket parts and services to sales of its equipment could constitute an illegal tie, and that the district court's grant of summary judgment in favor of Kodak was improper. Id. at 477-79.

[**34] This Court concludes that the *Kodak* "lock in" theory does not govern Plaintiffs' tying claims in the case at bar. There are material distinctions between the circumstances of a Kodak copier purchaser and Plaintiff lessee-dealers in the instant case. In *Kodak*, there was no long term contractual relationship between the copier purchaser and Kodak. Rather, provision of repair services or parts was an independent transaction between the copier owner (the consumer) and the supplier of the repair services; customers of Kodak equipment did not enter into any contractual obligation to purchase aftermarket service and parts from Kodak. See Kodak, 504 U.S. at 457-58. Indeed, the absence of a required service agreement with Kodak had provided the opportunity to the ISOs to thrive for years. Moreover, integral to the Court's analysis was Kodak's indisputable monopoly on the replacement parts market, one of the tying products, although the replacement parts were not included in the original copier purchase.

In contrast, Plaintiffs at bar have pre-existing and continuing contractual relationships with Defendants. Specifically, each Plaintiff signed a detailed Dealer Agreement [**35] and is obligated to comply with requirements in related documents such as the "Image Excellence Book" that establish a marketing plan prescribed by Defendants. See Plaintiffs' First Amended Complaint, at 11-12, PP 90-93. Plaintiffs are "locked in" to Defendants' ICR policy because of their supply contracts and contractual marketing requirements. It is these agreements that dictate how Plaintiffs are to sell Shell gasoline and grant Defendants the power to dictate policy to Plaintiffs. See Hyde, 104 S. Ct. at 1565 ("There HN13[ is nothing inherently anti-competitive about packaged sales. Only if [buyers] are forced to purchase [the tied] services as a result of the [seller's] market power would the arrangement have anti-competitive consequences." (emphasis added); see also Queen City Pizza, 124 F.3d at 441 (finding *Kodak* inapplicable where the plaintiffs were forced to purchase related products because of contractual requirements); see generally United Farmers, 89 F.3d 233 (5th Cir. 1996)). Plaintiffs' complaints about the ICR Policy challenge the way Defendants require their dealers (i.e., franchises) to market [*639] and sell [**36] the supplier's franchised product. These allegations presume Plaintiffs have an entitlement to Shell gasoline outside the relationship created by the Dealer Agreement.

Plaintiffs arguments attack the essence of the parties' contractual relationship. Plaintiffs artificially attempt to separate the means of delivery of the Shell gasoline to retail customers from the franchise relationship. Receipt and processing of retail customers' payments for retail gasoline purchases is an integral part of a gasoline dealer's function. Plaintiffs' challenge to Defendants' ICR policy amounts to an attack on the scope of parties' franchise relationship, and thus sounds in contract, or conceivably tort, not antitrust. The relationship between Plaintiffs and Defendants here is materially different from the circumstances in *Kodak* and its progeny.¹³ *Kodak* does not resuscitate life into Plaintiffs' otherwise insufficient tying allegations.

[**37] This conclusion is consistent with two circuit court rulings. First, in *United Farmers*, the Fifth Circuit indicated skepticism of antitrust claims arising solely from contractual relationships. In that case, the United Farmers Agents Association, Inc. ("UFAA") and insurance agents selling Farmers insurance sued Farmers, alleging that Farmers

¹³ Plaintiffs' theory that Shell gasoline is tied to the ICR policy arguably could be analogized to the *Kodak* parts/services tie; however, Plaintiffs' tying claim would not survive under this portion of the *Kodak* reasoning. In *Kodak*, the aftermarket parts (the tying product) were indisputably unique and Kodak had a monopoly in that market. Plaintiffs' contention that Shell gasoline *per se* (or even the Shell trademark) is a unique product lacks merit under antitrust doctrines. Neither Shell gasoline nor the Shell trademark are legally recognized unique products for antitrust purposes. See discussion *infra*, 75 F. Supp. 2d 626, 1999 U.S. Dist. LEXIS 20352 at *43-44. Plaintiff lessee-dealers are restricted to Shell gasoline and the Shell trademark because of their contractual relationships with Defendants, not because the product or trademark is unique under the law.

illegally tied the sale of specifically configured computers to its sale of electronic policyholder information. See *United Farmers*, [89 F.3d at 235](#). The Fifth Circuit held, in affirming a district court's grant of summary judgment in favor of Farmers, that the relevant market was insurance sales and that the UFAA did not present evidence that Farmers had market power in the insurance sales market. *Id. at 237*.¹⁴

[**38] The court of appeals in *United Farmers* further concluded that, even if it assumed the narrower tying product market advocated by the plaintiffs, UFAA had failed to offer any evidence concerning the supra-competitive price of the tied product, the specially configured computers. *Id.* The Fifth Circuit stated that:

This suit is essentially an intracompany dispute over how to run a computer system, not a valid claim under antitrust laws. [HN14](#) Economic power derived from contractual arrangements such as franchises or in this case, the agents' contract with Farmers, has nothing to do [[*640](#)] with market power, ultimate consumers' welfare, or antitrust.

[89 F.3d at 236-37](#) (emphasis added) (citation omitted).¹⁵

[**39] The limitation that franchise agreements impose upon antitrust claims is also addressed by the Third Circuit in *Queen City Pizza*. In *Queen City Pizza*, the plaintiffs were eleven Domino's Pizza, Inc. franchisees and the International Franchise Advisory Council, Inc. (a corporation formed to protect Domino's franchisees' common interests). As franchisees of Domino's, plaintiffs were required to sign a franchise agreement which provided that Domino's "may in [Domino's] sole discretion require that ingredients, supplies, and materials . . . be purchased directly from us or from approved suppliers or distributors." [124 F.3d at 433](#). The plaintiffs contended that years after the inception of plaintiffs' franchise agreements, Domino's initiated policies designed to limit the plaintiffs' ability to purchase less expensive ingredients and supplies from independent sources. *Id. at 434*. In response to Domino's actions, plaintiffs asserted various antitrust causes of action, including a tying claim alleging that Domino's

¹⁴ Nothing in the *United Farmers* holding indicates that the Fifth Circuit would disagree that the relevant market in the case at bar is retail gasoline franchises generally or all branded gasoline, and not the markets as defined by Plaintiffs, the Shell trademark or Shell gasoline *per se*. In *United Farmers*, the Fifth Circuit pointed out that the plaintiffs had failed to allege that the Farmers' insurance products were unique or that consumers would pay more for that coverage. See [89 F.3d at 236](#). Since the plaintiffs had made no such allegations, there was no need for the court of appeals to analyze the next issue, namely, whether those allegations were legally sufficient to define a relevant market. There is no indication that the court of appeals intended to engage in this analysis. See and compare *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, [959 F.2d 468, 479-80 \(3d Cir. 1990\)](#). Therefore, this Court concludes that the passing comment concerning lack of evidence of uniqueness of Farmers' insurance products is not meaningful precedent or support for Plaintiffs' claims that the Shell brand gasoline or trademark is a relevant tying product or that Plaintiffs' bald allegations of uniqueness are legally sufficient.

¹⁵ The alternative holding in *United Farmers* also is consistent with the result reached here. The court of appeals, after rejecting the plaintiffs' proposed relevant market (electronic access to Farmers' policy information), assumed the validity of that proposed relevant market and held that *Kodak* did not apply. See [89 F.3d at 237](#). The court of appeals then decided, using for the sake of discussion the relevant product market of "electronic access," that there was insufficient evidence of Farmers' market power in the tying market because the insurance market was so competitive. Engaging in a fact specific inquiry, the court held that the plaintiffs had failed to produce evidence of meaningful price discrimination or other evidence of market power. See *id. at 237*.

The allegations in Plaintiffs' First Amended Complaint in the instant case command similar conclusions. Plaintiffs' proposed tying product relevant markets, i.e., Shell gasoline or trademark, are insufficient since a single brand of gasoline or a gasoline dealership franchise cannot constitute a relevant tying product. See *infra* [75 F. Supp. 2d 626, 1999 U.S. Dist. LEXIS 20352](#) at *43-44. Second, like in *United Farmers*, *Kodak* does not apply to the facts at bar. Third, the logical inference from Plaintiffs' own allegations is -- contrary to Plaintiffs' intentions -- that there is a very competitive market for branded gasoline, the primary alleged tying product. Finally, Plaintiffs have made no allegations as to the existence of other gasoline brand dealerships (the true competitors of Plaintiffs) being provided with more favorable terms vis a vis ICRs and related credit processing.

illegally required franchisees to buy supplies and ingredients as a condition of obtaining fresh dough from Domino's. *Id. at 436.*¹⁶

[**40] The Third Circuit upheld the district court's [Rule 12\(b\)\(6\)](#) dismissal of plaintiffs antitrust claims. The court of appeals rejected the argument advanced by the plaintiffs that the relevant market was Domino's approved ingredients. *Id. at 438.* In so doing, the Third Circuit stated that "no court has defined a relevant product market with reference to the particular contractual restraints of the plaintiff." *Id.* (citing [Mozart Co. v. Mercedes-Benz of North America, 833 F.2d 1342 \(9th Cir. 1987\)](#)). The court of appeals explicitly found *Kodak* inapplicable and reiterated that the plaintiffs were involved in contractual franchise relationships with defendant: "Franchising is a bedrock of the American economy . . . we do not believe the antitrust laws were designed to erect a serious barrier to this form of business organization." [Queen City Pizza, 124 F.3d at 441](#). The appeals court concluded its distinction of *Kodak* by stating:

Unlike the plaintiffs in *Kodak*, plaintiffs here must purchase products from Domino's Pizza not because of Domino's market power over a unique product, but because they are bound by contract [*641] ... plaintiffs' [**41] remedy, if any, is in contract, not under the antitrust laws.

[Id. at 441.](#)

The Third Circuit's rationale concerning contractual power and antitrust claims in *Queen City Pizza* is probative in the case at bar. Plaintiffs, by entering into their Dealer Agreements, were aware that Defendants would control the gasoline product and many aspects of the method of sales by Plaintiffs. Plaintiffs attempt to distinguish *Kodak* from *Queen City Pizza* on the grounds that the Domino's franchisee plaintiffs, unlike those in *Kodak* and the present case, were aware of the contractual provisions that necessitated purchase of the tied product when they entered the franchise contract. See Plaintiffs' Response, at 11 & n.5. The Court is unpersuaded. The Third Circuit squarely held that franchise agreements do not give rise to antitrust liability. Any discussion of the knowledge of the franchisees in *Queen City Pizza* is ancillary to this main point. Moreover, the ties in issue in *Queen City Pizza* were imposed after the parties had entered into the initial franchise agreements. See [Queen City Pizza, 124 F.3d at 434.](#)

¹⁷

[**42] As stated in *United Farmers*, "economic power derived from contractual arrangements such as franchisees . . . has nothing to do with market power, ultimate consumers' welfare, or antitrust." See [United Farmers, 89 F.3d at 236-237](#). The only reason that Shell gasoline is "unique" for the Plaintiffs (lessee-dealers) is that they have contracted to sell Shell gasoline. Plaintiffs' tying claim complaining of injury to Plaintiffs as lessee-dealers therefore does not fit within the wrongs antitrust laws were designed to address.¹⁸

In summary, the Court holds that, in the case at bar, Plaintiffs' allegations [**43] are insufficient to escape the constraints of the Dealer Agreements, Plaintiffs' voluntary contractual arrangements with Defendants.

¹⁶ The franchise contract did not specifically mandate that the plaintiffs purchase the "dough" from Domino's. Rather, defendant Domino's required the plaintiff franchisees to purchase various other ingredients. The plaintiffs contended that Domino's allegedly increased prices of items it controlled and thus rendered unprofitable plaintiffs' efforts to save costs by making their own dough.

¹⁷ There is one district court case in this circuit that has declined to apply the rationale of *Queen City Pizza*. See [Wilson v. Mobil Oil Corp., 940 F. Supp. 944, 950 \(E.D. La. 1996\)](#). Responding to the defendant's claims that *Kodak* was inapplicable in the franchise context, the district court rejected the *Queen City Pizza* district court's holding, [922 F. Supp. 1055 \(E.D. Pa. 1996\)](#), held that *Kodak* was applicable in a franchise situation, and that there was no "principled distinction . . . between the franchise context and the durable equipment market involved in *Kodak*." [Wilson, 940 F. Supp. at 950](#). This Court respectfully disagrees with the conclusions in *Wilson*.

¹⁸ There is a dearth of appellate analysis on the limits of *Kodak* or the effect of franchise agreements to antitrust claims. Plaintiffs have not proffered legal authorities that support their theories in light of longstanding antitrust principles. See [Hyde, 466 U.S. 2, 15-16, 80 L. Ed. 2d 2, 104 S. Ct. 1551](#); [Town Sound and Custom Tops, 959 F.2d 468 at 475](#); [Breaux Brothers, 21 F.3d 83 at 86](#).

Lack of Allegations of Lessening of Competition in Tied Product's Market.-- Kodak also fails to assist Plaintiffs because Plaintiffs' First Amended Complaint does not allege that Defendants' tying arrangement had an anti-competitive effect on the ICR market or the market for bank processing services of ICR transactions. Thus, Plaintiffs fail as a matter of law to allege an illegal tying claim. Kodak eliminates the need to plead market power in the tying product, but does not excuse failure of a plaintiff to allege an effect on competition in the tied product's market.

Examples of Plaintiffs' allegations are that "as a result of Shell's mandates regarding ICR financing, Plaintiffs have been forced to pay a higher lease amount for the ICR machines than they would have incurred had they been able to purchase them outright or lease them from another party." Plaintiffs' First Amended Complaint, at 22, P 151. See also *id. at 18, PP 130, 131*. Plaintiffs in their Response state that "in the absence of a tie, plaintiffs would have selected [**44] different banks with more favorable rates." Plaintiffs' Response, at 12. These allegations are legally insufficient.

Indeed, Plaintiffs' allegations have the unintended consequence of demonstrating [*642] that the markets for ICRs and credit card processing services have not been affected by Defendants' ICR policy. Plaintiffs believe they could find comparable ICR products and services at a lower price from third party sources. Plaintiffs thus indicate that the market for those products and services experiences competition. Therefore, the Court concludes that Plaintiffs have failed to allege an anti-competitive effect on the markets for the tied products.

5. Retail Consumers of Shell Gasoline

Insufficient Allegations Concerning Tying Product Market.-- Plaintiffs allege a second illegal tying theory: they allege that Defendants' policies harm retail gasoline purchasers, the ultimate gasoline consumer. In this context, Plaintiffs contend that the tying product is Shell gasoline.

"Market [HN15](#)[¹⁵] power is a necessary prerequisite to an illegal tie." See [United Farmers](#), 89 F.3d at 235. [HN16](#)[¹⁶] In order to show market power, a plaintiff first must define the relevant market. [**45] While the exact contours of the relevant market depend upon factual determinations, the antitrust plaintiff in a tying claim at a minimum must *allege* a relevant market. See [Queen City Pizza](#), 124 F.3d at 436 (there is no "per se prohibition against dismissal of antitrust claims for failure to plead a relevant market under [Fed. R. Civ. P. 12\(b\)\(6\)](#)"). [HN17](#)[¹⁷] A key in determining the relevant market includes an analysis of the cross-elasticity of demand for the product in question and all of its potential substitutes. In other words, "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." *Id.* (quoting [Brown Shoe Co.](#), 370 U.S. at 325).

Plaintiffs' allegations as to the retail gasoline consumer fail as a matter of law for two reasons. First, the only tying product as to which Plaintiffs plead a relevant market in which Shell has market power is Shell gasoline, which Plaintiffs allege is "unique" because of "special patented additives in which Shell has market power." Plaintiffs' First Amended Complaint, at 19, P 139; at [**46] 21, P 147. Plaintiffs claim that Defendants' actions "harm[] the ultimate consumer who must endure higher prices to get the unique Shell gasoline product." Plaintiffs' First Amended Complaint, at 20, P 142; at 21, P150. In addition, Plaintiffs allege that the tying product is "Shell's trademark." [Id. at 19, PP 138, 139](#).

Plaintiffs' definition of the tying product market makes no reference to cross-elasticity of demand. Plaintiffs' allegations amount only to the contention that consumers may prefer Shell brand gasoline. Plaintiffs do not allege that there are no close substitutes for Shell gasoline. [HN18](#)[¹⁸] A single product, rarely constitutes a market for antitrust purposes, even if that product is a trademarked product. See [Town Sounds and Custom Tops, Inc.](#), 959 F.2d at 479. In *Town Sounds* the Third Circuit held that "a [HN19](#)[¹⁹] prestigious trademark is not itself persuasive evidence of economic power because a trademark, unlike a patent, protects only the name or symbol and not the product itself." *Id.* In response to an attempt to define the relevant market in terms of a single trademarked product, the Seventh Circuit stated that:

75 F. Supp. 2d 626, *642L¹999 U.S. Dist. LEXIS 20352, **46

Not even the most zealous **[**47]** antitrust hawk has ever argued that Amoco gasoline, Mobil gasoline, and Shell gasoline are three separate product markets, yet that absurd result would follow if we recognized Olympian trademarked generator sets as a separate market in this case.

[Generac Corp. v. Caterpillar Inc., 172 F.3d 971, 977 \(7th Cir. 1999\).](#)

Therefore, the Court concludes with respect to the retail consumer theory that Plaintiff has failed to plead a legally viable relevant market or to plead that Defendants possessed market power over a viable relevant product market.

No Effect on Tied Market.-- Plaintiffs' tying claim of alleged harm to retail consumers **[*643]** also is insufficient because Plaintiffs fail to allege that Defendants' ICR policy creates an adverse effect on a retail consumer market for any tied product. Plaintiffs, as noted above, do not make allegations concerning impact on the markets for ICRs and credit processing services.

Even if Plaintiffs alleged a legally cognizable market from the retail gasoline consumers' perspective, their theory fails since Plaintiffs do not allege that there is a tied product or any tying agreement as to these consumers. The Supreme **[**48]** Court has stated that [HN20](#) a tying arrangement must link "two distinct markets for products that [are] distinguishable in the eyes of buyers." [Hyde, 466 U.S. at 20.](#) [HN21](#) There can be no tying arrangement unless there is a "distinct demand" for the tied product. See [Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 477 \(7th Cir. 1988\)](#). One indicator of this distinct demand for the tied product is whether consumers make specific requests for it. *Id.* Plaintiffs have not alleged --and cannot allege -- that there is a distinct demand among retail gasoline buyers for a particular brand of ICR or for a certain bank's processing services separate from the gasoline purchase. Potential choices in ICRs or credit processing services are apparent only to the dealers.

Indeed, Plaintiffs' own allegations imply that for the gasoline consumer, there is only one product, Shell gasoline. Plaintiffs allege that the price of that *gasoline* is the dispositive factor for the retail consumer. Plaintiffs' First Amended Complaint, at 20, P 142; at 20-21, P 145; at 22, P 153. From the consumer's perspective, the tying product, gasoline, and the tied products, ICRs **[**49]** and related credit processing services, are offered in the same transaction. Plaintiffs have not alleged that gasoline consumers make (or seek to make) a separate choice as to which ICR or related credit service to use. See [Roy B. Taylor Sales, 28 F.3d at 1384](#) ("a foreclosure of choice to an ultimate consumer appears to be the principal key to a tie that is illegal per se").¹⁹

[50]** The Court thus concludes that Plaintiffs have failed to allege a *per se* unlawful tying arrangement for either Plaintiffs as the consumers, or for Plaintiffs' retail consumers. Therefore, Defendants' Motion to Dismiss Plaintiffs' *per se* illegal tying claims under [§ 1](#) of the Sherman Act in Count I of Plaintiffs' First Amended Complaint should be granted.

6. Rule of Reason Analysis on Tying Claims

[HN23](#) Claims that do not state a *per se* violation are analyzed under the rule of reason. See [United Farmers, 89 F.3d at 236 n.2](#) (citing [Hyde, 466 U.S. at 29](#)). Using a rule of reason analysis, this Court reaches the same conclusion as set forth above on the *per se* analysis; Plaintiffs have failed to state a viable tying claim.

[HN24](#) In a case involving the rule of reason, the plaintiff must demonstrate that the defendants' behavior "unreasonably restrained competition" (See [Hyde, 466 U.S. at 29](#)), or "suppresses competition" ([Nat'l Society of Prof'l Engineers v. United States, 435 U.S. 679, 691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 \(1978\)](#)). In a tying case, the

¹⁹ Plaintiffs may attempt to bolster their contention that there is an unlawful tie because the two products (gasoline and ICR services) are offered together and therefore the consumer is induced to use them together for convenience. This argument however is futile. [HN22](#) Offering convenience to the consumer does not demonstrate an unreasonable restraint on competition. See [Roy B. Taylor Sales, 28 F.3d at 1385](#) (citing [Hyde, 466 U.S. at 29-30](#)) ("The fact that consumers might buy goods because of a convenience created by a tie does not suffice as evidence of an unreasonable restraint on competition.").

rule of reason test requires an additional "inquiry into the actual effect of the [tying [**51](#)] arrangement] on competition in the market for the tied good." [Breaux Brothers Farms Inc. v. Teche Sugar Co., 21 F.3d 83, 88 \(5th Cir. 1994\)](#) (citing [Hyde, \[*644\] 466 U.S. at 29](#)). As explained in the foregoing analysis, Plaintiffs have not alleged any effect on the market for ICRs and credit processing services. Therefore, the Court concludes that under a rule of reason analysis, Plaintiffs have failed to state an illegal tying claim under the Sherman Act [§ 1](#).

7. Clayton Act [§ 3](#) Analysis

Defendants' Motion seeks dismissal of Plaintiffs' Clayton Act [§ 3](#) tying claim alleged in Count II of their First Amended Complaint. Plaintiffs allege in Count II that [§ 3](#) is violated by the ICR policy generally, but they focus more specifically on the requirement that Plaintiffs lease ICRs of Defendants' choice. See Plaintiffs' First Amended Complaint, at 21-22, PP 147, 148, 151.²⁰ Plaintiffs allege that although Defendants may not produce the ICRs in question, they lease the ICRs "to Plaintiffs at inflated monthly fees." Plaintiffs Response at 14. Plaintiffs have not responded to the Motion with any briefing pertaining to [§ 3](#).

[\[**52\]](#) The Clayton Act [§ 3](#) provides in pertinent part:

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, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities 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](#) (emphasis added). [HN26](#)[ Clayton Act [§ 3](#) applies only when both the tying and tied products are goods. See [Marts v. Xerox, 77 F.3d 1109, 1113 n.6 \(8th Cir. 1996\)](#); [Crossland v. Canteen Corp., 711 F.2d 714, 719 n.1 \(5th Cir. 1983\)](#). Tying arrangements that involve services are not governed by [§ 3](#). See [Advance Business Sys. and Supply Co. v. SCM Corp., 415 F.2d 55, 61 \(4th Cir. 1969\)](#).

Plaintiffs [\[**53\]](#) attempt to fit within the Clayton Act [§ 3](#) rubric by contending that the tied "goods" are Defendants' selection of ICRs. As a practical matter, however, the required lease of Defendants' choice of ICRs is part and parcel of the "pay at the pump" service that is mandated by Defendants for the retail customers at Shell gasoline stations. ICRs are merely the means to implement the credit purchases in issue. Indeed, Plaintiffs in Count II re-allege all prior allegations in the First Amended Complaint, and then state first and foremost that "Shell's practice of coercing Plaintiffs to agree to lease ICRs and forcing Plaintiffs to agree to utilize only Shell's chosen bank to process credit card transactions constitutes an illegal tying arrangement as is prohibited by [§ 3](#) of the Clayton Act." [Id. at 21, P 147](#). When read in context, Plaintiffs' tying claim in Count II thus involves the coerced use of services, not merely the purchase or lease of goods. Plaintiffs' Count II tying claim is therefore outside the scope of the Clayton Act [§ 3](#).

In any event, analysis of the sufficiency of the pleadings under the Clayton Act [§ 3](#) is virtually the same as under [§ 1](#) of the Sherman Act. See [\[**54\]](#) [Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc., 138 F.3d 869 \(11th Cir. 1998\)](#) ("As our predecessor court made clear, the two statutory theories of liability are substantively synonymous." (citing [Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1037 \(5th Cir. Unit A 1981\)](#))). Thus, to the extent the tied product in Plaintiffs' Count [\[*645\]](#) II tying claim involves "goods" and therefore properly

²⁰ Except for isolated words, such as Plaintiffs' defining the tied product as ICRs, [id. at 21, P 147](#), Plaintiffs' Clayton Act [§ 3](#) claim parrots Count I, their Sherman Act [§ 1](#), claim, which defines the tied product in part as the Defendants' mandated credit processing services.

is governed by the Clayton Act [§ 3](#), the Court nevertheless concludes that Plaintiffs have failed to state a legally cognizable claim for the same reasons set forth above in regard to the Sherman Act [§ 1](#) tying claim.

Since Plaintiffs have failed to allege a viable illegal tying claim under either possible theory, Counts I and II of Plaintiff's First Amended Complaint must be dismissed.

B. Robinson-Patman Act Illegal Price Discrimination

Plaintiffs also allege that Defendants have engaged in illegal price discrimination under § 2(a) of the Clayton Act as amended by the Robinson-Patman Price Discrimination Act, [15 U.S.C. § 13\(a\)](#) (collectively, the "Robinson-Patman Act").²¹ [\[**56\]](#) To establish a violation of the Robinson-Patman [\[**55\]](#) Act, each Plaintiff must prove the following four elements:

- (1) that one or more of Defendants' sales of gasoline in issue as to that Plaintiff was made in interstate commerce;
- (2) that the gasoline supplied by Defendants directly or through jobbers to stations competing with the particular Plaintiff was of the same grade and quality as the gasoline sold to that Plaintiff;
- (3) that Defendants discriminated in price as between the identified jobber (or other competing buyer) and the Plaintiff in issue, and
- (4) that the discrimination had a prohibited effect on competition.

See [Texaco Inc. v. Hasbrouck](#), 496 U.S. 543, 555, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990); [15 U.S.C. § 13\(a\)](#). In addition, to recover damages, a Plaintiff must prove the extent of his actual injuries. *Id.*²²

Defendants basically contend that Plaintiffs' Robinson-Patman Act claims fail because Plaintiffs' purchases of Shell gasoline do not take place "in commerce." Shell gasoline sold to each Plaintiff, Defendants argue, is produced in the same state in which that Plaintiff is located. The Court will address Plaintiffs' various responsive arguments in turn.

1. Interstate Commerce Requirement

Legal Standards [\[**57\]](#) **Governing Interstate Commerce Element**-- Analysis of these arguments in context is necessary. [HN29](#)[↑] The Robinson-Patman Act has a stringent interstate commerce requirement. See [McCallum v. City of Athens, Ga.](#), 976 F.2d 649, 657-58 (11th Cir. 1992) (adopting the Fifth Circuit standards); [Littlejohn v.](#)

²¹ These claims allege violations of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which provides:

[HN27](#)[↑] 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 either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . where the effect of such competition may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injury, 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\(a\)](#).

²² Plaintiffs argue that this is a "secondary-line" Robinson-Patman Act claim. "In [HN28](#)[↑] order to establish secondary-line price discrimination 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." [George Haug Co., 148 F.3d at 141](#)(citing [Texaco Inc. v. Hasbrouck](#), 496 U.S. 543, 556, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990)).

Shell Oil Co., 483 F.2d 1140, 1144 (5th Cir. 1973) (*en banc*) ("The language of the act -- requiring discriminatory sales be 'in commerce' -- is far narrower in scope than [*646] the 'effect on commerce' test applicable under the Sherman Antitrust Act."); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 208 (5th Cir. 1969) (same); Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir. 1965). **HN30**[¹⁸] Sales that merely "affect" interstate commerce do not meet the Robinson-Patman Act "in commerce" standard. See Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195, 42 L. Ed. 2d 378, 95 S. Ct. 392 (1974) ("The jurisdictional requirements of [the Robinson-Patman Act] cannot be satisfied merely by showing that allegedly anti-competitive acquisitions and activities affect commerce.").

HN31[¹⁹] In contrast with the [*58] Sherman Act, in which Congress exercised "the utmost extent of its Constitutional power in restraining trust and monopoly agreements," United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558, 64 S. Ct. 1162, 1176, 88 L. Ed. 1440 (1944), "the distinct 'in commerce' language of the Clayton and Robinson-Patman Act[s] . . . denote[] only persons or activities within the flow of interstate commerce -- the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer," Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195, 95 S. Ct. 392, 398, 42 L. Ed. 2d 378 (1974). **HN32**[²⁰] Claims under the Robinson-Patman Act must be predicated on the occurrence of an interstate sale of the relevant commodity. See S & M Materials Co. v. Southern Stone Co., 612 F.2d 198, 200 (5th Cir. 1980) ("the cases establish that the state of being 'in commerce' under § 2(a) [of the Clayton Act] requires physical movement of the *relevant product* across a state line") (emphasis added).

McCallum, 976 F.2d at 655-56 (footnote omitted); accord, [*59] Godfrey v. Pulitzer Publishing Co., 161 F.3d 1137, 1141 (8th Cir. 1998); Littlejohn, 483 F.2d at 1142, 1143-44; Bacon v. Texaco, Inc., 503 F.2d 946 (5th Cir. 1974), cert. denied, 420 U.S. 1005, 43 L. Ed. 2d 763, 95 S. Ct. 1447 (1975); Scranton Construction Co. v. Litton Indus. Leasing Corp., 494 F.2d 778 (5th Cir. 1974).

Interstate Commerce Analysis.-- Defendants' argument is founded on the factual assertion that the gasoline each Plaintiff resells at its retail stations is manufactured in the same state in which that Plaintiff is located. The Court is restricted to a review of Plaintiffs' First Amended Complaint. See Lovelace, 78 F.3d at 1017-18. None of the seventy-three Plaintiffs in this case has pleaded with specificity a source of supply of gasoline. Nor has any Plaintiff identified the jobber or other Shell gasoline station with which that Plaintiff competes, which that Plaintiff contends receives discriminatory gasoline prices from Defendants. The Court previously has directed Plaintiffs to address these factual matters through Defendants' interrogatories authorized [*60] by the Court at its pretrial conferences.

Nevertheless, since the parties have fully briefed their legal positions on the Robinson-Patman Act's jurisdictional "in commerce" element and this issue is a threshold matter, the Court will analyze the legal standards in light of the pending allegations.

The foregoing standards dictate that Plaintiffs who live in the same state in which Defendants refine the gasoline supplied to both those Plaintiffs *and* to the jobbers or others whom Plaintiffs contend receive favored pricing do not have a viable Robinson-Patman Act claim because they cannot meet the jurisdictional interstate commerce element.²³ These Plaintiffs, in recognition of this problem, assert several theories in an attempt to salvage their Robinson-Patman Act claims. The Court will address these arguments in turn.

[*61] [*647] Plaintiffs first contest Defendants' jurisdictional argument by contending that all Plaintiffs, regardless of their wholesale suppliers' locations, satisfy the interstate commerce element because Plaintiffs sell Shell gasoline to retail customers whose vehicles thereafter travel across state lines.²⁴ **HN62**[²⁵] This argument is rejected.

²³ Defendants do not dispute that the Robinson-Patman Act's "in commerce" requirement is met for a Plaintiff that purchases wholesale gasoline from a supplier located in a different state from that Plaintiff.

²⁴ Plaintiffs allege that:

Shell's sale of gasoline to jobbers and lessee-dealers occur "in commerce," or in the "uninterrupted flow of commerce" as the product, gasoline, crosses state lines either *before arriving* at the seller's location, or *after leaving* the buyer.

HN33[] Retail goods delivered from out of state to an in-state buyer who then re-sells the goods to retail customers generally "cease to be in the flow of interstate commerce" when the goods reach the in-state retailer. *Cliff Food Stores, Inc., 417 F.2d at 209.*²⁵ Plaintiffs' argument concerning Plaintiffs gasoline sales to retail customers therefore cannot satisfy the "in commerce" requirement of the Robinson-Patman Act.

Plaintiffs' "retail sales" jurisdictional argument fails also because the retail sales by Plaintiffs to consumers are not the transactions that Plaintiffs claim are discriminatory. The Fifth Circuit has held that "under **HN35**[] the terms of section 13(a) [of the Robinson-Patman Act] . . . at least one of the sales alleged to be discriminatory must actually be in interstate commerce." *Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 208 (5th Cir. 1969).* [****63**] In *Cliff Food Stores*, the court of appeals reaffirmed its observation in *Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir. 1969)*, cert. denied, 396 U.S. 901, 24 L. Ed. 2d 177, 90 S. Ct. 212 (1969),²⁶ that:

HN36[] In order to come within the provisions of the Robinson-Patman Act, the (plaintiff) must demonstrate that the discriminatory sales were "in commerce." . . . Thus, the Robinson-Patman Act is applicable only where the allegedly discriminatory transactions took place in interstate commerce. That is, ". . . at least one of the two transactions which, when compared, generate a discrimination must cross a state line."

Cliff Food Stores, Inc., 417 F.2d at 208-09. Plaintiffs' Robinson-Patman Act claims center wholly on discriminatory wholesale sales by Defendants. In order to satisfy the jurisdictional requirement of the Robinson-Patman Act, Plaintiffs must allege an interstate wholesale sale of gasoline. Plaintiffs have not done so. Plaintiffs' attempt to satisfy the interstate commerce element of their Robinson-Patman Act claim by referring to Plaintiffs' own retail sales is futile.

[**64] Plaintiffs secondarily attempt to satisfy the "in commerce" requirement by arguing that the additives in Shell gasoline travel through interstate commerce prior to being blended into Defendants' gasoline.²⁷ [****65**] This argument ignores the Fifth Circuit's longstanding rule that **HN37**[] the mere interstate transportation of ingredients used to make a product that is sold intrastate does not satisfy the jurisdictional requirements of the Robinson-Patman Act. See *Bacon v. I*6481 Texaco, Inc., 503 F.2d 946, 948 (5th Cir. 1974)* (in a case where the sales of gasoline were in issue, the interstate movement of crude oil prior to being refined into the gasoline was held insufficient)²⁸; *Scranton Construction Co., Inc. v. Litton Industries Leasing Corp.. 494 F.2d 778 (5th Cir. 1974)*

Plaintiffs' First Amended Complaint, at 10, P 86 (emphasis added).

²⁵ The Fifth Circuit noted that there are limited exceptions to this rule. **HN34**[] Retail goods remain part of the flow of commerce in only three situations:

- (1) The goods are purchased upon the order of a customer with the definite intention that the goods are to go at once to the customer;
- (2) The goods are purchased by the retailer to meet the needs of a specified customer pursuant to some understanding with the customer; and
- (3) The goods are purchased by the retailer based on the anticipated needs of a specific customer.

Cliff Food Stores, Inc., 417 F.2d at 210. None of these exceptions are alleged to apply in this case.

²⁶ The *Hiram Walker* case was cited with approval by the Supreme Court in *Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200* & n.17, *42 L. Ed. 2d 378, 95 S. Ct. 392 (1974)*.

²⁷ Plaintiffs state that "the additives are made and produced throughout the United States and added to the end product during refining . . ." Plaintiffs' First Amended Complaint, at 10, P 86.

²⁸ The Fifth Circuit held:

The extensive process involved in refining crude oil into gasoline results in the alteration of the nature of the product. No 'flow of commerce' ever took place as to the gasoline which is the subject of this claimed wrong. Therefore, the prior travels of the atoms and molecules of crude oil from which it came are not determinative of the inter- versus intra-state nature of the end product refined therefrom.

(holding that the "interstate movement of mere ingredients" does not suffice to satisfy the "in commerce" requirement); accord [McCallum, 976 F.2d at 657-58.](#)

Plaintiffs' "ingredients" interstate commerce argument also fails because Plaintiffs focus on the wrong transactions. As discussed above, each Plaintiff, to state a legally viable claim, must allege that one of the discriminatory wholesale transactions involving refined Shell gasoline was in interstate commerce. See, e.g., [Cliff Food Stores, Inc., 417 F.2d at 208.](#)

Last, Plaintiffs vaguely assert that Defendants' interstate promotions and advertising of Shell gasoline satisfies the "in commerce" requirement. See Plaintiffs' Response, at 16. This argument is rejected for several reasons. [**66] First, there is no such allegation in Plaintiffs' First Amended Complaint.²⁹ Even if Plaintiffs had included such an allegation in their First Amended Complaint, Plaintiffs cite no case law for the proposition that interstate advertising and promotion somehow convert an intrastate sale of gasoline to an interstate transaction.

[**67] Plaintiffs' reliance on [Shreveport Macaroni Mfg. Co., v. Fed'l Trade Comm'n, 321 F.2d 404 \(5th Cir. 1963\)](#), is misplaced. In that case, the Fifth Circuit held that the acts of advertising or promotion were part of the discrimination in issue (which actually were advertising or promotion allowances to two customers) and the allowances themselves were "in commerce." The court of appeals noted that the allowance payments could be said to have been derivative of the interstate sales. [Id. at 408-09](#) (citing and discussing ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962), at 393). See generally [McCallum, 976 F.2d at 655-56](#) (footnote omitted); [Littlejohn, 483 F.2d at 1142, 1143-44; Bacon, 503 F.2d at 948.](#) In contrast, Plaintiffs at bar complain of Defendants' wholesale distribution practices. Therefore, Defendants' advertising efforts vis a vis retail sales of Shell gasoline are irrelevant to Plaintiffs' Robinson-Patman Act claim.

Interstate Commerce Conclusion.-- Since the legal standards are clear, the Court directs the parties to apply this ruling in good faith to each Plaintiff's [**68] claims as soon as the necessary factual information is available to the parties through the early discovery authorized by the Court. Plaintiffs presumably will agree to dismissal of individuals who do not meet the jurisdictional requirement. Disputes as to any particular Plaintiff's standing in connection with these jurisdictional principles will be resolved by the Court through a summary judgment motion by Defendants or at trial.

[*649] 2. Lessening of Competition Element of Plaintiffs' Robinson-Patman Claim

Defendants argue that Plaintiffs have not, and cannot, allege a substantial lessening of competition in the gasoline market and, therefore, Plaintiffs' Robinson-Patman Act claim must fail. Defendants' Motion, at 18 (citing [M.C. Manufacturing Co. v. Texas Foundries, Inc., 517 F.2d 1059, 1066 \(5th Cir. 1975\)](#), cert. denied, 424 U.S. 968, 47 L. Ed. 2d 736, 96 S. Ct. 1466 (1076); [Oreman Sales, Inc. v. Matsushita Electric Corp., 768 F. Supp. 1174, 1184 \(E.D. La. 1991\).](#) Defendants assert -- without citation of any legal authority or explicit reasoning -- that "Plaintiffs' First Amended Complaint . . . is fatally defective because plaintiffs [**69] have not, indeed cannot, allege facts which would show that Shell's sale of gasoline to 'jobbers' at a lower price than to plaintiffs has or is likely to have a substantial anti-competitive impact on the sale of gasoline to the public. . . . The most that plaintiffs' Section 2(a) claim alleges is that plaintiffs have been injured, not that there has been injury to competition." Defendants' Motion,

[Bacon, 503 F.2d at 948.](#)

²⁹ Plaintiffs refer to Defendants' advertising only in passing in their "Background Facts" allegations:

Consumers are generally willing to pay more for Shell brand gasoline because of Shell's image as conveyed through Shell's advertising campaigns and by the overall appearance of Shell-branded stations as well as Shell's purported superior gasoline product which includes Shell's additive package thereby creating a Shell gasoline market.

First Amended Complaint, at 11, P 88. Plaintiffs merely assert baldly in their Response that "interstate promotions and advertising demonstrate that Shell views the relevant markets as interstate in nature." Plaintiffs' Response, at 16. This allegations is not fleshed out and the Court can only surmise its meaning.

at 18-19. Defendants further assert that Plaintiffs' allegations demonstrate that the sale of gasoline is a "fiercely competitive business." *Id. at 19.*³⁰ Defendants' argument appears to be that Plaintiffs (independent retail gas stations who receive deliveries of gasoline directly from Defendants) are in a functionally different position (*i.e.*, on a different level in the chain of distribution) from the jobbers (distributors/wholesalers) that Defendants supply with gasoline in bulk, and therefore any harm to Plaintiffs caused by Defendants' lower prices to the jobbers does not injure competition since Plaintiffs do not compete with the jobbers at the wholesale level of distribution.

[**70] Analysis of the adequacy of the lessening of competition issue necessitates an understanding of the elements of a Robinson-Patman Act claim and a review of recent Supreme Court and appellate authority that has altered the legal landscape for these claims.

Legal Standards Applicable to Robinson-Patman Act Claims.-- It has been said that [HN38](#)[] the primary purpose of the Robinson-Patman Act is to protect the competitive process, not individual competitors. *E.g., Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 680 (10th Cir. 1984).

[HN39](#)[] There are three types of violations actionable under the Robinson-Patman Act. See [Texaco Inc. v. Hasbrouck](#), 496 U.S. 543, 558 n.15, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990); [Godfrey v. Pulitzer Publishing Co.](#), 161 F.3d 1137, 1139 (8th Cir. 1998) (citing [Best Brands Beverage, Inc. v. Falstaff Brewing Corp.](#), 842 F.2d 578, 584 n.1 (2nd Cir. 1987)); [George Haug Co.](#), 148 F.3d at 141 n.2 (citations omitted). First, in a "primary-line" case, the plaintiff must show that the defendant's price discrimination adversely affects the defendant's competition with its own [**71] competitors.³¹ [Hasbrouck](#), 496 U.S. at 558 n.15; [Godfrey](#), 161 F.3d at 1139. In a "secondary-line" case, the plaintiff may demonstrate that the defendant's price discrimination injures competition among the defendant's customers, presumably, the plaintiff's competitors. *Id.* Finally, a "tertiary" or "third line" violation occurs when the "probable impact of the [price] discrimination . . . [is] on the customers of either of [the favored or disfavored buyers]." See [Hasbrouck](#), 496 U.S. at 558 n.15.³²

[**72] [*650] 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 purchaser(s) as of the time of the price differential." [George Haug Co.](#), 148 F.3d at 141 (quoting [Best Brands Beverage, Inc. v. Falstaff Brewing Corp.](#), 842 F.2d 578, 584 (2d Cir. 1987)).

The Supreme Court issued a significant ruling in *Texaco Inc. v. Hasbrouck* in 1990 to clarify what constitutes "actual competition" under the Robinson-Patman Act in secondary-line cases.³³ [**74] The *Hasbrouck* Court ruled that the

³⁰ Defendants appear to assume that "customers" in this context refer only to the purchasing public. This assumption appears unduly limited for reasons stated elsewhere. In summary, Plaintiffs also allege that they are "customers" under particular antitrust theories.

³¹ In the case at bar, to allege a primary-line violation, Plaintiffs would have to allege that Defendants' conduct harmed other producers of branded gasoline. *Id.* Plaintiffs do not do so.

³² [HN40](#)[] A third or tertiary-line violation was explained by the Eighth Circuit as follows: "Although the purchasers of the discriminating seller do not compete directly, their customers compete within a unified market region." [Godfrey](#), 161 F.3d at 1139; see generally [George Haug Co.](#), 148 F.3d at 141 n.2.

[HN41](#)[]

³³ *Hasbrouck* involved facts similar to those at bar and thus is instructive in considering Plaintiffs' secondary-line claim. In *Hasbrouck*, Texaco sold gasoline to two distributors, Gull Oil Company ("Gull") and Dompier Oil Company ("Dompier"). [496 U.S. at 549](#). Originally, Gull purchased gasoline at a lowest rate, because it sold unbranded Texaco gas under its own company label through various named stations. Dompier also received gasoline at a discounted price from Texaco, although not as low as Gull. Dompier re-sold its gasoline under the Texaco name. *Id. at 549*. Both Gull and Dompier picked up Texaco's product at the Texaco bulk plant and delivered directly to retail outlets. *Id. at 550*. *Hasbrouck* sold Texaco brand gasoline. The stations supplied by Dompier regularly sold at lower retail prices than independent stations supplied by Texaco directly, such as *Hasbrouck*. *Id. at 550*. Dompier later entered the retail gasoline business, allegedly at Texaco's urging. *Id.* The plaintiffs in

notion that a seller's functional discounts (a discount to a particular category of buyer) are *per se* lawful is not tenable. See [496 U.S. at 563](#)³⁴; [George Haug Co., 148 F.3d at 141-42](#). [HN42](#)[] The existence of functional competition between competitors who may, at first blush, seem to compete on different levels [*651] is determined through a factual inquiry rather than a blanket legal rule. See [George Haug Co., 148 F.3d at 141-42](#) (citing [FTC v. Fred Meyer, Inc., 390 U.S. 341, 349, 19 L. Ed. 2d 1222, 88 S. Ct. 904 \(1968\)](#)) (discussing [**73] § 2(d) of the Robinson-Patman Act, which has been interpreted similarly to § 2(a)).

[**75] Since *Hasbrouck*, [HN44](#)[] a Robinson-Patman Act plaintiff must allege, and eventually prove, that **either** it competed on the same functional level (*i.e.*, as a wholesaler or retailer) with the allegedly favored buyer of the defendant's product **or**, if competing on a different functional level from the allegedly favored buyer(s), the plaintiff must prove that putative "functional discounts" offered by the defendant to the latter were in fact subterfuges to avoid the Robinson-Patman Act restrictions.³⁵ See [George Haug Co., 148 F.3d at 142](#).

[**76] In addition, [HN45](#)[] a Robinson-Patman Act plaintiff must allege facts that "demonstrate a reasonable possibility that competition has been harmed as a result of the price differential." *Id.* (citing [Falls City Indus. v. Vanco Beverage, Inc., 460 U.S. 428, 434-35, 75 L. Ed. 2d 174, 103 S. Ct. 1282 \(1986\)](#), and [Corn Products Refining](#)

Hasbrouck were twelve independent Texaco retailers, who displayed the Texaco trademark, bought their gasoline directly from Texaco, and took delivery of their gasoline directly from Texaco. [Id. at 548](#). Texaco always charged a higher price to the plaintiffs than it charged to Gull or Dompier. See *id.*

The independent retail dealers brought a Robinson-Patman Act suit. Texaco defended its pricing by arguing that the wholesalers, Gull and Dompier, deserved lower prices because they rendered services to Texaco, *i.e.*, they earned "functional discounts." The Supreme Court analyzed "functional discounts" and ultimately affirmed the Ninth Circuit's endorsement of the district court's judgment based on a jury's finding that Texaco's differential pricing was illegal. The Supreme Court stated that:

[HN43](#)[] The [Robinson-Patman] Act contains no express reference to functional discounts. It does contain two affirmative defenses that provide protection for two categories of discounts -- those that are justified by savings in the seller's cost of manufacture, delivery, or sale, and those that represent a good faith response to the equally low prices of a competitor.

[Id. at 555-56](#) (footnotes omitted). The Court held that neither of these defenses was available to Texaco on the factual record before it. *Id.*

³⁴ The Supreme Court adopted the explanation of the legal status of functional discounts set forth in the Report of the Attorney General's National Committee to Study the Antitrust Laws 208 (1955). See [Hasbrouck, 496 U.S. at 560-61](#). The Committee's explanation in pertinent part was:

The Committee recommends, therefore, that suppliers granting functional discounts either to single-function or to integrated buyers should not be held responsible for any consequences of their customers' pricing tactics. . . . The price cutting of a customer who receives this type of differential results from his own independent decision to lower price and operate at a lower profit margin per unit. The legality or illegality of this price cutting must be judged by the usual legal tests. In any event, consequent injury or lack of injury should not be the supplier's legal concern.

On the other hand, the law should tolerate no subterfuge. For instance, where a wholesaler-retailer buys only part of his goods as a wholesaler, he must not claim a functional discount on all. Only to the extent that a buyer actually performs certain functions, assuming all the risk, investment, and costs involved, should he legally qualify for a functional discount. Hence a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it.

Id. (quoting Report, at 208) (footnotes omitted).

³⁵ Prior to *Hasbrouck*, the Second Circuit had held that in order to bring a secondary-line claim of price discrimination, a plaintiff must allege (and eventually show) that the defendant's price differential existed between entities competing "at the same functional level, *i.e.*, all wholesalers or all retailers, and within the same geographic market. See [Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 585 \(2d Cir. 1987\)](#). However, in *Hasbrouck*, the Supreme Court rejected the proposition that § 2(a) of the Clayton Act provided a safe harbor for any and all functional discounts. [496 U.S. at 563](#); see also [George Haug Co., 148 F.3d at 142](#).

Co. v. FTC, 324 U.S. 726, 742, 89 L. Ed. 1320, 65 S. Ct. 961 (1945)). There is a longstanding rule that "an HN46[¹] injury to competition may be inferred from evidence that some purchasers had to pay their supplier 'substantially more for their goods than their competitors had to pay.'" See Hasbrouck, 496 U.S. at 559 (quoting Fed'l Trade Comm'n v. Morton Salt Co., 334 U.S. 37, 46-47, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)). In the seminal case of *Morton Salt Co.*, the Supreme Court held that "the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate [to support a claim of competitive harm]." Morton Salt Co., 334 U.S. at 46-47 (emphasis added).

[**77] The Supreme Court altered this rule for cases involving primary-line violations of the Robinson Patman Act. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993). In *Brooke Group*, the plaintiff, a cigarette manufacturer, alleged that the defendant's volume rebates to wholesalers of generic cigarettes "amounted to price discrimination that had a reasonable probability of injuring competition." Id. at 216-17. Plaintiff's theory in *Brooke Group* was that these volume discounts were nothing more than a predatory pricing scheme designed to eliminate plaintiff from the generic cigarette market. Id. at 217. In support of its claim, the plaintiff offered proof that the defendant's scheme resulted in net prices for generic cigarettes that were below average variable costs. Id. at 217.

The Supreme Court characterized the plaintiff's claim alleging harm to the seller's direct competitors to be a primary-line Robinson-Patman Act claim. Id. at 220. In affirming the district court's grant of judgment as a matter of law for the defendant after [**78] a jury verdict for the plaintiff, the Supreme Court held that HN47[¹] evidence of a price differential alone was insufficient to impose liability on the defendant on the primary-line price discrimination cause of action. Id. at 217. The Court reiterated its long-standing skepticism toward predatory pricing claims brought by one manufacturer against another. Id. at 227 [*652] (citing Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588-590, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) ("In *Matsushita*, we remarked on the general implausibility of predatory pricing."). The Supreme Court concluded that the plaintiff's price fixing claim should not have gone to the jury since the plaintiff's allegation of harm to competition depended upon "a complex chain of cause and effect" that was unsupported by the trial record. 509 U.S. at 231.

Several circuits have held that the *Morton Salt* inference is applicable in secondary-line price discrimination cases and limited the *Brooke Group* decision to primary-line cases. See George Haug Co., 148 F.3d at 142-43; Chroma Lighting v. GTE Products Corp., 111 F.3d 653, 658 (9th Cir. 1997); [**79] Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182 (1st Cir. 1996); Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc., 63 F.3d 1267, 1271-75 (3d Cir. 1995); J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921, 113 L. Ed. 2d 246, 111 S. Ct. 1313 (1991).³⁶ Defendants have not meaningfully challenged this proposition.

³⁶ The Second Circuit recently stated that in " FTC v. Morton Salt Co., 334 U.S. 37, 49, 92 L. Ed. 1196, 68 S. Ct. 822 (1948), a secondary-line price discrimination case, the Supreme Court determined that the Robinson-Patman Act was 'especially concerned with protecting small business' 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)." George Haug Co., 148 F.3d at 142. The Fifth Circuit would appear to subscribe to this reasoning. In M.C. Manufacturing Co. Inc. v. Texas Foundries, Inc., 517 F.2d 1059 (5th Cir. 1975), the Fifth Circuit reversed a judgment awarded plaintiff on a secondary-line Robinson-Patman Act claim. Id. at 1061. The court of appeals held that the allegedly discriminatory sales were not made "in competition," and therefore, plaintiff's Robinson-Patman Act claim failed as a matter of law. Id. at 1066. The court went on, however, to state that:

Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, *it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor*. For surely there is *no more effective means of lessening competition* or creating monopolies than *the debilitation of a competitor*.

[**80] For the reasons set forth by the Second Circuit in *George Haug Co.* and the cases cited therein, this Court concludes that the Fifth Circuit would follow the lead of the First, Second, Third and Ninth Circuits on this issue. The Court therefore holds that [HN48](#)³⁷ the instant Plaintiffs must allege facts to support the proposition that "competitive injury" has occurred. This pleading burden is met if a Plaintiff alleges facts that "demonstrate a reasonable possibility that a price difference may harm competition." [*J.F. Feeser, Inc., 909 F.2d at 1531.*](#)³⁷ "In keeping with the Act's prophylactic [*653] purpose, [designed to prevent the occurrence of price discrimination rather than to provide a remedy for its effects], section 2(a) does not require that the discrimination must in fact have harmed competition." *Id.* (citing [*Falls City Industries, 460 U.S. at 435*](#) (quoting [*J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 \(1981\)*](#))).

[**81] **Analysis of Plaintiffs' Allegations**-- Plaintiffs, according to their Response intend to allege a "secondary-line" Robinson-Patman Act claim. See Plaintiffs' Response, at 18.³⁸

As noted above, Plaintiffs in a secondary-line claim must allege the existence of a competitive relationship. Plaintiffs have generally alleged that Defendants have given unjustified and unlawful price differentials to Defendants' direct customers for Shell gasoline, viz., jobbers, jobber stations, and company-owned or operated stations.³⁹ Plaintiffs also generically allege that they suffer unlawful price discrimination because Defendants cannot justify a "functional

[*Id. at 1067-68*](#) (quoting [*Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 \(10th Cir. 1959\)*](#) (emphasis added)).

³⁷ The Court notes a superficial inconsistency between the longstanding Third Circuit rulings in [*J.F. Feeser, Inc., 909 F.2d at 1531,*](#) and [*Stelwagon Mfg. Co., 63 F.3d at 1272,*](#) on the one hand, and a recent opinion by another panel in that Circuit in [*Crossroads Cogeneration Corp. v. Orange & Rockland Utilities Inc., 159 F.3d 129, 141 \(3rd Cir. 1998\)*](#), on the other hand. In *Crossroads Cogeneration*, the panel held that to state a claim under the Robinson-Patman Act, a plaintiff must allege facts to demonstrate that (1) the defendant made at least two contemporary sales of the same commodity at different prices to different purchasers; and (2) the effect of such discrimination was to injure competition." See [*Crossroads Cogeneration Corp., 159 F.3d at 141*](#). The panel stated that a plaintiff must demonstrate that "the effect of such discrimination was to injure competition," and rather than stating that the requirement was proof that there is a "reasonable possibility" that competition was harmed, as provided by *Morton Salt*. However, *Crossroads Cogeneration* does not represent the appellate panel's conscious rejection of the earlier Third Circuit rulings in *J.F. Feeser, Inc.* or *Stelwagon Mfg. Co.*, that a Robinson-Patman Act claim is supportable upon proof of a substantial price discrimination between competitors over time and thus the application of *Morton Salt*. See, e.g., [*Stelwagon Mfg. Co., 63 F.3d at 1272*](#). The *Crossroads Cogeneration* opinion addressed the Robinson Patman Act claim only in a cursory manner. It did not cite *Stelwagon Mfg.* (which gave detailed analysis to the issue of the applicability of the *Brooke Group Ltd.*). Indeed, *Crossroads Cogeneration* merely focused on the absence of any meaningful allegations by the plaintiff concerning the effect on competition.

Similarly, the Tenth Circuit's language in [*Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 680 \(10th Cir. 1984\)*](#), could be construed to conflict with the newer rulings cited in the text accompanying this footnote. However, the Tenth Circuit in *Black Gold Ltd.* emphasized that it had a unique circumstances before it ([*Id. at 681*](#)) and there was no need to address the effect on competition issues since they were not raised or implicated in the facts before that court. In any event, since the facts in *Black Gold, Ltd.* were materially different from those at bar, that holding is not persuasive authority in this case.

³⁸ However, [HN49](#)³⁸ allegations in a response to a motion are not sufficient to amend the complaint. See [*Shanahan v. City of Chicago, 82 F.3d 776, 781 \(7th Cir. 1996\)*](#). As indicated below, Plaintiffs are instructed that they must allege more precisely in a second amended complaint their theories of liability for each Plaintiff.

³⁹ Plaintiffs allege that these discriminatory pricing practices cannot be overcome and "result[] in the substantial lessening of competition in the retail gasoline market and the substantial lessening of competition between Plaintiffs and the favored buyers" in violation of the Robinson-Patman Act. Plaintiffs' First Amended Complaint, at 23, P 159. Plaintiffs contend that as a result of the discriminatory pricing, the Plaintiffs' "ability to compete with Shell jobbers at the retail level has been impaired, resulting in lost sales and profits, as well as other damages, including being forced out of the Shell-branded gasoline market." [*Id. at 23, P 160.*](#)

discount" [**82] to the unnamed jobbers.⁴⁰ Plaintiffs thus apparently seek to attack the functional discounts that they believe Defendants grant to the jobbers who supply jobber stations or "open dealers".

[**83] The Court concludes that the sweeping allegations in the Plaintiffs' First Amended Complaint, despite initial appearances of adequacy, do not state a claim under the Robinson-Patman Act. This is not a class action. It is a case in which seventy-three different lessee-dealers from various states have elected to proceed in a single suit. The case must be analyzed from the perspective [*654] of each Plaintiff separately. Plaintiffs have not even attempted to meet their individual pleading burden.

Since there are dozens of Plaintiffs, each must make individual allegations in order for the parties to join issue and the Court to assess the viability of any given Plaintiff's claim. Plaintiffs will be given an opportunity to amend their complaint one more time. To satisfy their pleading obligations as to the Robinson-Patman Act claim, each Plaintiff must allege facts pertaining to each of the elements of this claim. These allegations should address at a minimum:

- (i) the name and location of the source of the particular Plaintiff's Shell gasoline and, if known, the name and location of the source of gasoline acquired by the competing jobber, jobber-station, or company-owned station.
- (ii) [**84] the type of Robinson-Patman Act violation that is alleged (*i.e.*, primary, secondary, or tertiary, and whether there is a contention that Defendants use a functional discount as a subterfuge vis a vis the particular Plaintiff).
- (iii) the identity and location of the particular jobber(s) and/or other retail station(s) that received an allegedly unlawful favorable price, the approximate price that jobber received (if known), and the approximate time period of the allegedly unlawful favorable treatment,
- (iv) the geographic area in which the specific Plaintiff competes with each jobber or other station in issue as to that Plaintiff,
- (v) what or how competition has or may have been injured as a result of the price discrimination suffered by that Plaintiff, and

While notice pleading is acceptable in an antitrust case, it is important for the parties to join issue on the actual controversy, Plaintiff by Plaintiff. Plaintiffs may not achieve through generalized pleadings the benefits of a class action when no class allegations are made or appropriate.

3. Robinson-Patman Act Claim Conclusion

The Court will not dismiss the Robinson-Patman Act claim as to any [**85] Plaintiff at this time. However, Plaintiffs shall file their second amended complaint on or before **November 30, 1999**, satisfying the foregoing pleading requirements and shall dismiss Plaintiffs who do not satisfy the jurisdictional requirement. Plaintiffs, in addition to any general allegations covering them as a group, must attach an appendix that includes -- for each Plaintiff -- the factual matters pertinent to that Plaintiff, as set forth in the preceding section of this opinion. Plaintiffs, in pleading their Robinson-Patman Act claims, may cross-reference as necessary new allegations included in their re-stated fraud and/or other causes of action as directed elsewhere in this opinion.

⁴⁰ Plaintiffs allege that the

difference in price does not constitute a reasonable reimbursement for actual marketing functions performed by the jobbers. The jobbers are dual distributors, selling Shell gasoline both at the wholesale and retail levels, however, the substantially lower price given to jobbers greatly exceeds the value of the additional functions they perform. The added functions performed by the jobbers do not result in actual costs, legal risks and/or investments that would justify the deep discount enjoyed by the non-lessor retail stations.

Plaintiffs' First Amended Complaint, at 15, P 119. Plaintiffs also allege that:

Shell has engaged in the practice of giving jobbers a substantial and preferential discount on the price of Shell gasoline. Shell jobbers purchase Shell gasoline at Shell terminals The rack price paid by Shell jobbers is substantially lower . . . than the dealer tank wagon ("DTW") price charge by Shell to Shell Dealers.

Plaintiffs' First Amended Complaint, at 14, P 111.

Only after each Plaintiff's Robinson-Patman Act claim is set forth in the second amended complaint will the Court rule definitively on the sufficiency of the allegations as to any single Plaintiff. Defendants' Motion to Dismiss Plaintiffs' Robinson-Patman Act claims therefore is **granted in part and denied in part** in accordance with this opinion.

C. Sherman Act § 1 Claim

1. Parties' Allegations and Contentions

In Count IV of Plaintiffs' First Amended Complaint, Plaintiffs **[**86]** allege a contract, combination, and/or conspiracy affecting interstate commerce, in violation of [§ 1](#) of the Sherman Act.⁴¹ Plaintiffs allege that they have been forced by Defendants to pay a higher price for wholesale gasoline **[*655]** than certain jobbers who operate Shell brand⁴² stations and Shell-owned stations. This higher price allegedly is the result of a conspiracy between Defendants and jobbers to restrain trade in an anti-competitive manner.⁴³

[87]** Defendants argue that Plaintiffs have failed to state a claim under [§ 1](#) of the Sherman Act. Defendants contend that Plaintiffs allege a vertical restraint on trade by a manufacturer that is governed by the rule of reason analysis. Plaintiffs' claim does not, Defendants emphasize, involve any horizontal restriction or any vertical agreement to set or maintain prices. Defendants' alleged conspiracy, therefore, is not *per se* unlawful. Defendants further argue that, under a rule of reason analysis, Plaintiffs have failed to define a legally cognizable product market for Plaintiffs' Sherman Act [§ 1](#) claims. Therefore, Defendants contend the Sherman Act [§ 1](#) claim must be dismissed.

2. Legal Framework

General Legal Principles.-- [Section 1](#) of the Sherman Act states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is hereby declared to be illegal." [15 U.S.C. §](#)

⁴¹ [HN50](#) [↑] [Section 1](#) of the Sherman Act provides:

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.](#)

⁴² At the Court's September 24, 1999 hearing, counsel for Plaintiffs agreed with the Court's statement that Count IV of Plaintiffs' complaint alleged discrimination among retail sellers of Shell gasoline. See Transcript of September 24, 1999 conference [Doc. # 50], at 18-19.

⁴³ Plaintiffs allege a simple outline of a conspiracy. First, Plaintiffs allege:

Shell and certain "favored dealers" and jobbers have entered into agreements in which Shell uses discriminatory pricing practices to charge higher prices for gasoline to Plaintiffs than to these "favored" dealers and jobbers.

Plaintiffs' First Amended Complaint, at 23, P 164; at 25 PP 175, 176. Plaintiffs also allege in their Amended Complaint that: "Beginning at least in 1995 and continuing to the present, Shell has engaged in the practice of giving jobbers a substantial and preferential discount on the price of Shell gasoline." [Id. at 14, P 111](#). Plaintiffs then allege "on information and belief," that "Shell and its jobbers have entered into agreements regarding the price to be charged Plaintiffs, so as to exclude Plaintiffs from purchasing fuels at competitive wholesale prices." [Id. at 23, P 165](#). Plaintiffs add that "jobbers consistently refuse to sell Shell branded gasoline to Plaintiffs, apparently either by agreement with Shell or upon fear of retaliation by Shell." [Id. at 16, P 121](#). Thereafter, Plaintiffs allege that these alleged agreements between Shell and its jobbers "restrain trade in an anti-competitive manner." [Id. at 25, P 176](#).

1. HN51 [↑] In order to state a claim for a violation of § 1, a plaintiff must allege (1) the existence of a conspiracy (2) affecting interstate commerce (3) that imposes an "unreasonable" restraint of trade. See *C.G. Dillard v. Merrill Lynch, Pierce, Fenner, & Smith Inc.*, 961 F.2d 1148, 1158 (5th Cir. 1992) [**88] (citing *White & White v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 504 (6th Cir. 1983)).

HN52 [↑] There are two possible theories for a Sherman Act § 1 violation. *Per se* violations of § 1 involve those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . ." *United States v. General Motors Corp.*, 384 U.S. 127, 146, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966). *Per se* violations are held to be illegal without any inquiry into the actual effect on the relevant market. *Id.*; see also *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211, 79 S. Ct. 705, 709, 3 L. Ed. 2d 741 (1959). If a violation is not *per se* illegal, it is analyzed according to the rule of reason. See *Jayco Systems v. Savin Business Machines Corp.*, 777 F.2d 306, 317 (5th Cir. 1985); *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1004 (5th Cir. 1981) (citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)); accord *Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 368 (10th Cir. 1993); [**89] *Illinois Corp. Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 753 (7th Cir. 1989).

HN53 [↑] In order to determine whether a particular conspiracy is illegal *per se*, the [*656] Court must determine whether it represents a horizontal or a vertical restraint of trade. See *Red Diamond Supply, Inc.*, 637 F.2d at 1004. If the alleged conspiracy is horizontal, it is *per se* illegal and Plaintiffs need not allege market effects. *Id.* (citing *GTE Sylvania, Inc.*, 433 U.S. at 58 n.28). On the other hand, if the alleged conspiracy is vertical, then generally it should be analyzed under the rule of reason. *Id.*

HN54 [↑] There is an exception, however, to the general rule that vertical restraints be analyzed under the rule of reason. The Supreme Court has generally held that vertical restraints involving price maintenance or price levels are *per se* illegal. See *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 119 S. Ct. 493, 498, 142 L. Ed. 2d 510 (1998) (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988) ("vertical restraint is not illegal *per se* [**90] unless it includes some agreement on price or price levels")); *GTE Sylvania*, 433 U.S. at 52 n.18 ("we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy").⁴⁴

Vertical or Horizontal Restraint Analysis.-- Plaintiffs allege a conspiracy by Defendants and the jobbers to drive Plaintiffs out of the retail gasoline market [*91] through Defendants' discriminatory pricing between the jobbers and Plaintiffs.⁴⁵

Plaintiffs' First Amended Complaint contains no allegations of conspiratorial activity by Plaintiffs' retail competitors (jobber stations, open dealers or company-owned stations). See *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979).⁴⁶ [**93] Nor is there any allegation that the decisions to set allegedly discriminatory prices

⁴⁴ This *per se* rule does not extend to sellers' imposition of maximum prices on their distributors. See *State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275, 282, 139 L. Ed. 2d 199 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968), which held that vertical maximum price restrictions were *per se* illegal). Claims involving vertical maximum price restrictions are now analyzed under the rule of reason. *118 S. Ct. at 285*.

⁴⁵ To the extent that Plaintiffs attempt to allege that agents and officers of Shell conspired with Shell, their claim fails as a matter of law. See *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 486 (5th Cir. 1984) ("a point well established in this circuit is that **HN55** [↑] a corporation cannot conspire or combine with its own officers, employees, or wholly owned sales divisions and outlets in violation of section one"); accord *Crosby v. Hosp. Authority of Valdosta and Lowndes*, 93 F.3d 1515, 1526 (11th Cir. 1996).

⁴⁶ In *Cernuto*, a manufacturer of cabinets decided to discontinue its supply to plaintiff, a retail cabinet outlet (*Cernuto*). *Id. at 165*. *Cernuto* alleged that the manufacturers' decision was based on a request by one of its retail competitors. This competitor allegedly complained because plaintiff sold cabinets for a substantially lower price. In finding that the restraint fell under the *per se* rules, the Third Circuit stated that:

originated with [**92] Plaintiffs' retail competitors, the jobbers or jobber stations. Plaintiffs do not allege that any of Plaintiffs' retail competitors were involved in the wholesale gasoline pricing decisions or had any agreements concerning Plaintiffs. Nor do Plaintiffs allege that jobbers have made agreements among themselves about pricing of gasoline at their retail stations. Throughout Plaintiffs' First Amended Complaint, Plaintiffs refer to agreements between Shell and its "jobbers."⁴⁷ Accordingly, the Court concludes [*657] that Plaintiffs allege a vertical restraint concerning Defendants' pricing and distribution policies. Plaintiffs' claim thus must be analyzed under the rule of reason.⁴⁸

To the extent Plaintiffs also seek to allege that Defendants discriminate in price between the wholesale gasoline [**94] prices offered to the company-owned stations as compared to the gasoline prices available to Plaintiffs, this too is a vertical price restraint. Plaintiffs have alleged that the Shell-owned stations must acquire the product and act as retailers. They thus indicate that there is a transfer of ownership of the gasoline between levels in the distribution chain.

Even if Plaintiffs do not intend to suggest that such a transfer occurs with respect to the company-owned dealers, the result is the same. The Fifth Circuit has held that "when the manufacturer is the source, the conspiracy is vertical," even if the manufacturer also sells directly to the consumer. *Red Diamond Supply, Inc.*, 637 F.2d at 1004. The court of appeals stated:

HN57 When a producer elects to market its good through distributors, the latter are not, in an economic sense, competitors of the producer even though the producer also markets some of its goods itself; rather, the distributors are "agents" of the producer, employed because the producer has determined that it can supply its goods to consumers more efficiently by using distributors than it can by marketing them entirely by itself.

Id. at 1005. [**95] Thus, Plaintiffs' allegations concerning Defendants' pricing to company-owned stations fall within the prior conclusion that Plaintiffs have failed to allege any horizontal conspiracy.⁴⁹

No Price-Fixing or Price Maintenance Allegations to Require Per Se Standard.-- Plaintiffs have failed to allege facts that would bring this case within the price fixing or price maintenance exception to the general rule that vertical restraints are analyzed under the rule of reason. Plaintiffs' First Amended Complaint [**96] does not allege a conspiracy to **set** prices. See *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996) (citing *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)) ("The

HN56 When a manufacturer acts of its own, in pursuing its own marketing strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints However, if the action of a manufacturer or other supplier is taken *at the direction of its customer*, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier.

Id. at 168 (emphasis added).

⁴⁷ In fact, Plaintiffs' pleadings indicate that the pricing policy originated with Defendants, as Plaintiffs state that "jobbers consistently refuse to sell Shell brand gasoline to Plaintiffs, apparently either by agreement with Shell or upon fear of retaliation by Shell." Plaintiffs' First Amended Complaint, at 16, P 121

⁴⁸ This lack of involvement by retail competitors distinguishes this case from those cases cited by Plaintiffs, *Klor's* and *General Motors*. In *Klor's*, the parties did not contest the fact that the boycott was brought at the suggestion of the plaintiff's retail competitor. See *Klor's*, 359 U.S. at 209 ("Broadway Hale [plaintiff's retail competitor] has used its 'monopolistic' buying power to bring about this situation."). Likewise, in *General Motors*, the competing retail dealers complained to the manufacturer about their competitor's use of discounted retail prices. See *General Motors*, 384 U.S. at 133.

⁴⁹ This conclusion is consistent with the maxim that "**antitrust law** shows more concern to protect inter rather than intrabrand competition." *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) (citing *NYNEX Corp. v. Discon, Inc.*, U.S. 525 U.S. 128, 119 S. Ct. 493, 497-500, 142 L. Ed. 2d 510 (1998)). Accord *Jayco Systems, Inc.*, 777 F.2d at 320 n.48 (finding that plaintiff failed to demonstrate an anti-competitive effect on interbrand competition).

Supreme Court has instructed that vertical restraints of trade, which do not present an express or implied agreement to set resale prices, are evaluated under the rule of reason.""). Plaintiffs, retail dealers, complain that there is an improper differential between the wholesale prices Defendants charge to jobbers as compared to the prices Defendants charge to Plaintiffs for their gasoline supply.⁵⁰ ^[**97] There are no allegations ^[*658] that Defendants directly sought to influence the jobbers' resale prices or the retail price of gasoline at jobber stations.⁵¹ Plaintiffs have not alleged a claim of unlawful setting or maintaining of retail prices by a manufacturer, and therefore there is no legal basis for a *per se* analysis.⁵² The rule of reason must be applied in this case.

Application of the Rule of Reason.-- The Court further concludes that Plaintiffs have not made sufficient allegations to state a claim under the Sherman Act § 1 rule of reason analysis. HN58[↑] To prove a Sherman ^[**98] Act § 1 conspiracy violation under rule of reason analysis, Plaintiffs must show that Defendants' activities caused an "injury to competition." See Doctor's Hosp. of Jefferson, Inc. v. Southeast Medical Alliance, Inc., 123 F.3d 301, 307 (5th Cir. 1997) (citing Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379, 1385 (5th Cir.1994)); see also Red Diamond Supply, Inc., 637 F.2d at 1005 (holding that plaintiff must demonstrate that defendant's conduct "has an adverse effect on competition"). HN59[↑] A key element of any rule of reason analysis, therefore is a definition of the appropriate product and geographic markets. Cf. Doctor's Hosp. of Jefferson, 123 F.3d at 307.

HN60[↑] Failure to define a legally cognizable market is usually fatal to a § 1 conspiracy claim. See Bogan, 166 F.3d at 516; Jayco Systems, Inc., 777 F.2d at 320. Plaintiffs assert two theories in an effort to define a relevant product market. First, Plaintiffs argue that the relevant product market from the retail consumer's perspective is Shell gasoline. See Plaintiffs' First Amended Complaint, at 24, P 166. Alternatively, ^[**99] Plaintiffs argue that the product market is Shell brand gasoline "from the perspective of independent Shell dealers." See id. at 24, P 167.

HN61[↑] Courts generally employ the cross-elasticity method of determining relevant product markets. See Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 100 L. Ed. 1264, 76 S. Ct. 994 (1956); see also Jayco Systems, Inc., 777 F.2d at 319 (applying the *Brown Shoe* analysis to a § 1 conspiracy claim). Under this method, a product market is defined as the product at issue and all other "commodities reasonably interchangeable by consumers for the same purposes." See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 487 (5th Cir. 1984) (quoting E.I. du Pont de Nemours & Co., 351 U.S. at 395); accord R. D. Imports Ryno Industries, Inc. v. Mazda Distributors (Gulf), Inc., 807 F.2d 1222, 1224 (5th Cir. 1987).

The Court concludes that Plaintiffs have failed to allege a legally cognizable market. From the retail gasoline consumers' ^[**100] perspective, HN62[↑] a single product brand generally cannot constitute a relevant market, even if that product bears a trademark. See Town Sounds and Custom Tops, 959 F.2d at 479. This is true of branded gasoline. See discussion *supra* 1999 U.S. Dist. LEXIS 20352 at *45-47.

⁵⁰ Plaintiffs also complain in passing in their Sherman Act § 1 claim about the ICR policy. See Plaintiffs' First Amended Complaint, at 26, P 179. For this allegation to be consistent with the rest of Plaintiffs' claims in Count IV, Plaintiffs would have to allege that the retail stations with whom they compete are not saddled with this allegedly cumbersome tying agreement. Plaintiffs have not made any such allegations.

⁵¹ In fact, Plaintiffs allege that, "The jobber stations sell gasoline to the public at a lower price than the lessee-dealers can sell their gasoline because of the lower price jobber stations pay Shell for the gasoline." Plaintiffs' First Amended Complaint, at 14, P 112. Later, Plaintiffs state "Shell sells gasoline to the public at company-owned stations at retail prices which are at times lower than the dealers' 'break even' price." Id. at 16, P 122. If anything, the net effect of these allegations is that Defendants' scheme has resulted overall in a lowering of retail prices, not anti-competitive conduct resulting in the raising of prices.

⁵² If anything, Defendants' actions resemble an attempt to set the maximum retail price of Plaintiffs' retail competitors. Vertical agreements to set maximum prices are no longer *per se* illegal. See *supra*, note 47.

Plaintiffs' attempt to define a product market from their dealer perspective also lacks merit. [HN63](#)[↑] Generally, in order to define a relevant market under the Sherman Act [§ 1](#), a plaintiff must refer to the lack of product interchangeability. See [Global Discount Travel Services, L.L.C. v. Trans World Airlines, Inc., 960 F. Supp. 701, 704 I*6591 \(S.D. N.Y.1997\)](#) ("Plaintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal."). In their First Amended Complaint, Plaintiffs argue that they cannot purchase brand name gasoline from any source other than Shell. Plaintiffs do not meaningfully allege, however, that the lack of alternatives results from the absence of close substitutes interchangeable with Shell gasoline. To the extent Plaintiffs do allege that Shell gasoline is a unique product, the uniqueness stems primarily from Plaintiffs' [**101](#) contracts with Defendants to distribute Shell gasoline. Thus, Plaintiffs' proposed product market definition is a creation of contractual provisions, not market realities. Indeed, other than these contractual limits arising from Plaintiffs' status as Shell dealers, Plaintiffs' alternative definition of a relevant market -- Shell gasoline -- is no different from the retail consumer-based definition, and suffers from the same insufficiency. The Court therefore concludes that Plaintiffs have failed to allege a legally cognizable relevant product market to satisfy the standards set forth in *Brown Shoe* and *Du Pont*.

Plaintiffs thus do not allege a viable Sherman Act [§ 1](#) conspiracy; Plaintiffs have not alleged a legally cognizable relevant product market against which to measure the competitive effect of Defendant's alleged conspiracy. Plaintiffs' [§ 1](#) conspiracy claim accordingly fails as a matter of law.

D. Required Amendments by Plaintiffs to their Complaint

Based on the foregoing rulings, Plaintiffs are directed to file a second amended complaint. This pleading shall clarify Plaintiffs' claims as directed throughout this opinion. Specifically, but without limitation, [**102](#) Plaintiffs' second amended complaint must contain, to the extent possible under [Rule 11 of the Federal Rules of Civil Procedure](#), the following:

- (i) the name and location of the source of the particular Plaintiff's Shell gasoline and, if known, the name and location of the source of gasoline acquired by the competing jobber, jobber-station, or company-owned station.
- (ii) the type of Robinson-Patman Act violation that is alleged (*i.e.*, primary, secondary, or tertiary, and whether there is a contention that Defendants use a functional discount as a subterfuge vis a vis the particular Plaintiff),
- (iii) the identity and location of the particular jobber(s) and/or other retail station(s) that received an allegedly unlawful favorable price, the approximate price that jobber received (if known), and the approximate time period of the allegedly unlawful favorable treatment,
- (iv) the geographic area in which the specific Plaintiff competes with each jobber or other station in issue as to that Plaintiff,
- (v) what or how competition has or may have been injured as a result of the price discrimination suffered by that Plaintiff **or** other antitrust violation, [**103](#) and
- (vi) for each Plaintiff separately, detailed allegations of the allegedly fraudulent statements or conduct by Defendants as to that Plaintiff.

IV. CONCLUSION

Based on the reasons discussed above, the Court concludes that Defendants' Motion to Dismiss Plaintiffs Tying and Price Discrimination Claims [Doc. # 11] has merit concerning the Sherman Act [§ 1](#) and Clayton Act [§ 3](#) tying claims pleaded by Plaintiffs in Counts I and II of Plaintiffs' First Amended Complaint, and these claims should be dismissed. The Court concludes that Defendants' Supplemental Motion [Doc. # 46] has merit as to the Sherman Act [§ 1](#) conspiracy claim pleaded by Plaintiffs in Count IV of Plaintiffs' First Amended Complaint, and that claim also should be dismissed. Defendants' Motion [*660](#) has merit as to the Robinson-Patman Act claim since Plaintiffs jointly have presently attempted to plead that claim. But, dismissal of the entire Robinson-Patman Act claim for all Plaintiffs is premature. Each Plaintiff is granted the right to re-plead this claim before the sufficiency of his or her allegations can be evaluated. It is therefore

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ORDERED that Defendants' Motion to Dismiss Plaintiffs [**104] Tying and Price Discrimination Claims [Doc. # 11] is **GRANTED as to Plaintiffs' tying claims alleged in Counts I and II of the Plaintiffs' First Amended Complaint**. It is further

ORDERED that Defendants' Motion to Dismiss Plaintiffs Tying and Price Discrimination Claims [Doc. # 11] is **GRANTED in part and DENIED in part as to the Robinson-Patman Act claim alleged in Count III of Plaintiffs' First Amended Complaint**. Plaintiffs are granted leave to file a second amended complaint with the necessary appendix setting forth each Plaintiff's claim specifically as directed in this opinion. It is further

ORDERED that Defendants' Supplemental Motion to Dismiss Plaintiffs' Conspiracy Count [Doc. # 46] is **GRANTED**. It is further

ORDERED that Plaintiffs are granted leave to re-plead their tying and conspiracy claims if feasible under [Rule 11](#) in light of this opinion. It is finally

ORDERED that Plaintiffs' Second Amended Complaint must be filed on or before November 30, 1999.

SIGNED at Houston, Texas this 3rd day of November, 1999.

NANCY F. ATLAS

UNITED STATES DISTRICT JUDGE

End of Document



Rock-It, Inc. v. Futura Coatings, Inc.

United States District Court for the District of Vermont

November 3, 1999, Decided ; November 4, 1999, Filed

No. 99-CV-44

Reporter

74 F. Supp. 2d 420 *; 1999 U.S. Dist. LEXIS 17473 **

ROCK-IT, INC. and GREGORY J. and KIMBERLY BAHR, Plaintiff, v. FUTURA COATINGS, INC., RODNEY D. JARBOE and GENE J. BROCKLAND, Defendant,

Disposition: [**1] Defendants' Second Motion for Judgment on the Pleadings (paper 27) DENIED.

Core Terms

antitrust, Pleadings, anti-competitive, Defendants', allegations, employees

LexisNexis® Headnotes

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Judgments > Pretrial Judgments > General Overview

HN1 [down arrow] **Pretrial Judgments, Judgment on Pleadings**

Fed. R. Civ. P. 12(c) allows a party to move for a judgment on the pleadings at any point after the pleadings close and before the trial begins.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Judgments > Pretrial Judgments > General Overview

HN2 [down arrow] **Pretrial Judgments, Judgment on Pleadings**

In considering a motion for judgment on the pleadings, the court applies the same standard as required in a Fed. R. Civ. P. 12(b)(6) motion. Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint 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 > Judgments > Pretrial Judgments > Judgment on Pleadings

HN3 [down arrow] **Pretrial Judgments, Judgment on Pleadings**

The burden of proof in a *Fed. R. Civ. P. 12(c)* motion falls on the movant. The motion should be granted only if the movant is entitled to judgment as a matter of law.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Clayton Act > General Overview

HN4 [down arrow] **Antitrust & Trade Law, Sherman Act**

Employees are not categorically ineligible for standing under the Sherman and Clayton Acts. A narrow class of employees may, in certain circumstances, have standing to sue in antitrust.

Antitrust & Trade Law > Clayton Act > General Overview

HN5 [down arrow] **Antitrust & Trade Law, Clayton Act**

The language of §§ 4, 16 of the Clayton Act further clarifies the Sherman Act by stating that any person may sue for injuries caused by reason of anything forbidden in the antitrust laws. Courts limit this broad language to a narrower class of persons and injuries. 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.

Antitrust & Trade Law > Clayton Act > Claims

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN6 [down arrow] **Clayton Act, Claims**

A demonstration of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 or § 16 of the Clayton Act, because a party who has suffered or is threatened with antitrust injury may not be a proper plaintiff for other reasons. Among the other reasons that might limit a plaintiff's right to recover are the directness or indirectness of the asserted injury; the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; the speculativeness of the alleged injury; and the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Counsel: ROCK-IT, INC., plaintiff, Pro se.

GREGORY J. BAHR, plaintiff, Pro se, Bethel, VT.

KIMBERLY BAHR, plaintiff, Pro se, Bethel, VT.

For FUTURA COATINGS, INC., RODNEY D. JARBOE, GENE J. BROCKLAND, defendants: Samuel Hoar, Jr., Esq., Dinse, Knapp & McAndrew, P.C., Burlington, VT.

For FUTURA COATINGS, INC., RODNEY D. JARBOE, GENE J. BROCKLAND, counter-claimants: Samuel Hoar, Jr., Esq., Dinse, Knapp & McAndrew, P.C., Burlington, VT.

KIMBERLY BAHR, counter-defendant, Pro se, Bethel, VT.

Judges: William K. Sessions, III, United States District Court Judge.

Opinion by: William K. Sessions, III

Opinion

[*422] OPINION AND ORDER

Plaintiffs Rock-it, Gregory J. Bahr and Kimberly Bahr have sued Defendants Futura Coatings, Inc., et al., alleging anti-competitive behavior in the artificial urethane rock industry. Defendants have moved for a judgment on the pleadings, seeking an Order ruling that Plaintiff Kimberly Bahr's antitrust claims be dismissed due to lack of standing. For the reasons that follow, Defendants' Second Motion for Judgment on the Pleadings is DENIED.

I. Factual Background

On January 25, 1996, Futura [\[*2\]](#) Coatings, Inc. ("Futura") filed an action against Rock-it, Inc. ("Rock-it") and Gregory J. Bahr for patent infringement. On April 22, 1996, the Defendants filed an answer and counterclaim alleging harassment. The parties settled in August 1996. On September 10, 1996, pursuant to the Settlement Agreement, this Court issued a Consent Judgment and Injunction, enjoining Rock-it and Gregory J. Bahr from making, using or selling the artificial urethane rocks covered by the patents, unless licensed to do so by Futura. The counterclaims were dismissed with prejudice.

On February 5, 1999, Rock-it, Gregory, J. Bahr and Kimberley Bahr, *pro se*, filed an action for violations of [15 U.S.C. §§ 1](#) and [15](#) (the Sherman and Clayton Acts, respectively) and for "tortious [sic] interference," (paper 1), alleging that Futura committed unfair business practices and prevented Gregory J. Bahr from finding gainful employment in the urethane rock industry. Futura moved for a Judgment on the Pleadings (paper 11), and their motion was granted (paper 25) with respect to Rock-it and Gregory J. Bahr's claims, as those claims as raised in the first motion were foreclosed by the settlement [\[*3\]](#) agreement. Rock-it and Gregory J. Bahr's claims were dismissed without prejudice. The motion was denied with respect to the claims asserted by Rock-it employee Kimberly Bahr.

On September 1, 1999, Defendants filed its Second Motion for Judgment on the Pleadings (paper 27), arguing that Ms. Bahr lacks standing to bring an action in antitrust. Ms. Bahr characterizes herself as the director and "former employee who lost her job as a result of the anti-competitive acts of the Defendants." Ms. Bahr states that she was the sole and primary employee of Rock-it, a closely held corporation.

II. Legal Standards

[HN1](#) [Rule 12\(c\) of the Federal Rules of Civil Procedure](#) allows a party to move for a judgment on the pleadings at any point after the pleadings close and before the trial begins. [HN2](#) In considering a motion for Judgment on the Pleadings, this Court applies the same standard as required in a 12(b)(6) motion. See [Sheppard v. Beerman](#), [18 F.3d 147, 150 \(2d Cir. 1994\)](#), cert. denied, [513 U.S. 816, 130 L. Ed. 2d 28, 115 S. Ct. 73 \(1994\)](#). "Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences [\[*4\]](#) in favor of the non-movant; it should not dismiss the complaint '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.'" *Id.* (quoting [HN3](#) [Conley v. Gibson](#), [355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 \(1957\)](#)). The burden of proof falls on the movant [Cavanaugh v. Abbott Laboratories](#), [145 Vt. 516, 496 A.2d 154 \(Vt. 1985\)](#). The motion should be granted only if the

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movant is entitled to judgment as a matter of law. *Burns v. Int'l Sec. Servs. V. International Union*, 47 F.3d 14, 16 (2d Cir. 1994).

[*423]

III. Discussion

Defendants argue that Ms. Bahr lacks standing due to her status as an employee of Rock-it. However, [HN4](#)[↑] employees are not categorically ineligible for standing under the Sherman and Clayton Acts. A narrow class of employees may, in certain circumstances, have standing to sue in antitrust.

Congress enacted the Sherman Act to provide consumers with the assets of price competition in commercial markets. [HN5](#)[↑] The language of §§ 4 and 16 of the Clayton Act further clarifies the Sherman Act by stating that "any person" may sue for injuries caused [*5] by "by reason of anything forbidden in the antitrust laws." Over the years, courts have limited this broad language to a narrower class of persons and injuries. "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" *Cargill, Inc. v. Monfort of Colo., Inc.* 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986) (citations omitted).

However, [HN6](#)[↑] a "demonstration of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 or § 16, because a party who has suffered or is threatened with antitrust injury may not be a proper plaintiff for other reasons. *Cargill*, 107 S. Ct. at 489 nn. 5-6. Among the 'other reasons' that might limit a plaintiff's right to recover are the directness or indirectness of the asserted injury; the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; the speculativeness of the alleged injury; and the difficulty of identifying damages and apportioning them among direct and indirect [*6] victims so as to avoid duplicative recoveries. See *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 540-45, 103 S. Ct. 897, 909-12, 74 L. Ed. 2d 723 (1983)." *The National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories*, 850 F.2d 904, 912 (2nd Cir. 1988).

"Employees have generally been denied standing to enforce competition laws" for many of the above reasons. *Air Courier Conf. of Am. v. American Postal Workers Union*, 498 U.S. 517, 528, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991) (citations omitted). The above concerns do preclude standing for most corporate employees. However, none of these concerns are implicated with regard to Ms. Bahr's suit, due to her position as the principal employee of a closely held corporation.

If, as Plaintiff asserts, the fundamental cause of the demise of Rock-it was the illegal acts of the defendants, then Ms. Bahr's job loss is a direct consequence of the illegal activity. While indirect injury bars antitrust standing when "the chain of causation between the [...] injury and the alleged restraint in the market [...] contains several somewhat [*7] vaguely defined links," [459 U.S. at 540](#), Plaintiff's complaint alleges causation which is considerably more direct.

The Supreme Court has made clear that the narrowing of the language of the Clayton Act comports with Congressional intent. [459 U.S. at 531-34](#). However, they have made equally clear that broad language of the Acts remains in effect where the injury to the Plaintiff is direct. As the Supreme Court found in *Associated Gen. Contractors*,

"The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129; *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be [*424] perpetrated.' [334 U.S. 219 at 236](#), 68 S. Ct. 996 at 1006, 92 L. Ed. 1328. Similarly broad language was used in later cases holding that actions could be maintained by consumers, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-338, 99 S. Ct. 2326,

2330, 60 L. Ed. 2d 931 (1979), **[**8]** by a foreign government, Pfizer Inc. v. India, 434 U.S. 308, 313-314, 98 S. Ct. 584, 588, 54 L. Ed. 2d 563 (1978), and by the direct victim of a boycott. Blue Shield of Virginia v. McCready, [...] 457 U.S. 465, 102 S. Ct. 2540, 2550-51, 73 L. Ed. 2d 149 (1982). In each of those cases, however, the actual plaintiff was directly harmed by the defendants' unlawful conduct."

459 U.S. at 530. If Ms. Bahr's claims are true, she fits squarely within this exception to the narrowing of standing under the acts.

Second, Ms. Bahr very well may be the sole "private attorney general" available to raise these claims. Gregory J. Bahr's eligibility to sue remains uncertain. Plaintiff also alleges that Futura has threatened competitors with lawsuits if they work with Gregory J. Bahr or Rock-it. If these allegations are true, any other "identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement" appears difficult to ascertain. Thus, denying a remedy on the basis of the allegations in this case may risk leaving an "antitrust violation undetected or unremedied." Id. at 542. **[**9]**

Third, the injury to Rock-it's principal employee is not speculative; Plaintiff asserts that Rock-it fell into decline as a direct consequence of Futura's anti-competitive behavior. Defendants argue that "her continued employment by Plaintiff corporation, and any benefits therefrom, are obviously contingent upon so many factors exclusive of competition with Defendant corporation that it would be virtually impossible to determine [...] the effect of any anti-competitive behavior [...]" Brief at 4. Certainly there are always a variety of factors which effect the success or failure of a company. If the existence of such factors, regardless of how insignificant, necessarily barred claims as too speculative then the whole of antitrust law would be eviscerated. Given Ms. Bahr's status as the principal employee of this small organization, her job loss could be construed as directly attributable to the effect of the alleged anti-competitive behavior.

Finally, the small number of harmed individuals and the relative simplicity of the losses alleged in this case preclude manageability and duplicative recovery problems. Concerns of duplicative recovery and "keeping the scope of complex antitrust **[**10]** trials within judicially manageable limits," Id. at 543, do not apply in litigation involving such closely held corporations. Apportioning damages in this case, where there are only two individuals directly affected, would neither unduly burden the courts nor "undermine the effectiveness of treble-damages suits." Id. at 545. Therefore, Plaintiff must not be barred from suit on the basis of these concerns.

Again, Ms. Bahr has asserted that she occupied a special role in a closely held corporation as the principal employee who suffered direct injury due to Defendants' allegedly anti-competitive behavior. Considering these assertions in the light most favorable to the non-moving party, Ms. Bahr falls within the narrow class of employees eligible for antitrust standing. If Defendants later discover that in fact Ms. Bahr's role as an employee was merely administrative and not fundamental to Rock-it's operation, they may again raise the issue of standing in a Motion for Summary Judgment.

IV. Order

For the forgoing reasons, the Court hereby DENIES Defendants' Second Motion **[*425]** for Judgment on the Pleadings (paper 27).

Dated at Burlington, Vermont **[**11]** this 3rd day of November, 1999.

William K. Sessions, III

United States District Court Judge

Allegheny Gen. Hosp. v. Phillip Morris, Inc

United States District Court for the Western District of Pennsylvania

November 4, 1999, Decided ; November 4, 1999, Date Filed

Civil Action No. 99-9

Reporter

116 F. Supp. 2d 610 *; 1999 U.S. Dist. LEXIS 22344 **; 2000-1 Trade Cas. (CCH) P72,783

ALLEGHENY GENERAL HOSPITAL, et al., Plaintiffs, -VS- PHILIP MORRIS, INC., et al., Defendants.

Disposition: [**1] Motion to Dismiss of Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company), Lorillard Tobacco Company, United States Tobacco Company, The Tobacco Institute, Incorporated, The Council for Tobacco Research-USA, Incorporated, Hill & Knowlton, Inc. (Docket No. 19) and the Motion to Dismiss the Liggett Group, Inc. (Docket No. 22) GRANTED and Plaintiffs' First Amended Complaint against these named Defendants DISMISSED with prejudice.

Core Terms

Plaintiffs', Defendants', patients, injuries, smokers, medically indigent, non-paying, motion to dismiss, tobacco company, tobacco-related, products, smoking, tobacco, costs, illnesses, failure to state a claim, cigarettes, antitrust, indirect, remote, conspiracy, wrongdoing, damages, public nuisance, tobacco product, diseases, nicotine, safer, medical services, antitrust claim

LexisNexis® Headnotes

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

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

HN1[

In deciding a motion to dismiss, all factual allegations and all reasonable inferences therefrom must be accepted as true and viewed in the light most favorable to the plaintiff. A court may dismiss a plaintiff's complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. In ruling on a motion to dismiss for failure to state a claim, the court looks to whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer.

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

HN2[

116 F. Supp. 2d 610, *610 (1999 U.S. Dist. LEXIS 22344, **1

Proximate cause is evaluated in an antitrust action as follows: (1) the physical and economic nexus between the alleged antitrust violation and the harm to the plaintiff and (2) more particularly, 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 the antitrust laws. Where the injury alleged is an integral aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause.

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

HN3 Private Actions, Standing

There are a number of factors to consider in analyzing whether a plaintiff has antitrust standing. These factors are (1) the causal connection between defendant's antitrust wrongdoing and plaintiff's harm; (2) the specific intent of defendant to harm plaintiff; (3) the nature of plaintiff's injury (and whether it relates to the purpose of the antitrust laws, i.e. ensuring competition within economic markets); (4) the directness or indirectness of the asserted injury; (5) whether the damages claim is highly speculative; and (6) keeping the scope of complex antitrust trials within judicially manageable limits, i.e., avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > Elements of Proof > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Securities Law > RICO Actions > Remedies

HN4 Racketeering, Racketeer Influenced & Corrupt Organizations Act

In order to determine proximate causation in cases arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. § 1962](#), three factors must be considered: (1) the directness of the injury; (2) the difficulty of apportioning damages among potential plaintiffs; and (3) the possibility of other plaintiffs vindicating the goals of RICO.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN5 Fraud & Misrepresentation, Negligent Misrepresentation

In order to prove a state law fraud and negligence claim against a defendant under Pennsylvania law, a plaintiff would have to be able to establish that their injuries were proximately caused by defendants' conduct.

Torts > Negligence > Elements

Torts > ... > Elements > Duty > General Overview

[**HN6**](#) Negligence, Elements

A special duty claim is effectively a negligence cause of action, and therefore requires the element of proximate cause.

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

Real Property Law > Torts > Nuisance > General Overview

[**HN7**](#) Types of Nuisances, Public Nuisances

A public nuisance is an unreasonable interference with a right common to the general public.

Real Property Law > Torts > Nuisance > General Overview

[**HN8**](#) Torts, Nuisance

Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation; or (c) whether the conduct is of such a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

Real Property Law > Torts > Nuisance > General Overview

[**HN9**](#) Types of Nuisances, Public Nuisances

In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

Real Property Law > ... > Remedies > Injunctions > General Overview

Real Property Law > Torts > Nuisance > General Overview

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

[**HN10**](#) Remedies, Injunctions

A public nuisance may be enjoined at the behest of a private citizen or a group of citizens, if the latter, in either their property or civil rights, are specifically injured by the public nuisance over and above the injury suffered by the public generally. To constitute a public nuisance, the conduct must be an inconvenience or troublesome offense that annoys the whole community in general, and not merely some particular person.

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Torts > ... > Concerted Action > Civil Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

[HN11](#) [blue download icon] Civil Conspiracy, Elements

In Pennsylvania, to state cause of action for civil conspiracy, the following results are required: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act in pursuance of the common purpose; and (3) actual damage.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

[HN12](#) [blue download icon] Concerted Action, Civil Aiding & Abetting

Under a concert of action theory, for harm resulting to a third person from the tortious conduct of another, one is subject to liability if he does a tortious act in concert with another or pursuant to a common design with him.

Torts > ... > Multiple Defendants > Contribution > General Overview

Torts > ... > Defenses > Comparative Fault > General Overview

[HN13](#) [blue download icon] Multiple Defendants, Contribution

The right of indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence, --a doctrine which, indeed, is not recognized by the common law. It depends on a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured party.

Contracts Law > Remedies > Equitable Relief > General Overview

[HN14](#) [blue download icon] Remedies, Equitable Relief

Quantum meruit is an implied contract remedy based on payment for services rendered and on prevention of unjust enrichment. A promise to pay for services may only be implied when such services are rendered in such circumstances where the performing party entertains a reasonable expectation of being paid by the party benefited.

Counsel: For PLAINTIFFS: M THERESA CREAGH ESQ, NASH & COMPANY, PITTSBURGH, PA.

For DEFENDANTS: ROBERT S GRIGSBY ESQ, COHEN & GRIGSBY, PITTSBURGH, PA.

For PHILIP MORRIS, DEFENDANT: MARY MC LAUGHLIN ESQ, DECHERT PRICE & RHOADS, PHILADELPHIA, PA.

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For R.J. REYNOLDS, DEFENDANT: SCOTT D LIVINGSTON ESQ, MARCUS & SHAPIRA, PITTSBURGH, PA.

For B.A.T. INDUSTRIES, DEFENDANT: MARY E MCGARRY ESQ, SIMPSON THACHER & BARTLETT, NEW YORK, NY.

For LIGGETT GROUP, DEFENDANT: J KURT STRAUB ESQ, OBERMAYER REBMAN MAXWELL & HIPPEL, PHILADELPHIA, PA.

For LIGGETT GROUP, DEFENDANT: MARVIN S LIEBER ESQ, OBERMAYER REBMAN MAXWELL & HIPPEL, PITTSBURGH, [**2] PA.

For SMOKELESS TOBACCO, DEFENDANT: JOHN K GISLESON ESQ, SCHNADER HARRISON SEGAL & LEWIS, PITTSBURGH, PA.

Judges: Donetta W. Ambrose.

Opinion by: Donetta W. Ambrose

Opinion

[*611] OPINION and ORDER OF COURT

Pending before the court are Motions of Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company), Lorillard Tobacco Company, United States Tobacco Company, The Tobacco Institute, incorporated, The Council for Tobacco Research-USA, Incorporated, Hill & Knowlton, Inc. and the Liggett Group, Inc. ("Defendants") to Dismiss the First Amended Complaint filed against them by Plaintiffs who own and operate hospitals and health care facilities and have provided and continue to provide medical services to Medicaid, medically indigent and non-paying patients who suffered from tobacco-related illnesses. The Plaintiffs' First Amended Complaint alleges federal claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [18 U.S.C. § 1962](#), and the federal antitrust laws, [15 U.S.C. § 1 et seq.](#), as well as various state law [**3] claims, and seeks monetary damages from Defendants. Because I have found that all of the Plaintiffs' claims against the Defendants must fail for [*612] failure to state a claim upon which relief can be granted, the Defendants' Motions to Dismiss are granted.

STANDARD OF REVIEW

HN1 In deciding a motion to dismiss, all factual allegations and all reasonable inferences therefrom must be accepted as true and viewed in the light most favorable to the plaintiff. [Colburn v. Upper Darby Tp., 838 F.2d 663, 666 \(3d Cir. 1988\)](#), cert. den'd, 489 U.S. 1065 (1989). A court may dismiss a plaintiff's complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. [Conley v. Gibson, 355 U.S. 41, 45, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#). In ruling on a motion to dismiss for failure to state a claim, the court looks to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." [Colburn, 838 F.2d at 666](#).

LEGAL ANALYSIS

Although contained in a 103 page, [**4] 387 paragraph, fifteen (15) count First Amended Complaint, in a nutshell, the Plaintiffs' claims against the Defendants are premised upon allegations that the Defendants conspired to conceal from and/or misrepresent to the Plaintiffs information in their possession about the health hazards of cigarette smoking and other tobacco products and also intentionally conspired not to compete in the development of a "safer" cigarette or other nicotine delivery products, all in order to cause the Plaintiffs not to reduce tobacco

consumption in the Medicaid, medically indigent and non-paying patients that they treated for tobacco-related illnesses and to continue paying the costs of health care to these patients. Plaintiffs contend that as a result of the above-described conduct by the Defendants, the Plaintiffs suffered injuries in the form of incurring significant financial costs and expenses attributable to tobacco-related diseases, being unable to participate in a health care market where there would have been alternative safer or less addictive cigarettes that would have reduced their costs and expenses related to tobacco-related diseases or where they could have advised, suggested, subsidized [**5] or required their patients to use effective alternative products such as safer cigarettes or less addictive cigarettes or other nicotine products.

A. Proximate Causation/Standing.

Defendants first attack all of the Plaintiffs' claims against them on the basis that the Plaintiffs suffered no direct injury, but merely incurred the costs of injuries allegedly suffered directly by smokers who sought medical treatment from them and therefore, their injuries are too remote as a matter of law for them to have standing to sue the Defendants.¹ Memorandum in [*613] Support of Certain Defendants' Motion to Dismiss the Amended Complaint For Failure to State A Claim ("Defendants' Supporting Brief"), pp. 4-5. Plaintiffs raise a number of arguments in response to Defendants' argument that all their claims must be dismissed because it is too remote from the alleged wrongdoing of the Defendants. Memorandum in Support of the Hospital Plaintiffs' Opposition to Certain Defendants' Motion to Dismiss the Amended Complaint for Failure to State a Claim ("Plaintiffs' Opposition Brief"), pp. 1, 3-6, 9.

[**6] Although Defendants do not utilize the terms, this argument in essence is that the Plaintiffs' claims against them must be dismissed for lack of proximate causation/lack of standing. In examining the issue of whether Defendants' alleged misconduct was the proximate cause of the Plaintiffs' injuries and therefore, the Plaintiffs have standing to bring suit or whether the alleged injuries are too remote from the alleged conduct and therefore, the Plaintiffs lack standing to bring suit, the applicable analysis is set forth by the United States Court of Appeals for the Third Circuit in *Steamfitters, supra*. In *Steamfitters*, the appellate court was reviewing the district court's dismissal of

¹ More particularly, Defendants argue:

the Hospitals did not purchase or smoke cigarettes or suffer direct injury as a result of the defendants' alleged misconduct. Rather, the Hospitals allege that certain Medicaid and other indigent patients suffered "smoking-related" injuries from using defendants' products and that the Hospitals were indirectly injured when they provided medical services for those patients. The Complaint must be dismissed because as this Court explained less than four months ago, the law has been clear for more than 150 years that "[a] plaintiff who complaint[s] of harm flowing merely from the misfortunes visiting upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Williams & Drake*, slip op. at 5-6 (quoting *Holmes v. Sec Investor Protection Corp.*, 503 U.S. 258, 268-69, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)).

The Hospitals attempt to conjure up a direct injury by alleging that defendants' alleged misrepresentations misled the Hospitals, as well as the smokers, and that as a result the Hospitals "did not take, or would have taken sooner, actions to minimize the losses resulting from tobacco-related injuries and diseases and to discourage and reduce cigarette . . . use and costs associated therewith." Amended Compl. P 300; see also Amended Compl. PP 64, 66, 304, 311. But no matter how the Hospitals plead their claim, their alleged injury remains derivative because the Hospitals did not suffer any loss unless and until the smokers suffered an injury that required treatment.

Defendants' supporting Brief, p. 4, citing, *Williams & Drake Co., Inc. v. American Tobacco Co.*, 1998 U.S. Dist. LEXIS 21917, No. 98-553, slip op. (W.D. Pa. Dec. 21 1998) (J. Ambrose); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999) ("Steamfitters II"); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 172 F.3d 223 (2d Cir. 1999), withdrawn at request of court, superseding opinion, 191 F.3d 229, 1999 WL 639865 (2d Cir. Aug. 18, 1999) ("Laborers Local II"); *Regence Blueshield v. Philip Morris, Inc.*, 40 F. Supp. 2d 1179 (W.D. Wash. 1999). See also *id.* at p. 2, citing, *Laborers Local II, supra*. ("the Amended Complaint should be dismissed in its entirety because the Hospitals are in precisely the same position as the employer in *Williams & Drake* and the union trust funds in *Steamfitters II* and *Laborers Local II* - they suffered no direct injury, but merely incurred the costs of injuries allegedly suffered directly by smokers who sought medical treatment. As the Second Circuit succinctly concluded, because such 'economic injuries . . . are purely derivative of the physical injuries suffered by [individual smokers],' the plaintiffs' alleged injuries are 'too remote as a matter of law for them to have standing to sue defendants'.").

claims by union health and welfare funds against tobacco companies and tobacco industry organizations under **antitrust law**, the RICO statute and state common law to recover for the funds' costs of treating their participants' smoking-related illnesses.² The Steamfitters decision will be discussed *infra* in great detail with respect to many of the Plaintiffs' claims against the Defendants.

[**7] 1. Plaintiffs' Antitrust Violation Claims (Counts IV and V).

Relevant to the Plaintiffs' antitrust violation claims against the Defendants, Plaintiffs allege:

Defendants have conspired: (1) to suppress innovation and competition in product quality by agreeing not to engage in research, development, manufacture and marketing of less harmful cigarettes and other nicotine products; (2) to suppress output in the market, and to engage in concerted refusal to deal, by agreeing to keep at zero the output of less harmful cigarettes and other nicotine products; and (3) to suppress competition in marketing by agreeing not to take business from one another by making claims as to the relative safety of [*614] particular brands, whether or not such claims would have been truthful.

Plaintiffs' First Amended Complaint, P269. Plaintiffs also allege that they were consumers in the market for information related to the effects of tobacco use on health as well as for information related to alternative tobacco products which would reduce their expenditures for care provided to Medicaid, medically indigent and non-paying patients. *Id. at P 274*. Plaintiffs further allege that the Defendants [**8] are in the business of selling nicotine, a drug, and that but for the conspiracy alleged, a new submarket for less harmful cigarettes or other nicotine products would have been available to consumers. Plaintiffs aver that they are purchasers of such drugs, products and services used in the treatment of nicotine addiction and dependence and are potential customers in the market for less harmful cigarettes or other nicotine products.

Concerning the proximate cause requirement for antitrust claims, the Steamfitters court first discussed the primary factors for evaluating HN2[] proximate cause in an antitrust action as set forth by the United States Supreme Court in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982), which are as follows: "(1) 'the physical and economic nexus between the alleged [antitrust] violation and the harm to the plaintiff' and (2) 'more particularly, . . . 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 the antitrust laws." *Steamfitters*, 171 F.3d at 922. [**9] Notably, in making this inquiry, the McCready Court explained in relevant part: "where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations . . . would be likely to cause." *McCready*, 457 U.S. at 479.

Applying the McCready inquiry to the allegations relevant to the antitrust claims contained in Plaintiffs' First Amended Complaint, I find, as did the Steamfitters court, that here:

the tobacco companies could have achieved their alleged aims without the existence of the [Plaintiffs] or the relationship between the [Plaintiffs] and smokers, . . . The tobacco companies would have had ample reason to engage in a conspiracy to prevent safer tobacco products from coming on the market, regardless of the relationship between the [Hospital Plaintiffs] and smokers. The very existence of smokers would be a sufficient reason for such an alleged conspiracy. The fact that the [Hospital Plaintiffs] provided unreimbursed medical

² The Steamfitters court summarized the allegations contained in the plaintiffs' complaint as follows:

the plaintiff funds allege that they were defrauded by the defendants -- tobacco companies and related industry organizations -- into paying for their participants smoking-related illnesses, as well as prevented by these defendants from informing the funds' participants about safer smoking and smoking cessation products. The defendants allegedly conspired to prevent the funds from obtaining and using information that would have reduced the incidence of smoking -- and therefore of illness -- among the funds' participants.

services to Medicaid, medically indigent and non-paying patients] for their smoking-related illnesses might have [**10] made the conspiracy more profitable or allowed it to exist longer, but the relationship between the [Hospital Plaintiffs] and smokers was not a necessary step in effecting the ends of the alleged illegal conspiracy".

Id. 171 F.3d at 923. Thus, under the McCready analysis, Plaintiffs have not alleged facts in their First Amended Complaint sufficient to establish the proximate cause requirement for their antitrust claims. The Steamfitters court then discussed the United States Supreme Court's decision in Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) ("AGC") wherein the court outlined HN3[¹] a number of factors to consider in analyzing whether a plaintiff has antitrust standing. These factors are:

(1) the causal connection between defendant's [antitrust] wrongdoing and plaintiff's harm; (2) the specific intent of defendant to harm plaintiff; (3) the nature of plaintiff's injury (and whether it relates to the purpose of the antitrust laws, i.e. ensuring competition within economic markets); (4) "the directness or indirectness of the asserted injury"; [**11] (5) whether the "damages claim is . . . [*615] highly speculative"; and (6) "keeping the scope of complex antitrust trials within judicially manageable limits," i.e., "avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other."

Steamfitters, 171 F.3d at 924, quoting, AGC, 459 U.S. at 537-38.

Applying the AGC factors to the facts alleged in Plaintiffs' First Amended Complaint, I find first that Plaintiffs have alleged a causal connection between the Defendants' alleged conspiratorial conduct and the Plaintiffs' injuries in that their allegations are that but for the alleged conspiratorial misconduct, Plaintiffs could have assisted their patients to stop smoking and/or one or more of the Defendants would have developed a less harmful cigarette or other nicotine delivery system which their Medicaid, medically indigent and non-paying patients with tobacco-related illnesses would have used. Therefore, Plaintiffs argue, they would have been able to reduce their costs for caring for Medicaid, medically indigent and non-paying patients with tobacco-related diseases.

Second, I find [**12] that Plaintiffs have alleged that the Defendants' alleged conspiratorial conduct was specifically intended to harm the Plaintiffs in that Defendants allegedly acted as they did so that Plaintiffs, rather than Defendants, would incur the costs of treating Medicaid, medically indigent and non-paying patients with tobacco-related diseases.

Third, concerning the nature of the Plaintiffs' injuries and whether they relate to the purpose of the antitrust laws, i.e. ensuring competition within economic markets, it is helpful to examine the discussion of the Steamfitters court on this issue. Specifically, the Steamfitters court first discussed the plaintiff funds' claims based upon indirect cost increases from smoking-related illnesses and concluded that because "the Funds are not consumers forced to pay higher prices for tobacco products or competitors harmed by defendants' ability to conceal the unsafe nature of their products," but rather, were "simply some of the many groups or individuals suffering the financial or medical repercussions of the decades-long marketing of a product we now know is demonstrably unsafe," this injury by the Fund did not relate to the purpose of the antitrust [**13] laws. Id. 171 F.3d at 927. The Steamfitters court then went on to explain that:

the Funds' claims of direct injury include allegations that they were in the market for safer tobacco products or for products that would reduce or prevent people from smoking. Therefore, these claims might meet the third factor from AGC. If the Funds were consumers in a market for information and products that would have reduced their expenditures (because they allegedly would have provided the information and products to their participants, some of whom would have smoked less and become less ill), their asserted injuries as consumers -- may be of the appropriate type.

Id.

Turning to the nature of the Plaintiffs' claimed injuries and whether they relate to the purpose of the federal antitrust laws, i.e. ensuring competition within economic markets, I find that to the extent Plaintiffs' claimed injuries are

based upon: (1) their status as potential customers in the market for safer cigarettes or other nicotine products that would reduce or prevent their Medicaid, medically indigent or non-paying patients with tobacco-related illnesses from smoking or (2) their status as consumers **[**14]** in the market for information related to the effects of tobacco use on health and information related to alternative tobacco products which would have reduced their expenditures for care provided to the Medicaid, medically indigent and non-paying patients they treated for tobacco-related diseases, said injuries "may be of the appropriate type" *Id. at 927*. To the extent, however, Plaintiffs' claims are premised "simply on *indirect* cost increases from [their providing medical services **[*616]** to their Medicaid, medically indigent and non-paying patients with] smoking-related illnesses," said injuries are not the type sought to be protected by anti-trust laws because "the [Plaintiffs] are not consumers forced to pay higher prices for tobacco products or competitors harmed by defendants' ability to conceal the unsafe nature of their products. They are simply some of the many groups or individuals suffering the financial or medical repercussions of the decades-long marketing of a product that we know now is demonstrably unsafe." *Id.*

Turning next to the inquiry of "the directness or indirectness of the asserted injury," again the court's analysis in Steamfitters provides direction. **[**15]** The court began its analysis on the question of the directness/indirectness of the plaintiff funds' injuries as follows: "the Funds' claims of direct injury might also meet the fourth factor from AGC, which focuses on the directness or indirectness of the alleged injury. Subsumed in the "directness" factor is also the issue of whether other, more directly injured parties could vindicate the policies underlying the antitrust laws While more direct injured parties existed in AGC . . . , this is not necessarily the case here. Smokers can sue for personal injuries arising from smoking, but they are unlikely (or unable) to press antitrust claims against the tobacco companies." *Id.* The court continued:

we question [however] whether these direct injuries are necessarily more direct than the indirect injuries on which much of our discussion has focused. Under plaintiffs' direct theory, the tobacco companies' conduct aimed at the Funds induced the Funds to not take certain actions, which led to a greater incidence of smoking (and of smokers using more dangerous products), which led to more illness, which led to increased health care expenditures being borne by the **[**16]** plaintiffs. Although the alleged wrongdoing was more directly aimed at the Funds, the injury itself certainly was no more direct than the indirect injury that arose from the defendants' actions towards smokers.

Id.

Under the precedent set forth above in Steamfitters, clearly to the extent that the Plaintiffs' claims are based simply on indirect cost increases from smoking-related injuries, said injuries are not "direct." Further, as the Steamfitters court concluded, to the extent the Plaintiffs' antitrust claims relate to the Defendants' intentional conduct towards the Plaintiffs, while the conduct was allegedly directed at the Plaintiffs, the injuries allegedly suffered by the Plaintiffs as a result of said conduct were "no more direct than the indirect injuries that arose from the defendants' actions towards smokers." *Id.*

Turning next to the AGC inquiry of whether the "damages claim is . . . highly speculative," I find, as did the Steamfitters court, that "the [plaintiffs'] damages claims are quite speculative (and very difficult to measure)." *Id. at 928-29*. As explained by the Steamfitters court:

the [Plaintiffs'] alleged damages **[**17]** are said to arise from the fact that the tobacco companies prevented them from providing smoking-cessation or safer smoking information [or safer tobacco products] to their [Medicaid, medically indigent and non-paying patients], some of whom would have allegedly quit smoking or begun smoking safer products, reducing their smoking-related illnesses, and thereby lowering the [Plaintiffs'] costs for [providing unreimbursed medical services to said patients]. In order to calculate the damages-i.e., the costs not lowered due to the antitrust conspiracy-the [Plaintiffs] must demonstrate how many smokers would have stopped smoking if provided with smoking-cessation information, how many would have begun smoking less dangerous products, how much healthier these smokers would have been if they had taken these actions, and the savings the [Plaintiffs] would have realized by [having to provide fewer unreimbursed medical services to Medicaid, medically **[*617]** indigent and non-paying patients] for smoking-related illnesses.

Id. at 929.

Finally, concerning the goals of "keeping the scope of complex antitrust trials within judicially manageable limits," i.e., "avoiding either [**18] the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other," I conclude that I am not overly concerned that there is any real risk of duplicate recoveries or complex apportionment of damages under the allegations underlying the antitrust claims set forth in the First Amended Complaint. I do, however, agree with the Steamfitters court's concern that to the extent the Plaintiffs' Medicaid, medically indigent and non-paying patients have suffered some sort of pecuniary loss as a result of the Defendants' alleged conspiracy, for example, increased cigarette prices, then they too could bring antitrust and RICO (as well as personal injury claims) against the Defendants and "therefore, to some minimal extent at least, an apportionment of damages between health care payers and smokers might be necessary. Id. at 928, n. 10.

Thus, in conclusion, after review of all of the AGC factors in light of the allegations contained in the Plaintiffs' First Amended Complaint, I find that "however plaintiffs characterize their claims-as director indirect-they necessarily fail for being too remotely connected in the causal chain from any wrongdoing [**19] on defendants' part." Id. at 928. Simply stated, "the tortured path that one must follow from the tobacco companies' alleged wrongdoing to the [Plaintiffs'] increased expenditures demonstrates that the plaintiffs' claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out . . ." Id. at 930. See also Id. at 932 ("the injuries that [Plaintiffs] allegedly suffered from defendants' wrongdoing are simply too remote from that wrongdoing to be cognizable under the antitrust laws. The causal links that plaintiffs must connect in order to make their case are just too numerous and too speculative . . ."). Plaintiffs' antitrust claims against Defendants are dismissed as a matter of law for failure to state a claim upon which relief can be granted.

2. Plaintiffs' RICO Claims (Counts I, II and III).

HN4 [↑] In order to determine proximate causation in RICO cases, three factors must be considered: (1) the directness of the injury; (2) the difficulty of apportioning damages among potential plaintiffs; and (3) the possibility of other plaintiffs vindicating the goals of RICO. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268-69, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992); [**20] Callahan v. A.E.V., Inc., 182 F.3d 237, 242 (3d Cir. 1999); Steamfitters, 171 F.3d at 932. These factors are critical because "(1) the more indirect the injury, 'the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to [defendant's wrongdoing] as distinct from other, independent, factors'; (2) allowing recovery by indirectly injured persons would require complicated rules for apportioning damages; and (3) direct victims could generally be counted on to vindicate the policies underlying the relevant law." Steamfitters, 171 F.3d at 932, quoting, Holmes, 503 U.S. at 269-70.

Regarding the directness of the Plaintiffs' alleged injuries, as explained by the Steamfitters court: "applied to the present case, if the [Plaintiffs] are allowed to sue, the court would need to determine the extent to which their increased costs for smoking related illnesses resulted from the tobacco companies' conspiracy to suppress health and safety information [and safer tobacco products], as opposed to smokers' other health problems, smokers' independent (i.e., separate from the fraud and conspiracy) [**21] decisions not to smoke, smokers' ignoring of health and safety warnings, etc. . . . This causation chain is much too speculative and attenuated to support a RICO claim." Id. 171 F.3d at 933 (internal footnote omitted).

Concerning the inquiry of the apportionment of damages, as stated by the Steamfitters court:

[*618] as we noted in our discussion of the [Plaintiffs'] antitrust claims, more directly injured parties, i.e., smokers, would be unlikely to bring federal claims against the tobacco companies for the same damages claimed by the Funds. Yet, as we also noted above, [smokers] who have not been fully reimbursed for their out-of-pocket costs that are traceable to defendants' alleged fraud and conspiracy might bring RICO or antitrust claims. Therefore, as in *Holmes*, a court adjudicating the [Plaintiffs'] RICO claims would need to consider the appropriate apportionment of damages between smokers and others such as the [Plaintiffs] who suffered economic losses as a result of the tobacco companies' alleged fraudulent acts.

Id.

Last, concerning the issue of whether others could generally be counted on to vindicate the Plaintiffs' RICO claims, I agree that this **[**22]** factor weighs in favor of Plaintiffs being able to bring the instant RICO claims in that they are alleging to have suffered far greater economic damages than did the smokers themselves. However, "yet we are unconvinced that this distinction is sufficient to overcome the concerns about apportioning damages and, most fundamentally, the remoteness of the Funds' alleged RICO injuries from any wrongdoing on the part of the tobacco companies." [Id. at 933-34.](#)

Thus, for the reasons stated above, I find that the Plaintiffs' alleged injuries are too remote from the Defendants' alleged conduct to be able to state any RICO claims against the Defendants. Defendants' Motions to Dismiss Plaintiffs' RICO claims for failure to state a claim upon which relief can be granted are granted.

3. Fraudulent Misrepresentation, Fraudulent Concealment, and Negligent Misrepresentation and Omission Claims (Counts VI, VII and VIII).

HN5 In order to prove their state law fraud and negligence claims against Defendants, Plaintiffs would have to be able to establish that their injuries were proximately caused by Defendants' conduct. [Steamfitters, 171 F.3d at 934-35, 937 n. 23](#) (fraudulent **[**23]** misrepresentation and negligence claims); [Scaife Co. v. Rockwell-Standard Corp., 446 Pa. 280, 285 A.2d 451, 454 \(1971\)](#), cert. den'd, 407 U.S. 920 (1972) (fraudulent misrepresentation claim); [Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 464 A.2d 1243, 1252 \(1983\)](#) (fraud claim); [Fort Washington Resources, Inc. v. Tannen, 858 F. Supp. 455, 459, 461 \(E.D. Pa. 1994\)](#) (fraud and negligent misrepresentation claims). "Just as we have found the link between defendants' alleged fraud-providing false information regarding the safety of their products-and plaintiffs' alleged injuries too attenuated to support a RICO claim, we also find the link too remote to support a common-law fraud claim." [Steamfitters, 171 F.3d at 935](#), citing [Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882, 889 \(1994\)](#); [Crawford v. Pituch, 368 Pa. 489, 84 A.2d 204 \(1951\)](#). For the reasons set forth above with respect to Plaintiffs' antitrust and RICO claims, I find as a matter of law that in the instant case, the causal connection between the Defendants' alleged fraudulent and/or negligent misrepresentations **[**24]** or omissions and the Plaintiffs' alleged injuries are too remote to support Plaintiffs' state law fraudulent misrepresentation, fraudulent concealment and negligent misrepresentation claims. Defendants' motions to dismiss said claims for failure to state a claim upon which relief can be granted are granted.

4. Breach of Special Duty Claim (Count IX).

In [Steamfitters](#), the court explained with respect to breach of special duty claims that **HN6** "a special duty claim is effectively a negligence cause of action, and therefore requires the element we have found missing from plaintiffs' case, proximate cause. . . ." [Steamfitters, 171 F.3d at 936](#). Given my conclusion that the element lacking **[*619]** from Plaintiffs' case against Defendants in general is proximate cause between Defendants' conduct and Plaintiffs' injuries, Plaintiff's breach of special duty claim, premised upon the Defendants' publication of information, representations to and omissions from the public, including the Plaintiffs, also must fail as a matter of law. Defendants' Motions to Dismiss Plaintiffs' breach of special duty claim for failure to state a claim upon which relief can be granted are granted. **[**25]**

5. Plaintiffs' Remaining State Law Claims.

While the Defendants argue that all of the Plaintiffs' claims against them must be dismissed based upon remoteness doctrine, a review of the elements of the Plaintiffs' remaining state law claims against the Defendants, public nuisance, aiding and abetting, civil conspiracy, restitution/unjust enrichment, indemnity, and quantum meruit, does not indicate that proximate causation is an element of said claims. Therefore, I find it necessary to turn to the Defendants' alternative arguments as to why said claims should be dismissed.

B. Plaintiffs' Remaining Claims Against Defendants.

1. Public Nuisance Claim (Count X).

HN7 [↑] "A public nuisance is 'an unreasonable interference with a right common to the general public'." *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 315 (3d Cir.), cert. den'd, 474 U.S. 980 (1985), quoting, *Restatement (Second) of Torts* § 821B(1). Further:

HN8 [↑] circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

- (a) whether the conduct involves a significant interference with [**26] the public health, the public safety, the public peace, the public comfort or the public convenience;
- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) whether the conduct is of such a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B. **HN9** [↑] "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." *Id.* at § 821C(1). See also *Pennsylvania Society for the Prevention of Cruelty to Animals v. Bravo Enterprises, Inc.*, 428 Pa. 350, 360, 237 A.2d 342, 343 (1968) **HN10** [↑] ("a public nuisance may be enjoined at the behest of a private citizen or a group of citizens, if the latter, in either their property or civil rights, are specifically injured by the public nuisance over and above the injury suffered by the public generally."). "To constitute a public nuisance, [**27] the conduct must be an inconvenience or troublesome offense that annoys the whole community in general, and not merely some particular person." *Feeley v. Borough of Ridley Park*, 121 Pa. Commw. 564, 551 A.2d 373, 375 (1988).

Defendants first move to dismiss Plaintiffs' public nuisance claim on the basis that "the defendants' alleged conduct - failure to disseminate complete and truthful information about their cigarettes- cannot by its nature interfere with a 'public' right. Rather, . . . the persons affected by the defendants' alleged misconduct here are defendants' customers, the narrow subset of the general public that smokes. Because there was not interference with a public right, the nuisance claim must be dismissed." Defendants' Supporting Brief, pp. 15-16. Alternatively, Defendants argue that the Plaintiffs lack standing to assert a public nuisance claim because they have not alleged [*620] that they suffered "harm of a kind different from that suffered by other members of the public." *Id.* at p. 16, quoting, *Restatement (Second) of Torts*, § 821C(1). "The Hospitals have not alleged any special harm 'over and above' that caused to the general public. In [**28] fact, the costs of medical services for which the Hospitals seek recovery are entirely coincident with, and derivative of, the harm allegedly caused to their patients, the smokers." *Id.* at p. 16.

In response, Plaintiffs first argue that the class of people affected by Defendants' alleged conduct consists of approximately 50 millions Americans, including millions of Pennsylvania residents and therefore, the alleged conduct affected the whole community in general. Plaintiffs' Opposition Brief, p. 22. They also argue that the Defendants ignore the direct harm they inflicted on the Hospitals and that as a result of the Defendants' conduct, they suffered a harm of greater magnitude than the general public. *Id.*, citing, *Philadelphia Elec. Co., supra*.

After careful consideration of the submissions of the parties, I find that while arguably the Defendants' alleged conduct affected the whole community in general, the Plaintiffs have not sufficiently alleged a harm suffered by them that was different from/of a greater magnitude than the harm suffered by other members of the general public exercising the right common to the general public that was the subject of interference. [**29] Accordingly,

Defendants' motions to dismiss Plaintiffs' public nuisance claim for failure to state a claim upon which relief can be granted are granted.

2. Aiding and Abetting and Civil Conspiracy Claims (Counts XI and XV).

Defendants also move to dismiss Plaintiffs' aiding and abetting and civil conspiracy claims. In support of their motion, Defendants argue that dismissal is warranted because Plaintiffs have failed to plead any actionable tortious conduct by Defendants and because the Plaintiffs have failed to identify which alleged wrongdoers caused which alleged injuries, i.e. "the Hospitals therefore have not satisfied the strict standard for pleading proximate cause on a conspiracy or a concert of action theory. [HN11](#)[¹] In Pennsylvania, "to state cause of action for civil conspiracy, the following results are required: '(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act in pursuance of the common purpose; and (3) actual damage'." [Strickland v. University of Scranton](#), 700 A.2d 979, 987-88 (Pa. Super. 1997), quoting, [Smith v. Wagner](#), 403 Pa. Super. 316, 320-24, 588 A.2d 1308, 1311-12 (1991). [**30] Moreover, "[a] claim for civil conspiracy can only proceed when there is a cause of action for the underlying act." [Caplan v. Fellheimer Eichen Braverman & Kaskey](#), 884 F. Supp. 181, 184 (E.D. Pa. 1995), citing, [Nix v. Temple Univ. of Com. System of Higher Educ.](#), 408 Pa. Super. 369, 596 A.2d 1132, 1137 (1991). See also [Pelagatti v. Cohen](#), 370 Pa. Super. 422, 432, 536 A.2d 1337, 1342 (1987), appl den'd, 519 Pa. 667, 548 A.2d 256 (1988) ("absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy."). Similarly, [HN12](#)[¹] under a concert of action theory, "for harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with another or pursuant to a common design with him. [Skipworth by Williams v. Lead Industries Ass'n, Inc.](#), 547 Pa. 224, 236, 690 A.2d 169, 174 (1997).

Given that Plaintiffs have failed to sufficiently plead any actionable tortious conduct by Defendants, Plaintiffs' claims for civil conspiracy and aiding and abetting must be dismissed for failure to state a claim upon [**31] which relief can be granted.

3. Restitution/Unjust Enrichment Claim (Count XIII).

As explained by the [Steamfitters](#) court in relevant part:

in the tort setting, an unjust enrichment claim is essentially another way of [*621] stating a traditional tort claim (i.e., if defendant is permitted to keep the benefit of his tortious conduct, he will be unjustly enriched). As the Restatement of Restitution puts it:

the desirability of permitting restitution in [tort] cases is ordinarily not so obvious as in the cases where there has been no tort since the tortfeasor is always subject to liability in an action for damages and . . . the right to maintain an action for restitution in such cases is largely the product of imperfections in the tort remedies, some of which imperfections have now been removed.

Restatement of Restitution, § 3 cmt. a (1937); see also *id.* at ch. 7 introductory note ("Actions of tort are ordinarily not restitutionary . . . They are based primarily upon wrongdoing and ordinarily, through the payment of money, compensate the injured person for the harm suffered by him as a result of the wrongful conduct, irrespective of the receipt of anything [**32] by the defendant"). We can find no justification for permitting plaintiffs to proceed on their unjust enrichment claim once we have determined that the District Court properly dismissed the traditional tort claims because of the remoteness of plaintiffs' injuries from defendants' wrongdoing.

[Steamfitters](#), 171 F.3d at 936-37. I agree that it would be improper to allow Plaintiffs to proceed with their restitution/unjust enrichment claim against Defendants having determined that their traditional tort claims must be dismissed because of the remoteness of the Plaintiffs' alleged injuries from the Defendants' alleged conduct. Accordingly, Plaintiffs' claim for restitution/unjust enrichment against Defendants is dismissed for failure to state a claim upon which relief can be granted.

4. Indemnity Based On Intentional and/or Reckless Conduct Claim (Count XII).

In Count XII of their First Amended Complaint, Defendants move to dismiss Plaintiffs' claim that Defendants should indemnify them for the unreimbursed costs of providing medically necessary care and services to Medicaid, medically indigent and non-paying patients injured by use of Defendants' tobacco [**33] products. Specifically, Defendants argue that "under Pennsylvania law, indemnity is only available: (1) where there is an express contract to indemnify; or (2) where the party seeking indemnification was secondarily liable for the indemnitor's acts," and neither scenario exists under the facts alleged in Plaintiffs' First Amended Complaint. Defendants' Supporting Brief, p. 17.

In response, Plaintiffs argue: (1) Defendants misconstrue indemnity case law when they argue that Plaintiffs cannot state a claim for indemnity because Plaintiffs are primarily liable for the costs of medical care for patients with tobacco-related disease; (2) Defendants are wrong when they argue that the Hospitals are primarily liable for the costs of medical care for Medicaid, medically indigent and non-paying patients with tobacco-related disease; (3) Plaintiffs are not "liable" to these patients; and (4) Defendants are primarily liable for the injuries that the Defendants caused to the smokers who the Plaintiffs treated for tobacco-related diseases. Plaintiffs' Opposition Brief, p. 23.

In [Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368 \(1951\)](#), the Pennsylvania Supreme Court [**34] explained the concept of indemnity claims:

HN13[¹³] the right of indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence, -- [*622] a doctrine which, indeed, is not recognized by the common law. It depends on a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured party.

...

It is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized. But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive [**35] only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.

[McCabe, 366 Pa. at 325-28, 77 A.2d at 370-71](#) (internal citation omitted). Clearly, the facts pled in the Plaintiffs' First Amended Complaint, where Plaintiffs are neither vicariously nor secondarily liable for any torts committed upon their Medicaid, medically indigent or non-paying patients with tobacco-related diseases by Defendants, are not the type of facts which give rise to an indemnity action. Accordingly, Defendants' Motions to Dismiss Plaintiffs' indemnity action for failure to state a claim upon which relief can be granted are granted.

5. Quantum Meruit Claim (Count XIV).

Finally, Defendants move to dismiss the Plaintiffs' quantum meruit claim against them. The Plaintiffs' quantum meruit claim is premised upon the theory that by paying for the medical services of its Medicaid, medically indigent and non-paying patients with tobacco-related diseases, Plaintiffs satisfied the Defendants' [**36] legal duties and saved them from initially bearing the costs for harm proximately caused by their fraudulent and wrongful conduct. Specifically, Defendants move to dismiss this claim on the basis that in order for the Plaintiffs to recover damages under a theory of quantum meruit, there must have been either "(1) an implied contract between the parties, or (2)

plaintiff must have performed services for the defendant for which the plaintiffs had a reasonable expectation of compensation." Defendants' Supporting Brief, p. 20 (emphasis in original). "Plaintiffs certainly have not alleged that there was an implied contract between the Hospitals and the tobacco companies under which the tobacco industry was obligated to pay for the health care costs of smokers. Nor did the plaintiffs provide a service to the defendants for which they reasonably expected compensation. See Amended Compl., PP 373-79. Instead, plaintiffs provided services to smokers, from which they expected to be paid, if at all, by the smokers themselves, or by Medicaid." Id.

In response, Plaintiffs contend that Defendants misread Plaintiffs' First Amended Complaint and state: "at paragraph 377, the Hospitals **[**37]** allege that 'Defendants impliedly promised to pay the Hospital Plaintiffs for their valuable services rendered as a result of their wrongful conduct . . .' At paragraph 376, the Hospitals allege that they "reasonably expected to be reimbursed their usual and customary fees to provide such services." See also FAC P 377 ("Defendants knew Hospitals incurred costs to treat tobacco-related illness caused by Defendants' wrongful conduct and that Hospitals would reasonably expect to be paid for their services."). Plaintiffs' Opposition Brief, pp. 24-25.

HN14  "Quantum meruit is an implied contract remedy based on payment for services rendered and on prevention of unjust enrichment. . . [A] promise to pay for services may only be implied when such services are rendered in such circumstances where the performing party entertains a reasonable expectation of being paid by the party benefited." *Aloe Coal Co. v Department of Transp.*, 164 Pa. Commw. 453, 643 A.2d 757, 767 (1994), citing, *Martin I^{*6231} V. Little, Brown and Co.*, 304 Pa. Super. 424, 450 A.2d 984 (1981). After careful consideration of the submissions of the parties on this issue and the factual allegations **[**38]** pled in the Plaintiffs' First Amended Complaint, I find that under the facts pled in Plaintiffs' First Amended Complaint, see in particular PP 376 and 377 of the First Amended Complaint,³ contrary to Plaintiffs' contentions, it cannot be inferred from Defendants' alleged conduct that they impliedly promised to pay Plaintiffs for the medical services Plaintiffs provided to Medicaid, medically indigent and non-paying patients with tobacco-related illnesses or that at the time Plaintiffs rendered said medical services, they did so reasonably expecting to be reimbursed by Defendants for their usual and customary fees to provide such services. Accordingly, Defendants' Motions to Dismiss Plaintiffs' quantum meruit claim for failure to state a claim upon which relief can be granted are granted.

[[39] C. Defendants' no cognizable injury argument.**

Defendants also argue in support of their Motions to Dismiss that all of the Plaintiffs' claims against them must be dismissed because Plaintiffs' have suffered no cognizable injury. Given my above determinations with respect to the sufficiency of the Plaintiffs' federal and state law claims against Defendants, it is not necessary to address this argument and therefore, I elect not to do so.

³ In toto, PP 376 and 377 of Plaintiffs' First Amended Complaint state:

376. The Hospital Plaintiffs acted unofficiously, were required by law and/or morality to provide such health care, did not volunteer to provide such health care free of charge, intended to charge for such services and reasonably expected to be reimbursed their usual and customary fees to provide such services.

377. The [Hospital Plaintiffs] have expended sums to diagnose and treat tobacco-related illnesses caused by Defendants' wrongful conduct and for which the Defendants had, and continue to have a duty to pay, but have avoided paying by deceit, mendacious lobbying efforts, propaganda, scorched-earth and illicit and deceptive litigation tactics and other means. The Defendant Tobacco Companies knew or reasonably should have known that the Hospital Plaintiffs would be required to bear health care costs attributable to Defendants' conduct. Defendants knew of and appreciated the benefits that the Hospital Plaintiffs' bearing of such health care costs conferred on Defendants. At no time did the Defendants, or any of them, inform the Hospital Plaintiffs that Defendants would not reimburse the Hospital Plaintiffs for the cost of treating the Hospital Plaintiffs' Medicaid, medically indigent and non-paying patients despite Defendants' knowledge that the health care expenses that the Hospital plaintiffs incurred to treat tobacco-related illnesses were caused by the Defendants' wrongful conduct and that the Hospital Plaintiffs would reasonably expect to be paid for their services. Under these circumstances, the Defendants impliedly promised to pay the hospital Plaintiffs for their valuable services rendered as a result of their wrongful conduct, and it would be inequitable, unconscionable and unjust not to enforce their implied promise.

ORDER OF COURT

AND NOW, this **4th** day of November, 1999, after careful consideration and for the reasons set forth in the accompanying Opinion, it is **ORDERED** that the Motion to Dismiss of Phillip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company), Lorillard Tobacco Company, United States Tobacco Company, The Tobacco Institute, Incorporated, The Council for Tobacco Research-USA, Incorporated, Hill & Knowlton, Inc. (Docket No. 19) and the Motion to Dismiss the Liggett Group, Inc. (Docket No. 22) are **GRANTED** and Plaintiffs' First Amended Complaint against these named Defendants is **DISMISSED** **[**40] *with prejudice*.**

BY THE COURT:

Donetta W. Ambrose,

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Intergraph Corp. v. Intel Corp.

United States Court of Appeals for the Federal Circuit

November 5, 1999, Decided

98-1308

Reporter

195 F.3d 1346 *; 1999 U.S. App. LEXIS 29199 **; 52 U.S.P.Q.2D (BNA) 1641 ***; 1999-2 Trade Cas. (CCH) P72,697; 40 U.C.C. Rep. Serv. 2d (Callaghan) 107

INTERGRAPH CORPORATION, Plaintiff-Appellee, v. INTEL CORPORATION, Defendant-Appellant.

Prior History: [**1]Appealed from: United States District Court for the Northern District of Alabama. Judge Edwin L. Nelson.

Disposition: INJUNCTION VACATED

Core Terms

district court, Sherman Act, patent, products, monopolization, antitrust, customer, anti trust law, competitors, monopoly power, monopolist, Chips, microprocessors, non-disclosure, termination, leveraging, compete, license, injunction, monopoly, relevant market, manufacturer, anticompetitive, workstation, graphics, preliminary injunction, parties, benefits, terms, proprietary information

LexisNexis® Headnotes

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 > Appeals > Appellate Jurisdiction > General Overview

HN1[] Jurisdiction Over Actions, Exclusive Jurisdiction

On appellate review, except for issues within the Federal Circuit Court of Appeals' exclusive jurisdiction, a federal appeals court applies the discernable law of the regional circuit.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

[**HN2**](#) [down] **Injunctions, Preliminary & Temporary Injunctions**

The criteria for grant of a preliminary injunction is: (1) the party seeking the injunction has shown a substantial likelihood of success on the merits, (2) there is a substantial threat of irreparable injury in absence of the injunction, (3) the balance of harms favors the party seeking the injunction, and (4) entry of the injunction does not disserve the public interest. These criteria apply to antitrust issues as to other areas of law. The burden of establishing entitlement to the injunction is on the movant.

[Civil Procedure > Appeals > Standards of Review > De Novo Review](#)

[Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions](#)

[Civil Procedure > Appeals > Standards of Review](#)

[**HN3**](#) [down] **Standards of Review, De Novo Review**

The grant of a preliminary injunction is reviewed on the standard of abuse of discretion. This standard requires plenary review of the correctness of the district court's rulings on matters of law, including the correctness of the legal criteria used in evaluating the likelihood of success on the merits.

[Civil Procedure > Appeals > Standards of Review > Abuse of Discretion](#)

[Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions](#)

[Civil Procedure > Appeals > Standards of Review > De Novo Review](#)

[**HN4**](#) [down] **Standards of Review, Abuse of Discretion**

A district court necessarily abuses its discretion when it bases a ruling on an erroneous view of the law. Any legal determinations made by the district court in ruling on a preliminary injunction are reviewed de novo. A district court abuses its discretion when it misconstrues its proper role, ignores or misunderstands the relevant evidence, and bases its decision upon considerations having little factual support.

[Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions](#)

[Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest](#)

[**HN5**](#) [down] **Injunctions, Preliminary & Temporary Injunctions**

The Eleventh Circuit Court of Appeals has consistently held that for preliminary relief a substantial likelihood of success on the merits must be shown. A party seeking a preliminary injunction must establish the following four factors: (1) a substantial likelihood of success on the merits, (2) a threat of irreparable injury, (3) that its own injury would outweigh the injury to the nonmovant, and (4) that the injunction would not disserve the public interest.

[Antitrust & Trade Law > Sherman Act > Remedies > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market](#)

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > 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 > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

[HN6](#) Sherman Act, Remedies

Unlawful monopolization requires both the existence of monopoly power and anticompetitive conduct. Monopoly power is generally defined as the power to control prices or exclude competition in a relevant market; anticompetitive conduct is generally defined as conduct whose purpose is to acquire or preserve the power to control prices or exclude competition. The prohibited conduct must be directed toward competitors and must be intended to injure competition.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN7](#) Regulated Practices, Monopolies & Monopolization

Monopolistic conduct must affect the relevant product market, that is, the area of effective competition between the defendant and plaintiff. The relevant market has two dimensions: first, the relevant product market, which identifies the products or services that compete with each other; and second, the geographic market, which may be relevant when the competition is geographically confined. Thus the market which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

[HN8](#) Monopolies & Monopolization, Attempts to Monopolize

The **antitrust law** has consistently recognized that a producer's advantageous or dominant market position based on superiority of a commercial product and ensuing market demand is not the illegal use of monopoly power prohibited by the Sherman Antitrust Act, [15 U.S.C.S. § 1 et seq.](#) the offense of monopoly under [§ 2](#) of the Sherman Antitrust 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. Product superiority and the ensuing market position, flowing from a company's research, talents, commercial efforts, and financial commitments, do not convert the successful enterprise into an illegal monopolist under the Sherman Antitrust Act, [15 U.S.C.S. § 1 et seq.](#)

Antitrust & Trade Law > Sherman Act > Claims

Patent Law > ... > Defenses > Inequitable Conduct > 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

Patent Law > Infringement Actions > General Overview

HN9 [blue icon] Sherman Act, Claims

The Sherman Antitrust Act (Sherman Act), [15 U.S.C.S. § 1 et seq.](#), does not convert all harsh commercial actions into antitrust violations. Unilateral conduct that may adversely affect another's business situation, but is not intended to monopolize that business, does not violate the Sherman Act. To establish a violation of [15 U.S.C.S. § 2](#) for attempted monopolization, a plaintiff must show (1) an intent to bring about a monopoly and (2) a dangerous probability of success.

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

HN10 [blue icon] Antitrust & Trade Law, Sherman Act

Defining the relevant market is an indispensable element of any monopolization or attempt case, for it is the market in which competition is affected by the asserted predatory or anticompetitive acts. It is the market in which sellers compete, based on products that are in competition with each other. 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.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Patent Law > Statutory Bars > Abandonment & Forfeiture Bar > Abandonment

HN11 [blue icon] Regulated Practices, Market Definition

A patent grant is a legal right to exclude, not a commercial product in a competitive market. Firms do not compete in the same market unless, because of the reasonable interchangeability of their products, they have the actual or potential ability to take significant business away from each other.

Antitrust & Trade Law > Sherman Act > General Overview

HN12 [blue icon] Antitrust & Trade Law, Sherman Act

The Sherman Antitrust Act, [15 U.S.C.S. § 1 et seq.](#), is a law in the public, not private, interest. To constitute a violation, the monopolist's activities must tend to cause harm to competition; unrelated harm to an individual competitor or consumer is not sufficient.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN13 [] **Regulated Practices, Monopolies & Monopolization**

The essential facility theory does not depart from the need for a competitive relationship in order to incur Sherman Antitrust Act, [15 U.S.C.S. § 1 et seq.](#) liability and remedy. An antitrust claim on the essential facility theory requires that a monopolist who competes with the plaintiff in the monopolized market controls an essential facility, and refuses the plaintiff's request for access to the facility. Stated most generally, the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN14 [] **Regulated Practices, Monopolies & Monopolization**

The elements of liability under the "essential facilities" theory are: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN15 [] **Regulated Practices, Monopolies & Monopolization**

A non-competitor's asserted need for a manufacturer's business information does not convert the withholding of that information into an antitrust violation.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN16 [] **Regulated Practices, Monopolies & Monopolization**

Other than as a remedy for illegal acts, the antitrust laws do not compel a company to do business with anyone, customer, supplier, or competitor.

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

HN17 [] **Monopolies & Monopolization, Attempts to Monopolize**

It is well established that in the absence of any purpose to create or maintain a monopoly, the Sherman Antitrust Act, [15 U.S.C.S. § 1 et seq.](#) does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN18](#) **Regulated Practices, Monopolies & Monopolization**

The relationship between a manufacturer and its customer should be reasonably harmonious; and the bringing of a lawsuit by the customer may provide a sound business reason for the manufacturer to terminate their relations.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN19](#) **Regulated Practices, Monopolies & Monopolization**

A "refusal to deal" may raise antitrust concerns when the refusal is directed against competition and the purpose is to create, maintain, or enlarge a monopoly.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

[HN20](#) **Sherman Act, Claims**

A monopolist's unilateral refusal to deal with its competitors (as long as the refusal harms the competitive process) may constitute *prima facie* evidence of exclusionary conduct in the context of a [15 U.S.C.S. § 2](#) claim. A monopolist may nevertheless rebut such evidence by establishing a valid business justification for its conduct.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN21](#) **Regulated Practices, Monopolies & Monopolization**

A manufacturer is under no duty to help a plaintiff or other peripheral equipment manufacturers survive or expand. Absent a duty, the defense of business justification is unnecessary.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[HN22](#) **Regulated Practices, Monopolies & Monopolization**

Antitrust liability based on leveraging of monopoly power is a concept of imprecise definition, for the courts have varied in their requirements of the nature of the advantage obtained in the assertedly leveraged market.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

HN23 [blue icon] **Regulated Practices, Monopolies & Monopolization**

The Sherman Antitrust Act, [15 U.S.C.S. § 1 et seq.](#) is violated if monopoly power in one market provides a "competitive advantage" in another market, whether or not there is an intent to create a monopoly in the second market.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN24 [blue icon] **Regulated Practices, Monopolies & Monopolization**

To establish illegal leveraging of monopoly power the challenged conduct must threaten the second market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share. Absent an adverse effect in the second market, the Sherman Antitrust Act, [15 U.S.C.S. § 1 et seq.](#) would serve to restrain competition rather than promote it.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN25 [blue icon] **Regulated Practices, Monopolies & Monopolization**

The use of a position in one market to gain an advantage in another market is not an illegal market restraint unless a significant fraction of buyers or sellers are frozen out of a market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN26 [blue icon] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Coercive reciprocity is defined as a coerced reciprocal dealing in which two parties face each other as both buyer and seller and one party agrees to buy the other party's goods on condition that the second party buys other goods from it. Illegal tying is similarly defined: The essential characteristic of a invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Reciprocal Dealing

[**HN27**](#) [blue icon] Antitrust & Trade Law, Sherman Act

To violate the Sherman Antitrust Act, [15 U.S.C.S. § 1 et seq.](#), the entity that coerces reciprocal dealing must be a monopolist in one product and thus be positioned to require dealing in the coerced product, which but for the monopolist's coercion could be acquired elsewhere.

Antitrust & Trade Law > Sherman Act > Claims

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

[**HN28**](#) [blue icon] Sherman Act, Claims

Conspiracy is an essential element of all Sherman Antitrust Act, [15 U.S.C.S. § 1](#) violations, and specific intent to monopolize is a necessary element of a Sherman Antitrust Act, [15 U.S.C.S. § 2](#) offense of actual monopolization. To violate [15 U.S.C.S. § 2](#), conduct is unlawful only when it threatens actual monopolization. For both sections, harm to competition is a necessary element of all private antitrust suits under the Sherman Antitrust Act, [15 U.S.C.S. §§ 1 and 2](#).

195 F.3d 1346, *1346LÁ1999 U.S. App. LEXIS 29199, **1LÁ52 U.S.P.Q.2D (BNA) 1641, ***1641

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Reciprocal Dealing

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

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

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

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Patent Law > Ownership > Patents as Property

HN29 [blue icon] Exclusive & Reciprocal Dealing, Reciprocal Dealing

Commercial negotiations to trade patent property rights for other consideration in order to settle a patent dispute is neither tying nor coercive reciprocity in violation of the Sherman Antitrust Act, [15 U.S.C.S. § 1 et seq.](#)

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Ownership > Patents as Property

HN30 [blue icon] Ownership & Transfer of Rights, Assignments

The antitrust laws do not negate the patentee's right to exclude others from patent property. The patent and antitrust laws are complementary, the patent system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk, and the antitrust laws serving to foster industrial competition.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN31 [blue icon] Ownership & Transfer of Rights, Licenses

While exclusionary conduct can include a monopolist's unilateral refusal to license a patent or copyright, or to sell its patented or copyrighted work, a monopolist's desire to exclude others from its protected work is a presumptively valid business justification for any immediate harm to consumers.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > Infringement Actions > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

Patent Law > Ownership > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Remedies > General Overview

[HN32](#) [blue] Inequitable Conduct, Anticompetitive Conduct

No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having refused to license or use any rights to the patent. A patent holder who lawfully acquires a patent cannot be held liable under [§ 2](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 2](#) for maintaining the market power he lawfully acquired by refusing to license the patent to others.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[HN33](#) [blue] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

To establish a boycott under [15 U.S.C.S. § 1](#), there must be an illegal agreement in restraint of trade.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN34 [blue icon] **Monopolies & Monopolization, Actual Monopolization**

Section 2 of the Sherman Antitrust Act, [15 U.S.C.S. § 2](#), prevents persons from combining or conspiring with any other person or persons, to monopolize any part of the trade or commerce; such a claim requires deliberate concerted action with the specific intent to achieve an unlawful monopoly, accompanied by acts in furtherance of the conspiracy.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

Torts > Business Torts > Unfair Business Practices > General Overview

HN35 [blue icon] **Regulated Practices, Trade Practices & Unfair Competition**

The federal antitrust 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.

Antitrust & Trade Law > Sherman Act > General Overview

HN36 [blue icon] **Antitrust & Trade Law, Sherman Act**

The withdrawal of technical service is not a violation of the antitrust laws. Even when the parties are in competition with each other an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN37 [blue icon] **Sherman Act, Claims**

The court rejects the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of the Sherman Antitrust Act, [15 U.S.C.S. §§ 1 or 2](#).

Counsel: William L. Jaeger, Townsend and Townsend and Crew LLP, argued for plaintiff-appellee. Of counsel on the brief were David Vance Lucas, Senior Counsel, Intergraph Corporation, of Huntsville, Alabama; and John G. Roberts, Jr., Hogan & Hartson L.L.P., of Washington, DC.

Marc G. Schildkraut, Howrey & Simon, of Washington, DC, argued for defendant-appellant. With him on the brief was Joel M. Freed. Of counsel on the brief were Peter N. Detkin and Thomas C. Reynolds, Intel Corporation, of Santa Clara, California.

Lars H. Liebeler, Thaler & Liebeler, of Washington, DC, amicus curiae for Computing Technology Industry Association-Technology Access Action Coalition.

Judges: Before NEWMAN, Circuit Judge, SMITH, Senior Circuit Judge, * and PLAGER, Circuit Judge.

Opinion by: NEWMAN

Opinion

[***1642] [*1349] NEWMAN, Circuit Judge.

Intel Corporation appeals the grant of a preliminary injunction by the United States District Court for the Northern District of Alabama. [**2] ¹ We vacate the injunction.

Intel is a manufacturer of high performance computer microprocessors. The microprocessors are sold to producers of various computer-based devices, who adapt and integrate the microprocessors into products that are designed and sold for particular uses. These producers are called original equipment manufacturers, or OEMs. Intergraph Corporation is an OEM, and develops, makes, and sells computer workstations that are used in producing computer-aided graphics. From 1987 to 1993 Intergraph's workstations [*1350] were based on a high performance microprocessor developed by the Fairchild division of National Semiconductor, embodying what is called the "Clipper" technology. Intergraph owns the Clipper technology and patents thereon. In 1993 Intergraph discontinued use of Clipper microprocessors in its workstations and switched to Intel microprocessors. In 1994 Intel designated Intergraph a "strategic customer" [**3] and provided Intergraph with various special benefits, including proprietary information and products, under non-disclosure agreements.

Starting in late 1996 Intergraph charged several Intel OEM customers with infringement of the Clipper patents based on their use of Intel microprocessors. The accused companies sought defense and indemnification from Intel. Negotiations ensued between Intel and Intergraph. Intel inquired about a license to the Clipper patents, but the proposed terms were rejected by Intergraph [***1643] as inadequate. Intel then proposed certain patent cross-licenses, also rejected by Intergraph. Intel also proposed that the non-disclosure agreement relating to a new joint development project include a license to the Clipper patents; this too was rejected by Intergraph. As negotiations failed and threats continued the relationship deteriorated, and so did the technical assistance and other special benefits that Intel had been providing to Intergraph.

In November 1997 Intergraph sued Intel for infringement of the Clipper patents. Intergraph also charged Intel with other violations of law, including fraud, misappropriation of trade secrets, negligence, wantonness and willfulness, [**4] breach of contract, intentional interference with business relations, breach of express and implied warranties, and violation of the Alabama Trade Secrets Act. Intergraph demanded that Intel be enjoined from infringement of the Clipper patents, and the award of compensatory and punitive damages and trebled damages.

Intergraph moved to enjoin Intel pendente lite from cutting off or delaying provision of the special benefits that Intel had previously provided to Intergraph. Following Intel's opposition to this motion Intergraph amended its complaint to charge Intel with violation of the antitrust laws. After a hearing, the district court held that Intel was a monopolist and had violated sections 1 and 2 of the Sherman Act or was likely to be so shown, and issued a preliminary injunction that included the following provisions:

- 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 . . ., whether [**5] it is on an advance basis for the development of motherboards, graphics

* SMITH, Senior Circuit Judge, participated in oral argument of this case but did not take part in the decision.

¹ *Intergraph Corp. v. Intel Corp., 3 F. Supp. 2d 1255 (N.D. Ala. 1998).*

subsystems or workstations utilizing Intel's existing, or future generation products (hereinafter "Product Development"), or current products as needed for support of such products. . . .

* * *

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 situated Competitors,

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. . . .

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 [*1351] as all future chips proposed by, or available from Intel, [**6] including but not limited to 333mhz Pentium II, BX, Deschutes and Merced Chips, in accordance with a forecast supplied by Intergraph. . . .

* * *

(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,

* * *

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 agreed to by the parties

Intel appeals, arguing that no law requires it to give such special benefits, including its trade secrets, proprietary information, intellectual property, pre-release products, allocation of new products, and other preferences, to an entity that is suing it on charges of multiple wrongdoing and is demanding damages and the shutdown of its core business. Intel states that its commercial response to Intergraph's suit is not an antitrust violation, and that this "garden-variety [**7] patent dispute" does not warrant the antitrust remedy here imposed. Intel also states that the scope of the injunction far exceeds the special benefits that had previously been accorded to Intergraph, and that it is unworkable, as well as unfair to Intel's overall business relationships, for the court to promote [***1644] Intergraph to a disproportionately favored position.

Intergraph's response is that it can not survive in its highly competitive graphics workstation business without these services and benefits from Intel, and that the district court simply acted to preserve Intergraph's prior commercial position while the parties litigate unrelated patent issues. Intergraph states that the national interest requires that patentees be free to enforce their patents without risk of retaliatory commercial response from the accused infringer. Intel disputes these premises, and also points out the incongruity of Intergraph's statement that it is essential to Intergraph's business that it have the products for which it is demanding the shutdown of Intel's production.

Standard of Review

HN1[] On appellate review, except for issues within the Federal Circuit's exclusive jurisdiction we apply [**8] the discernable law of the regional circuit. See [Mikohn Gaming Corp. v. Acres Gaming, Inc., 165 F.3d 891, 894, 49 U.S.P.Q.2D \(BNA\) 1308, 1310 \(Fed. Cir. 1998\)](#) (applying regional circuit law to review of a preliminary injunction); [Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1067, 46 U.S.P.Q.2D \(BNA\) 1097, 1103 \(Fed. Cir. 1998\)](#) (*en banc*) (applying regional circuit law to antitrust issues except for issues concerning patents).

In [Lucero v. Operation Rescue, 954 F.2d 624, 627 \(11th Cir. 1992\)](#) the Eleventh Circuit summarized **HN2**[] the criteria for grant of a preliminary injunction as (1) the party seeking the injunction has shown a substantial likelihood of success on the merits, (2) there is a substantial threat of irreparable injury in absence of the injunction, (3) the balance of harms favors the party seeking the injunction, and (4) entry of the injunction does not disserve the public interest. These criteria apply to antitrust issues as to other areas of law. See [DFW Metro Line Serv. v.](#)

Southwestern Bell Telephone Co., 901 F.2d 1267, 1269 (5th Cir. 1990) ("The traditional prerequisites for injunctive relief are applicable [**9] to antitrust cases.") The burden of establishing entitlement to the injunction is on the movant. *HN3* [↑] *Nnadi v. Richter, 976 F.2d 682, 690 (11th Cir. 1992)*.

The grant of a preliminary injunction is reviewed on the standard of abuse of discretion. This standard requires plenary review of the correctness of the district court's rulings on matters of law, including the correctness of the legal criteria [*1352] used in evaluating the likelihood of success on the merits. See *Bah v. City of Atlanta, 103 F.3d 964, 966 (11th Cir. 1997)* ("A HN4" [↑] district court necessarily abuses its discretion when it bases a ruling on an erroneous view of the law. Any legal determinations made by the district court in ruling on a preliminary injunction are reviewed de novo.") (citations omitted); *Jove Engineering, Inc. v. IRS, 92 F.3d 1539, 1546 (11th Cir. 1996)* ("A district court abuses its discretion when it misconstrues its proper role, ignores or misunderstands the relevant evidence, and bases its decision upon considerations having little factual support.") (quoting *Arlook v. S. Lichtenberg & Co., 952 F.2d 367, 374 (11th Cir. 1992)*).

While recognizing [**10] that an appropriate range of discretionary authority is possessed by the trial court in weighing and balancing the criteria of relief pendente lite, the Eleventh Circuit has not generally used a "sliding scale" wherein the severity of the hardship may lessen the showing of likelihood of success on the merits. In *Snook v. Trust Co. of Georgia Bank, N.A., 909 F.2d 480, 483 n.3 (11th Cir. 1990)* the court stated that the sliding scale has not been adopted by the Eleventh Circuit. Intergraph disputes the validity of this Eleventh Circuit practice, suggesting that earlier Fifth Circuit decisions recognizing a sliding scale should be deemed in effect in the Eleventh Circuit because they were not overruled *en banc*. However, we take note that HN5 [↑] the Eleventh Circuit has consistently held that for preliminary relief a substantial likelihood of success on the merits must be shown. See, e.g., *Tefel v. Reno, 180 F.3d 1286, 1295 (11th Cir. 1999)* ("A party seeking a preliminary injunction must establish the following four factors: (1) a substantial likelihood of success on the merits, (2) a threat of irreparable injury, (3) that its own injury would [**11] outweigh the injury to the nonmovant, and (4) that the injunction would not disserve the public interest."); *McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998)* (same). Thus we review whether, on the record before the district court, Intergraph established a substantial likelihood of success on the merits of its antitrust claims. See *Warren Publ'g, Inc. v. Microdos Data Corp., 115 F.3d 1509, 1516 (11th Cir. 1997)* (*en banc*) ("Because we conclude that Warren failed to establish a substantial likelihood of success on the merits, we need not address the additional elements required for a preliminary injunction.")

We conclude that the antitrust rulings of the district court are incorrect in law or are devoid of sufficient factual support to present a substantial likelihood of establishing [***1645] an antitrust law violation with respect to the issues presented. We also conclude that the district court's alternate contract-based ground for the injunction is unsupported on the facts presented.

Intel as "Monopolist"

The district court ruled that Intergraph is likely to succeed in showing that Intel is a "monopolist," whereby Intel's [**12] withdrawal of the benefits it had previously accorded to Intergraph and other actions were deemed to violate sections 1 and 2 of the Sherman Act. 15 U.S.C. "1,2. ² The [*1353] court relied on several legal theories,

² 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 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, 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.

Section 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.

viz.: (1) the essential facility theory and the corollary theory of refusal to deal, (2) leveraging and tying, (3) coercive reciprocity, (4) conspiracy and other acts in restraint of trade, (5) improper use of intellectual property, and (6) retaliatory enforcement of the non-disclosure agreements. The court alternatively ruled that Intergraph is likely to succeed on its contract claims, including the claim that the mutual at-will termination provision of the non-disclosure agreements is unconscionable. While the parties dispute some of the factual determinations of the district court, the court's dispositive rulings were made as a matter of law, and are subject to plenary review.

[**13] Intel states that unlawful monopolization was not shown, as a matter of law, because Intergraph and Intel are not competitors. [HN6](#) Unlawful monopolization requires both the existence of monopoly power and anticompetitive conduct. See 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶650a, at 66 (1996) ("Unlawful monopolization under '2 of the Sherman Act requires both power and 'exclusionary' or anticompetitive conduct before any kind of relief is appropriate.") Monopoly power is generally defined as the power to control prices or exclude competition in a relevant market; anticompetitive conduct is generally defined as conduct whose purpose is to acquire or preserve the power to control prices or exclude competition. *Id.* at 67 ("The relevant conduct is often described as 'exclusionary' in the sense that it impairs the opportunities of rivals and is neither 'competition on the merits' nor more restrictive than reasonably necessary for such competition.") The prohibited conduct must be directed toward competitors and must be intended to injure competition. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993) [**14] ("The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.")

[HN7](#) Such conduct must affect the relevant product market, that is, the "area of effective competition" between the defendant and plaintiff. See *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1581 (11th Cir. 1985) ("The relevant market is the 'area of effective competition' in which competitors generally are willing to compete for the consumer potential.") (quoting *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-29, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)); see also, e.g., *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) ("The relevant market for purposes of antitrust litigation is the 'area of effective competition' within which the defendant operates.") In *Brown Shoe Co. v. United States*, 370 U.S. 294, 324, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962) the Court summarized that the relevant market has two dimensions: first, the relevant product market, which identifies the products or services that compete [**15] with each other; and second, the geographic market, which may be relevant when the competition is geographically confined. Thus "the 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration." [HN8](#) *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956).

The *antitrust law* has consistently recognized that a producer's advantageous or dominant market position based on superiority of a commercial product and ensuing market demand is not the illegal use of monopoly power prohibited by the Sherman Act. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985) the Court explained that "the offense [***1646] 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 as distinguished from growth or development as a consequence of a superior product, business acumen, or [*1354] historic accident," quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). [**16] Product superiority and the ensuing market position, flowing from a company's research, talents, commercial efforts, and financial commitments, do not convert the successful enterprise into an illegal monopolist under the Sherman Act.

Intel does not dispute the high market share achieved by its high performance microprocessors. However, that is not a violation of law. Intel stresses that it is not in competition with Intergraph in any relevant market; that its relationship with Intergraph is that of supplier and customer, not competitor. Although the district court found that Intel and Intergraph compete or will compete in the future in the "graphics subsystems" market, as we discuss *post*, Intel points out, and Intergraph does not dispute, that neither firm possesses monopoly power in this market. Intel stresses that violation of the Sherman Act requires the use of monopoly power to exclude competition or maintain prices, see Areeda, *Antitrust Law*, ¶650a at 66, none of which is here alleged.

Although the district court recognized that Intel's market power derives from the technological superiority of its products, the court found a *prima facie* case of market power [**17] based on Intel's market share of high performance microprocessors, and concluded that Intel had willfully acquired and maintained monopoly power in the high-end microprocessor market, although the record did not show an effect on competition in any market in which Intergraph competes with Intel. The district court concluded that "[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," [3 F. Supp. 2d at 1275](#), citing [U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.](#), [7 F.3d 986, 999 \(11th Cir. 1993\)](#). In [U.S. Anchor](#) the defendant was accused of attempting to monopolize the market for certain types of anchors that were also sold by the plaintiff, through predatory pricing and tying arrangements; the court held that a sixty to sixty-five percent share of the market was sufficient to present a jury question on the issue of attempted monopolization, thus precluding summary judgment for the defendant. However, the court did not eliminate the requirement that plaintiff and defendant compete in the relevant market; that fundamental premise underlies [**18] [U.S. Anchor](#).

Intel's market power in the microprocessor market is irrelevant to the issues of this case, all of which relate to the effect of Intel's actions on Intergraph's position in its own markets. There is substantial precedent discussing Sherman Act constraints with respect to a single firm's conduct toward another firm when there is no effect or threat of monopolization flowing from that conduct. In [Copperweld Corp. v. Independence Tube Corp.](#), [467 U.S. 752, 774, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#) the Court explained that "because the Sherman Act does not prohibit unreasonable restraints of trade as such but only restraints effected by a contract, combination, or conspiracy it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to '1 liability.' See [Spectrum Sports](#), [506 U.S. at 457](#) ("the notion that proof of unfair or predatory conduct alone is sufficient to make out the offense of attempted monopolization is contrary to the purpose and policy of the Sherman Act").

The conduct complained of is Intel's withdrawal [**19] or reduction of technical assistance and special benefits, particularly pre-release access to Intel's new products, in reaction to Intergraph's suit for patent infringement. However, [HN9](#) [↑] the Sherman Act does not convert all harsh commercial actions into antitrust violations. Unilateral conduct that may adversely affect another's business situation, but is not intended to monopolize that business, does not violate [*1355] the Sherman Act. See [Levine v. Central Fla. Med. Affiliates, Inc.](#), [72 F.3d 1538, 1555 \(11th Cir. 1996\)](#) ("To establish a violation of [section 2](#) for attempted monopolization, a plaintiff must show (1) an intent to bring about a monopoly and (2) a dangerous probability of success.") (quoting [Norton Tire Co. v. Tire Kingdom Co.](#), [858 F.2d 1533, 1535 \(11th Cir. 1988\)](#)). Although Intergraph stresses the adverse effect on its business of Intel's proposed withdrawal of these special benefits, the record contains no analysis of the effect of such action on competition among manufacturers of graphics subsystems or high-end workstations. "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 \(1977\)](#) [**20] (emphasis in original) (quoting [Brown Shoe](#), [370 U.S. at 320](#)). See, e.g., [Levine](#), [72 F.3d at 1551](#) ("the antitrust laws are intended to protect competition, not competitors"). [***1647]

[HN10](#) [↑] Defining the relevant market is an indispensable element of any monopolization or attempt case, [U.S. Anchor](#), [7 F.3d at 994](#), for it is the market in which competition is affected by the asserted predatory or anticompetitive acts. It is the market in which sellers compete, based on products that are in competition with each other. See [Brown Shoe](#), [370 U.S. at 325](#) ("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."); [Image Technical Servs., Inc. v. Eastman Kodak Co.](#), [125 F.3d 1195, 1202 \(9th Cir. 1997\)](#) ("The relevant market is the field in which meaningful competition is said to exist."); [SmithKline Corp. v. Eli Lilly & Co.](#), [575 F.2d 1056, 1063 \(3d Cir. 1978\)](#) (the relevant market is the market wherein producers "have the ability actual or potential to take significant amounts [**21] of business away from each other").

The district court found that Intel possessed monopoly power in two "relevant markets": (1) the market for high-end microprocessors, and (2) the submarket of Intel microprocessors. Neither one is a market in which Intergraph and Intel are in competition with each other. Intergraph states that it competes in the microprocessor market by virtue of

its Clipper patents. However, [HN11](#)[↑] the patent grant is a legal right to exclude, not a commercial product in a competitive market. Intergraph abandoned the production of Clipper microprocessors in 1993, and states no intention to return to it. Firms do not compete in the same market unless, because of the reasonable interchangeability of their products, they have the actual or potential ability to take significant business away from each other. [U.S. Anchor, 7 F.3d at 995.](#)

The district court also mentioned the graphics subsystems market as a relevant market, describing Intergraph and Intel as competitors in that market, and finding that Intel has plans to enter the workstation market. There was neither evidence nor suggestion of monopoly power by Intel in these markets, or the willful acquisition [\[**22\]](#) or maintenance of monopoly power in Intergraph's market. We shall discuss the issue of Intel's entry into downstream markets in connection with the district court's finding of illegal "leveraging." However, the observation in [Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336, 1348 \(11th Cir. 1987\)](#) is apt: "Here, where Ad-Vantage could prove that GTEDC and Ad-Vantage competed, i.e., in the sale of national advertising, it could not prove that GTEDC was a monopolist. Where Ad-Vantage could prove that GTEDC was a 'monopolist,' i.e. in the sale of local advertising in its own directory, it could not demonstrate that Ad-Vantage *competed* with GTEDC. In order to demonstrate 'an area of effective competition' one must establish a competitive relationship. Ad-Vantage failed to do so." Intergraph has similarly failed to establish a competitive relationship.

[\[*1356\]](#) Intel's conduct with respect to Intergraph does not constitute the offense of monopolization or the threat thereof in any market relevant to competition with Intergraph. [HN12](#)[↑] The Sherman Act is a law in the public, not private, interest. And even if the district court's view [\[**23\]](#) of Intel as a monopolist were accepted, as stated in [Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc., 919 F.2d 1517, 1522 \(11th Cir. 1990\)](#), "to constitute a violation the monopolist's activities must tend to cause harm to competition; unrelated harm to an individual competitor or consumer is not sufficient."

We turn to consideration of the specific grounds on which the district court applied the Sherman Act to the relationship between these entities and, finding a likelihood of violation of the antitrust laws, awarded antitrust-type relief to Intergraph.

The "Essential Facility" Theory

The "essential facility" theory of Sherman Act violation stems from [United States v. Terminal RR Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 \(1912\)](#), wherein a group of railroads formed an association that controlled the railroad terminals, bridges, and switching yards serving the City of St. Louis. The Court held that this association was formed for an anticompetitive purpose, that the railroad terminals, bridges, and yards were facilities essential to competing railroads, and that [section 1](#) of the Sherman Act was violated. [\[**24\]](#) See generally ABA Section of [Antitrust Law, Antitrust Law](#) Developments 276 (4th ed. 1997).

The district court found that "the Advance Chips Samples and advance design and technical information are essential products and information necessary for Intergraph to compete in its markets." Reasoning that "the antitrust laws impose on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms," the court held that Intel's action in withdrawing these benefits violated the Sherman Act. As authority the district court cited [Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\)](#); [Aspen Skiing, 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847](#); and [MCI Communications /***16481 Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1132 \(7th Cir. 1983\)](#).

Intergraph argues that the essential facility theory provides it with the entitlement, in view of its dependence on Intel microprocessors, to Intel's technical assistance and other special customer benefits, because Intergraph needs those benefits in order to compete in its workstation market. However, [\[**25\]](#) precedent is quite clear that [HN13](#)[↑] the essential facility theory does not depart from the need for a competitive relationship in order to incur Sherman Act liability and remedy. See, e.g., [Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1088 \(D.C. Cir. 1998\)](#) (an antitrust claim on the essential facility theory requires that a monopolist who competes with the plaintiff in the monopolized market controls an essential facility, and refuses the plaintiff's request for access to the facility); [Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542 \(9th](#)

Cir. 1991) ("Stated most generally, the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first."). In Otter Tail Power, Aspen Skiing, and MCI Communications the "essential facilities" denied to the plaintiffs were all controlled by competitors.

In Otter Tail Power an electric utility withheld access to its power transmission lines from municipalities that [**26] wanted to establish their own municipal power distribution systems. Otter Tail Power's use of its monopoly power as a regulated utility, to refuse to "wheel" competitive electricity over its lines, along with its refusal to sell wholesale power to the municipal systems, was held to violate section 2 of the Sherman Act. The Court also noted that Otter [*1357] Tail Power had entered into a series of territorial allocation schemes with other electric utilities, which were held to be *per se* antitrust violations.

In Aspen Skiing the owner of three of the four major ski areas in Aspen raised its revenue demands for continuing a joint lift ticket arrangement with the fourth ski area, such that it was tantamount to refusal to continue the joint ticket program. The Court upheld the jury instruction to determine whether Aspen Skiing "willfully acquired, maintained, or used [monopoly] power by anti-competitive or exclusionary means or for anti-competitive or exclusionary purposes," as well as the instruction that "a firm possessing monopoly power has no duty to cooperate with its business rivals" unless the purpose is predatory or anticompetitive. Having approved these premises and statements [**27] of law, the Court stated that it was "unnecessary to consider the possible relevance of the 'essential facilities' doctrine." 472 U.S. at 611 n.44.

In MCI Communications, 708 F.2d at 1132-33, the court enumerated HN14[ the elements of liability under the "essential facilities" theory as "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." The courts have well understood that the essential facility theory is not an invitation to demand access to the property or privileges of another, on pain of antitrust penalties and compulsion; thus the courts have required anticompetitive action by a monopolist that is intended to "eliminate competition in the downstream market." Alaska Airlines, 948 F.2d at 544-45. See MCI Communications, *supra*. This understanding is seriously strained by the district court's holding that "reasonable and timely access to critical business information that is necessary to compete is an essential facility," although [**28] the asserted competition is in a different market. HN15[ A non-competitor's asserted need for a manufacturer's business information does not convert the withholding of that information into an antitrust violation.

Although the viability and scope of the essential facility theory has occasioned much scholarly commentary, no court has taken it beyond the situation of competition with the controller of the facility, whether the competition is in the field of the facility itself or in a vertically related market that is controlled by the facility. That is, there must be a market in which plaintiff and defendant compete, such that a monopolist extends its monopoly to the downstream market by refusing access to the facility it controls. See TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992) (relevant market must be proven for an essential facilities claim); Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 494 (4th Cir. 1986) ("The fact remains that a relevant market must be proven under any of these theories [including denial of access to an essential facility]"). Absent such a relevant market and competitive [**29] relationship, the essential facility theory does not support a Sherman Act violation.

Ignoring this weight of jurisprudence, Intergraph argues that violation of the Sherman Act under the essential facility theory does not depend on whether Intel and Intergraph [***1649] are competitors in any market. That is incorrect. As we have discussed, the presence of a competitive relationship is fundamental to invoking the Sherman Act to force access to the property of another. See Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958) ("the policy unequivocally laid down by the Act is competition"). HN16[ Other than as a remedy for illegal acts, the antitrust laws do not compel a company to do business with anyone customer, supplier, or competitor. See American Key Corp., 762 F.2d at 1578 (the "antitrust laws do not compel a company to do business with anyone"). The notion that withholding of technical information and samples of pre-release chips violates [*1358] the Sherman Act, based on essential facility jurisprudence, is an unwarranted extension of precedent and can not be supported on the premises presented. The district court erred in [**30] holding that

Intel's superior microprocessor product and Intergraph's dependency thereon converted Intel's special customer benefits into an "essential facility" under the Sherman Act. The court's ruling of antitrust violation can not be sustained on this ground.

Intergraph also phrases Intel's action in withholding access to its proprietary information, pre-release chip samples, and technical services as a "refusal to deal," and thus illegal whether or not the criteria are met of an "essential facility." However, [HN17](#)[↑] it is well established that "in the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." [United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#). See also, e.g., [Associated Press v. United States, 326 U.S. 1, 15, 89 L. Ed. 2013, 65 S. Ct. 1416 \(1945\)](#); cf [Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 \(1968\)](#) (an [**31] adjudicated monopolist's practice of leasing and refusing to sell its machinery was an instrument in the maintenance of monopoly power as against actual and potential competition, and violated the Sherman Act). Intel states that it continued to sell its products to Intergraph, that it did not refuse to deal with Intergraph as with any regular customer, and that the antitrust laws do not require it to give preferred treatment to a customer that is suing it.

Courts have recognized that "the [HN18](#)[↑] relationship between a manufacturer and its customer should be reasonably harmonious; and the bringing of a lawsuit by the customer may provide a sound business reason for the manufacturer to terminate their relations." [House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 871 \(2d Cir. 1962\)](#); see also [Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 889-90 \(9th Cir. 1982\)](#) (noting absence of any case where refusal to deal in response to a customer's suit against a manufacturer has been deemed an unreasonable restraint of trade); [Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 134 n.3 \(5th Cir. 1979\)](#) (court should not "be called [**32] upon to weld together two business entities which have shown a propensity for disagreement, friction, and even adverse litigation"). Although we have observed a few rulings wherein a court has, for example, barred the termination of a distributor during litigation, no case has held that the divulgence of proprietary information and the provision of special or privileged treatment to a legal adversary can be compelled on a "refusal to deal" antitrust premise.

[HN19](#)[↑] A "refusal to deal" may raise antitrust concerns when the refusal is directed against competition and the purpose is to create, maintain, or enlarge a monopoly. For example, in [Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 \(1951\)](#) the only newspaper in town refused to sell newspaper advertising to persons who also advertised on a competing radio station; this was held to be an attempt to monopolize the mass dissemination of all news and advertising, and to violate the Sherman Act. See also, e.g., [Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183-84 \(1st Cir. 1994\)](#) ("[[HN20](#)[↑]] A monopolist's unilateral refusal to deal with its competitors (as [**33] long as the refusal harms the competitive process) may constitute *prima facie* evidence of exclusionary conduct in the context of a [section 2](#) claim. A monopolist may nevertheless rebut such evidence by establishing a valid business justification for its conduct.") (citing [Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#)).

[*1359] Intergraph provided no support for its charge that Intel's action in withholding "strategic customer" benefits from Intergraph was for the purpose of enhancing Intel's competitive position. Although the district court found that there was a lack of business justification for Intel's actions, there was no showing of harm to competition with Intel; thus the need did not arise to establish the defense of business justification. As stated in [HN21](#)[↑] [California Computer Products, Inc. v. International Bus. Mach. Corp., 613 F.2d 727, 744 \(9th Cir. 1979\)](#), a manufacturer is "under no duty to help [plaintiff] or other peripheral equipment manufacturers survive or expand." Absent a duty, justification is unnecessary. ***1650]

To the extent that Intergraph has presented on this appeal, [**34] or the district court relied on, a theory of refusal to deal based on Intel's withdrawal of the special customer benefits (Intel continued to sell to Intergraph as a regular customer), a basis for violation of the antitrust laws has not been established.

Leveraging

The district court held 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." The district court found that Intel was itself in the graphics subsystems market, for Intel "signed an agreement to purchase Chips & Technology Company, an experienced and successful producer of graphics chips and chip sets" and was in the process of developing a graphics chipset. The court held that these actions were an illegal leveraging of monopoly power in violation of the Sherman Act, and that this warranted the remedy imposed in the preliminary injunction.

HN22[] Antitrust liability based on leveraging of monopoly power is a concept of imprecise definition, [**35] for the courts have varied in their requirements of the nature of the advantage obtained in the assertedly leveraged market. The district court relied on *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979) for the position that **HN23**[] the Sherman Act is violated if monopoly power in one market provides a "competitive advantage" in another market, whether or not there is an intent to create a monopoly in the second market. However, the district court appeared to view Intel's participation in, and planned entry into, the graphics workstation market as a *per se* Sherman Act violation, for there was no economic evidence or proffer concerning Intel's participation in the downstream market. As discussed by Professor Areeda, **HN24**[] to establish illegal leveraging of monopoly power the challenged conduct must "threaten[] the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share." 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* &652c, at 90 (1996). Absent an adverse effect in the second market, the Sherman Act would serve to restrain competition [**36] rather than promote it.

The concept of illegal leveraging arose in *United States v. Griffith*, 334 U.S. 100, 107-08, 92 L. Ed. 1236, 68 S. Ct. 941 (1948), wherein the Court explained that monopoly power can not be used "to beget monopoly" and "to gain a competitive advantage." The Second Circuit has rejected a broad reading of *Berkey Photo*, describing the statement quoted *supra* as "dictum" and holding in *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990) that Sherman Act violation based on leveraging requires a showing of "tangible harm to competition" in the second market. See also *AD/SAT*, 181 F.3d at 230 ("Although a plaintiff alleging monopoly leveraging is not required to demonstrate a substantial market share by the defendant, application of the doctrine is limited to those circumstances where the challenged conduct actually injures competition, not just competitors, in the second, non-monopolized market.")

[*1360] Some circuits have explicitly rejected the standard stated in *Berkey Photo*. In *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171 (3d Cir. 1992) the court held [**37] that a *section 2* leverage claim requires the use of monopoly power in the second market, and that a mere attempt to gain a competitive advantage is insufficient as a matter of law. In *Alaska Airlines*, 948 F.2d at 548-49, the Ninth Circuit stated that "the elements of the established actions for 'monopolization' and 'attempted monopolization' are vital to differentiate between efficient and natural monopolies on the one hand, and unlawful monopolies on the other. *Berkey Photo*'s monopoly leveraging doctrine fails to differentiate properly among monopolies." The Eleventh Circuit approached the issue in *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258, 1262 (11th Cir. 1998), declining to "extend Berkey Photo to a situation in which a monopolist projects its power into a market it not only does not seek to monopolize, but in which it does not even seek to compete." In *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503-04 (11th Cir. 1985) the court, citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984), stated that **HN25**[] the use of a position [**38] in one market to gain an advantage in another market is not an illegal market restraint unless "a significant fraction of buyers or sellers are frozen out of a market." The district court's ruling herein is not in accord with Eleventh Circuit precedent, for Intel's action affected only Intergraph, in a heavily populated competitive market.

Intergraph made no proffer to show that Intel possessed market power in either the graphics subsystems market or the workstation market. A manufacturer's plan to enter [***1651] a downstream market is not a *per se* antitrust violation based on a theory of leveraging. An integrated business does not offend the Sherman Act by drawing on its competitive advantages of efficiency, experience, or reduced transaction costs, in entering new fields. These advantages are not uses of monopoly power. See *AD/SAT*, 181 F.3d at 230. Intergraph provided no evidence or

proffer tending to show that "a necessary and direct result" of Intel's planned entry into these markets would have a prohibited effect within the meaning of the Sherman Act. Although the district court stated that this and other rulings "are based on the evidence received to this point, **[**39]**" there must be evidence that would support, or be likely to support, at least *prima facie*, the court's rulings when they are implemented by preliminary injunction based on a determination of antitrust violation or the substantial likelihood thereof.

The district court's ruling that Intel's expansion into the computer workstation and graphics subsystems markets constitutes illegal leveraging appears to be based on a *per se* theory of future Sherman Act violation. It is an enlargement of antitrust theory and policy to prohibit downstream integration by a "monopolist" into new markets. The specter of Intel's resources and talent is not evidence of future Sherman Act violation. As we have discussed, the purpose of the antitrust laws is to foster competition in the public interest, not to protect others from competition, in their private interest. Intergraph cites section 16 of the Clayton Act, 15 U.S.C. '26, as authority for the district court's ruling. Section 16 authorizes action "against threatened loss or damage by a violation of the antitrust laws." The salutary purpose is to prevent antitrust injury before it happens. However, the conduct to be prevented must be such that **[**40]** if it occurred would violate the antitrust laws. Section 16 authorizes prevention of the consequences of antitrust violation; it does not create the violation.

The injunction can not be supported on a theory of illegal leveraging.

Coercive Reciprocity and Tying

The district court found that Intel engaged in unlawful "coercive reciprocity," defined by the court as "the practice of using economic leverage in one market coercively to secure competitive advantage **[*1361]** in another," by its proposals to settle the patent dispute. The court referred to 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." The court depicted Intel's proposals as a *per se* antitrust violation "because of its pernicious effect and economic similarity to illegal tying cases," in violation of both [sections 1](#) and [2](#) of the Sherman Act.

The district court cited cases wherein economic leverage in one product was used to coerce dealing in another product. In [Betaseed, Inc. v. U&I Inc., 681 F.2d 1203, 1216 \(9th Cir. 1982\)](#) **[**41]** the court defined [HN26](#) coercive reciprocity as a coerced reciprocal dealing "in which two parties face each other as both buyer and seller and one party agrees to buy the other party's goods on condition that the second party buys other goods from it." Illegal tying is similarly defined: "The essential characteristic of a invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." [HN27](#) [Jefferson Parish Hosp., 466 U.S. at 12.](#)

To violate the Sherman Act the entity that coerces reciprocal dealing must be a monopolist in one product and thus be positioned to require dealing in the coerced product, which but for the monopolist's coercion could be acquired elsewhere. Thus Betaseed, the only processor of sugar beets geographically accessible to the U&I company, conditioned the processing of U&I's beets on the purchase by U&I of Betaseed's beet seeds, thereby excluding competition in the market for beet seed. Similarly in [Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 424 \(5th Cir. 1978\)](#), **[**42]** also relied on by the district court, Spartan demanded that the producers of breeding chickens purchase Spartan chicken feed and chicks in order for Spartan to buy their eggs (the market in which it had power). These are classical examples of illegal coerced reciprocal dealing.

In contrast, Intel's various licensing proposals furthered no illegal relationship. It is Intergraph, not Intel, that owns the Clipper patents. To the extent that the record mentions these negotiations, it appears that Intergraph is interested in selling or licensing the Clipper patents, but has deemed Intel's various offers to be inadequate. Intel did not demand that Intergraph buy its products, and the record describes no market in which Intel's licensing proposals were shown to have distorted competition. See [Betaseed, 681 F.2d at 1220](#) ("The Supreme Court has indicated that whether a court invokes a *per se* **[**1652]** or rule of reason analysis, the purpose of the analysis is to form a judgment about the competitive significance of the restraint.") (citing [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)). Although the district court appeared to be concerned [**43] that in the license negotiations the parties did not negotiate as equals, the elements of Sherman Act violation do not inhere in failed negotiations.

The district court provided no explanation of its terse holding that Intel's proposal to trade a license under the Clipper patents for continuation of the "strategic customer" program violated both sections 1 and 2 of the Sherman Act. No conspiracy is identified, although "conspiracy HN28[¹] is an essential element of all Section 1 violations," American Key Corp., 762 F.2d at 1579 n.8, and "specific intent to monopolize is a necessary element of a Section 2 offense of actual monopolization." Id. And as we have discussed, to violate section 2, conduct "is unlawful only when it threatens actual monopolization." Copperweld, 467 U.S. at 767-68. For both sections, "harm to competition is a necessary element of all private antitrust suits under Sections 1 and 2 of the Sherman Act." American Key Corp., supra, citing Brunswick Corp. v. Pueblo Bowl-O-Mat, [*1362] Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977).

No threat or actual monopolization is asserted to flow from the various [**44] rejected patent license proposals. HN29[¹] Commercial negotiations to trade patent property rights for other consideration in order to settle a patent dispute is neither tying nor coercive reciprocity in violation of the Sherman Act. Although the district court calls Intel's actions "hardball," it is not the judicial role to readjust the risks in high-stakes commercial dealings. The district court erred in law in ruling that on the theories of coercive reciprocity and tying Intel *per se* violated sections 1 and 2 of the Sherman Act. The antitrust-based remedy here imposed can not be supported on these theories.

Use of Intellectual Property To Restrain Trade

In response to Intel's argument that its proprietary information and pre-release products are subject to copyright and patents, the district court observed that Intel's intellectual property "does not confer upon it a privilege or immunity to violate the antitrust laws." That is of course correct. But it is also correct that HN30[¹] the antitrust laws do not negate the patentee's right to exclude others from patent property. See Cygnus Therapeutic Sys. v. ALZA Corp, 92 F.3d 1153, 1160, 39 U.S.P.Q.2D (BNA) 1666, 1671 (Fed. Cir. 1996) [**45] ("The patent statute grants a patentee the right to exclude others from making, using, or selling the patented invention.") The patent and antitrust laws are complementary, the patent system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk, and the antitrust laws serving to foster industrial competition. See Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 876-77, 228 U.S.P.Q. (BNA) 90, 100-01 (Fed. Cir. 1985) (the purpose of the patent system is to "encourage innovation and its fruits"; the purpose of the antitrust laws is "to promote competition"). The patent and antitrust laws serve the public in different ways, both of importance to the nation.

The district court stated that "unlawful 'exclusionary conduct can include a monopolist's unilateral refusal to license a [patent or] copyright or to sell a patented or copyrighted work,'" quoting from Image Technical Services. This quotation, however, is part of a longer passage which imparts a quite different meaning:

Under the fact-based approaches of Aspen Skiing and Kodak, some measure must guarantee that the jury account for the procompetitive effects [**46] and statutory rights extended by the intellectual property laws. To assure such consideration, we adopt a modified version of the rebuttable presumption created by the First Circuit in Data General, and hold that "while HN31[¹] exclusionary conduct can include a monopolist's unilateral refusal to license a [patent or] copyright," or to sell its patented or copyrighted work, a monopolist's "desire to exclude others from its [protected] work is a presumptively valid business justification for any immediate harm to consumers."

Image Technical Servs., 125 F.3d at 1218 (alterations in original). In Image Technical Services the Ninth Circuit reported that it had found "no reported case in which a court had imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright." 125 F.3d at 1216. Nor have we. In accord is the joint statement of the United States Department of Justice and Federal Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property 4 (1995) that market power does not "impose on the intellectual property owner an obligation to license the use of that property to others." Id. at [**47] 4. See 35 U.S.C. '271(d)(4) ("No HN32[¹] patent owner otherwise entitled to relief for infringement or contributory infringement of a [***1653] patent shall be denied relief or deemed

guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (4) refused to license or use any rights to the patent"). See also, e.g., *Miller Insituform, Inc. v. Insituform of North Am., Inc.*, 830 F.2d 606, 609 (6th Cir. 1987) ("A patent [*1363] holder who lawfully acquires a patent cannot be held liable under section 2 of the Sherman Act for maintaining the [market] power he lawfully acquired by refusing to license the patent to others."); *United States v. Westinghouse Electric Corp.*, 648 F.2d 642, 647-48 (9th Cir. 1981) (patent holder has the "untrammeled" right to license or not, exclusively or otherwise); *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1206-07 (2d Cir. 1981)

Further, Intergraph is not seeking a license under Intel's patents and copyrights, but a preferred position as to the products that embody this intellectual property before they are commercially available, as well as access to trade [**48] secrets. In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161, 103 L. Ed. 2d 118, 109 S. Ct. 971 (1989) the Court recognized that trade secrets are of value only before the products embodying them are commercially available. Intergraph seeks technical information that is not generally known, samples of new products before they are available to the public, and individualized technical assistance. However, as we have stated, the owner of proprietary information has no obligation to provide it, whether to a competitor, customer, or supplier. Precedent makes clear that a customer who is dependent on a manufacturer's supply of a component can not on that ground force the producer to provide it; there must also be an anticompetitive aspect invoking the Sherman Act. In *Eastman Kodak*, for example, Kodak and the independent service organizations were in direct competition in the market for servicing Kodak's photocopiers and micrographic equipment; the Court assumed, for the purpose of reviewing a grant of summary judgment, that Kodak had the intent to limit competition in the service market and that it succeeded in doing so. *504 U.S. at 455, 458*. [**49] The district court herein recognized that there must be an anticompetitive intent, but ignored the absence of competition between Intel and Intergraph.

The district court's conclusory statement that Intel was using its intellectual property to restrain trade was devoid of evidence or elaboration or authority. A Sherman Act violation can not be so imprecisely invoked.

The Conspiracy Theory

The district court found that Intergraph was likely to prove that sections 1 and 2 of the Sherman Act were violated by Intel in conspiring with Intergraph's OEM competitors, by aiding them in customer presentations and assistance on the asserted condition that the customer would deal with the OEM that made the presentation, and not with Intergraph. The district court characterized this action as an effort to "persuade Intergraph's customers to boycott Intergraph."

Intel readily concedes that it participates in presentations with workstation producers, and apparently had done so in conjunction with Intergraph in the past. *HN33*[] To establish a boycott under section 1 there must be an illegal agreement in restraint of trade; we have been directed to no showing where a customer was required [**50] to agree not to deal with Intergraph in order to receive Intel's presentation. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940) ("The essence of [a conspiracy to monopolize] is an agreement entered into with the specific intent of achieving monopoly")

HN34[] Section 2 prevents persons from "combining or conspiring with any other person or persons, to monopolize any part of the trade or commerce"; such a claim requires deliberate concerted action with the specific intent to achieve an unlawful monopoly, accompanied by acts in furtherance of the conspiracy. Intel states, without challenge by Intergraph, that there is no evidence that its presentations had any effect on actual or potential monopolization in this field. On the evidence presented, a violation of section 2 was not supported. See *Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice* 266 (1994) [*1364] ("If a monopoly manufacturer sells to fifty retailers, and then arbitrarily cuts one of them off, the retail market will remain competitive. There is no plausible way that such a refusal can result in a lower output or higher prices. [**51] ")

HN35[] The federal antitrust 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.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993) (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945)). The record states that Intergraph's market

contains many competitors, with no significant entry barriers. Absent illegal conduct or an adverse effect on competition, Intel's customer presentations are devoid of antitrust significance. See American Key Corp., 762 F.2d at ***1654, 1579 (injury to competition, as distinguished from injury to a competitor, is essential to a Sherman Act claim).

The events here complained of do not state an antitrust claim, whether or not they may state a claim under some other theory. In NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 119 S. Ct. 493, 498, 142 L. Ed. 2d 510 (1998) the Court, on different facts, cautioned against judicial adoption of a *per se* rule of antitrust liability that would "transform cases [**52] involving business behavior that is improper for various reasons . . . into treble-damages antitrust cases." Although undoubtedly judges would create a kinder and gentler world of commerce, it is inappropriate to place the judicial thumb on the scale of business disputes in order to rebalance the risk from that assumed by the parties.

The Non-Disclosure Agreements

In 1994 Intel and Intergraph entered into the first of a series of non-disclosure agreements concerning the protection of Confidential Information as defined therein. The Agreements provide that "Neither party has any obligation to disclose Confidential Information to the other," that there is no "obligation to buy or sell products," that both parties may "cease giving Confidential Information to the other party without liability," and that either party can "terminate this Agreement at any time without cause upon notice to the other party" with return of the Confidential Information. Under these agreements Intel provided Intergraph with the trade secret and proprietary information and pre-release products here at issue.

The district court ruled that "Intel's retaliatory lawsuits and the threatened and actual [**53] termination of its non-disclosure agreements (NDAs) with Intergraph, under which Intel provided technical information to Intergraph, constitute unlawful restraints of trade." The court held that Intel could not terminate the agreements and the provision of Confidential Information thereunder, since there was no legitimate business justification for doing so. The court concluded 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." However, onerous actions do not in themselves constitute antitrust violations, see Brooke Group, 509 U.S. at 225 ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.") As the Court stated in Hunt v. Crumboch, 325 U.S. 821, 826, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945), "[The Sherman] Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." See Spectrum Sports, 506 U.S. at 459 ("The concern that '2 might [**54] be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics."

The district court also ruled that the at-will termination clause was "unconscionable" at the time the non-disclosure agreements were entered into, or at least would be unconscionable if Intel were now [*1365] permitted to terminate the agreements and discontinue the disclosures they had enabled. The district court rejected the argument that unconscionability as a ground of contract illegality was intended for consumer protection, and held that "the principle applies with equal force in the commercial field." We observe, however, that the Alabama courts, like others, have emphasized that "recission of a contract for unconscionability is an extraordinary remedy usually reserved for the protection of the unsophisticated and the uneducated." Wilson v. World Omni Leasing, Inc., 540 So. 2d 713, 717 (Ala. 1989). Although Intergraph is a much smaller company than Intel, it is one of the Fortune 1000, and does not plead inadequate legal advice in its commercial dealings. The Alabama Code comments that "The principle is one of [**55] the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." Ala. Code '7-2-302 Comment (1) (1997). Applying this state law, the Alabama courts have recognized that "it is not the province of the court to make or remake a contract for the parties." Muscle Shoals Aviation, Inc. v. Muscle Shoals Airport Auth., 508 So. 2d 225, 228 (Ala. 1987).

Trade secrets and other proprietary information and products including pre-release samples of chips are commercial property, and the terms of their disclosure and use are traditional matters of commercial contract.

Intergraph does not state that it objected to the mutual at-will termination provision when the contract was entered. Indeed, the district court found that when Intergraph switched from the Clipper technology "Mr. [***1655] Grove did not commit Intel to provide a perpetual supply of chips, pre-released chips, or confidential information [and] did not commit Intel to any continued or 'perpetual business relationship' with Intergraph."

In an agreement relating to confidential information, negotiated between commercial entities, it is not the judicial role [**56] to rewrite the contract and impose terms that these parties did not make. Such intrusion into the integrity of contracts requires more than changed relationships. No fraud or deception is here alleged. Even on the district court's view of the mutual termination clause as unconscionable, the remedy would be rescission or imposition of a termination notice period, not the Sherman Act remedy of enforced disclosure of trade secrets and proprietary information and provision of pre-released products, none of which is required to be disclosed under any agreement. Neither the conclusion that the termination of the agreements violated the Sherman Act, nor the content of the injunction, can be supported on the ground that the non-disclosure agreements contained a termination at-will provision.

Alternatively, the district court held that since the non-disclosure agreements lacked a termination date, the court could impose one. The court ruled that "reasonable notification would take effect at the conclusion of the Deschutes and Merced Programs continuing through 1999." This reformation, adding some twenty months to the date of the court's injunction Order, is not accompanied by an analysis of [**57] the original understanding of the parties or by evidence of objective termination parameters for similar agreements, and is without precedent. Although the weight of this aspect has been diluted by the passage of time and other events,³ this judicial revision of the parties' contract is without support.

Non-disclosure agreements were apparently also involved in connection with Intel's refusal to authorize help to Intergraph for removal of a "bug" or defect in a product, an event described by the district [*1366] court as "requiring Intergraph to spend substantial time and resources to solve the problem and delaying Intergraph's product entry into the market." [HN36](#)⁴ The withdrawal of technical [**58] service is not a violation of the antitrust laws. As stated in [Brooke Group, 509 U.S. at 225](#), even when the parties are in competition with each other "an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."⁴

The March 1997 Letter

The district court also ruled that Intel had contractually committed itself to continue to provide Intergraph with preferred customer benefits. This ruling was based on a letter written by an Intel representative in March 1997, when Intergraph was beginning to inform the OEMs about the Clipper patents. The letter stated that Intergraph would be treated as "a strategic customer in present and future programs" that are "currently being managed under [**59] Non-Disclosure Agreements." The district court considered this letter to be in conflict with and thus to supersede the non-disclosure agreements, rendering "illusory" the termination-at-will provision of the agreements and requiring Intel to provide strategic customer benefits into the future.

The district court found that this letter is likely to be established as an enforceable contract "of a sufficiently definite duration." Recognizing the absence from the letter of basic contract terms, for the letter contained no statement of obligations, duration, price, quantity, etc, the district court held that the Alabama UCC "gap-filler" rules could be used to create a binding contract. Thus the district court held that the duration was "at least through 1999, when the Merced program is publicly launched, and perhaps through the year 2000." However, the letter's broad usages, its lack of specificity, and its silence on virtually all of the elements of a contract, negate its interpretation as replacing

³We take notice that a consent order, reported to provide some of the same relief as does the preliminary injunction, has been entered by the Federal Trade Commission. [Intel Corp.](#), Docket No. 9288 (FTC March 1999) (Agreement Containing Consent Order). That proceeding, under Section 5 of the FTC Act, 15 U.S.C. '45, is not before us.

⁴The district court also described this event as a breach of warranty. Evidence on this issue is not provided. Intergraph's claim in this suit, and the relief awarded, is not for breach of warranty, but for antitrust violation.

the non-disclosure agreements with specific obligations, and separate it from the sort of document subject to a "gap-filler" expedient. Ala. Code "7-2-305 to 310. There is no gap-filling [**60] exercise that can reasonably include all of the terms of the district court's injunction order.

Thus we do not share the district court's view of this letter as changing and replacing the non-disclosure agreements as to major contractual provisions. Indeed, the letter refers [***1656] to the terms of the current non-disclosure agreements as governing future relationships. Although the letter may be viewed as one of reassurance to Intergraph, the letter by its terms did not supersede the non-disclosure agreements. The judicial obligation in document interpretation is to attempt to determine the mutual intent at the time, but not to impose an interpretation that would be likely to have been rejected at the time. Whatever the correct reading of this letter, it can not be read as binding Intel to new substantive obligations that were not mentioned in the letter.

The preliminary injunction can not be sustained on the ground that it is simply implementing the Intel letter of March, 1997.

Everything Taken Together

Intergraph argues that the various theories of antitrust liability discussed by the district court should not be viewed separately but should be taken together, lest the [**61] slate be "wiped clean" after each aspect fails to violate the Sherman Act, citing [Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 \(1962\)](#). In Continental Ore the Court held that the "factual components" of a case should be viewed together, not the pieces of legal theory. [Id. at 699](#). Continental Ore did not hold, [*1367] as Intergraph proposes, that the degrees of support for each legal theory should be added up. Each legal theory must be examined for its sufficiency and applicability, on the entirety of the relevant facts. The proper analytical approach was explained in [City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 928-29 \(2d Cir. 1981\)](#): "Even though many of the issues the municipalities raise are interrelated and interdependent, however, we must, like the municipalities' briefs, analyze the various issues individually. Moreover, [HN37](#) we reject the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of [section 1](#) or [section 2](#) of the Sherman Act."

Conclusion

[**62] Despite the district court's sensitive concern for Intergraph's well-being while it conducts its patent suit against Intel, there must be an adverse effect on competition in order to bring an antitrust remedy to bear. The remedy of compulsory disclosure of proprietary information and provision of pre-production chips and other commercial and intellectual property is a dramatic remedy for antitrust illegality, and requires violation of [antitrust law](#) or the likelihood that such violation would be established. In the proceedings whose record is before us, Intergraph has not shown a substantial likelihood of success in establishing that Intel violated the antitrust laws in its actions with respect to Intergraph, or that Intel agreed by contract to provide the benefits contained in the injunction. The preliminary injunction is vacated.

Costs

Costs to Intel, *Fed. Cir. R.* 39.

INJUNCTION VACATED

Bar Techs., Inc. v. Conemaugh & Black Lick R.R.

United States District Court for the Western District of Pennsylvania

November 9, 1999, Decided

Civil Action No. 99-41J

Reporter

73 F. Supp. 2d 512 *; 1999 U.S. Dist. LEXIS 17355 **

BAR TECHNOLOGIES INC., Plaintiff, v. CONEMAUGH & BLACK LICK R.R. CO., Defendant.

Disposition: [**1] Motion to dismiss, dkt. no. 5, GRANTED; plaintiff's antitrust claims DISMISSED WITH PREJUDICE; motion for hearing DENIED.

Core Terms

track, rail line, common carrier, carrier, antitrust, competitor, transportation, railroad, grade crossing, construct, industrial, damages, railroad line, spur, anti trust law, crossing, rates, motion to dismiss, facilities, interstate, tariff, antitrust claim, no jurisdiction, certificate, interfere, Terminal, asserts, argues, steel

LexisNexis® Headnotes

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

HN1[Motions to Dismiss, Failure to State Claim

A motion to dismiss cannot be granted unless the allegations in the complaint taken as true fail to state any claim upon which relief can be granted.

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

HN2[Motions to Dismiss, Failure to State Claim

In ruling upon a motion to dismiss, a district court must accept as true all facts alleged in the complaint, and view them in the light most favorable to the plaintiff. A court need not credit a complaint's bald assertions or legal conclusions.

Transportation Law > Rail Transportation > General Overview

HN3[Transportation Law, Rail Transportation

See [49 U.S.C.S. § 10901\(a\)](#).

Transportation Law > Rail Transportation > Lands & Rights of Way

HN4[] Rail Transportation, Lands & Rights of Way

See [49 U.S.C.S. § 10901\(d\)\(1\)](#).

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Transportation Law > Rail Transportation > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN5[] Subject Matter Jurisdiction, Jurisdiction Over Actions

[49 U.S.C.S. § 10501](#) sets forth a grant of general jurisdiction to the Surface Transportation Board.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Surface Transportation Board

Transportation Law > Rail Transportation > General Overview

HN6[] Interstate Commerce, US Surface Transportation Board

[49 U.S.C.S. § 10501\(a\)\(1\)](#) provides that the Surface Transportation Board has jurisdiction over transportation by rail carrier that is by railroad. [49 U.S.C.S. § 10501\(a\)\(2\)](#) then limits that jurisdiction to, for some purposes, transportation over the interstate rail network.

Transportation Law > Rail Transportation > Lands & Rights of Way

HN7[] Rail Transportation, Lands & Rights of Way

See [49 U.S.C.S. § 10501\(b\)](#).

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Surface Transportation Board

Transportation Law > Rail Transportation > General Overview

HN8[] Separation of Powers, Jurisdiction

73 F. Supp. 2d 512, *512LÁ999 U.S. Dist. LEXIS 17355, **1

The Surface Transportation Board's (Board) jurisdiction over the construction of spur or industrial track is exclusive only to the extent the Board has jurisdiction at all, that is, to the extent that the proposed tracks implicate transportation by rail carrier that is by railroad. [49 U.S.C.S. 10501\(a\)\(1\)](#).

Torts > ... > Rail Transportation > Theories of Liability > Federal Employers' Liability Act

Transportation Law > Carrier Duties & Liabilities > Definitions

Transportation Law > Rail Transportation > General Overview

[HN9](#)[] Theories of Liability, Federal Employers' Liability Act

[49 U.S.C.S. § 10102\(5\)](#) defines a rail carrier as a person providing common carrier railroad transportation for compensation. Both judicial decisions and administrative adjudications have further defined a common carrier as an entity that offers its services for compensation to all members of the public that are in a position to use them.

Transportation Law > Rail Transportation > General Overview

[HN10](#)[] Transportation Law, Rail Transportation

Mere construction of track by a company on its own property does not, without more, turn that company into a common carrier.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Duty to Provide Service

Transportation Law > Carrier Duties & Liabilities > Definitions

Transportation Law > Carrier Duties & Liabilities > General Overview

[HN11](#)[] Common Carrier Duties & Liabilities, Duty to Provide Service

A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed.

Transportation Law > Rail Transportation > General Overview

[HN12](#)[] Transportation Law, Rail Transportation

See [49 U.S.C.S. § 10906](#).

Transportation Law > Rail Transportation > General Overview

73 F. Supp. 2d 512, *512LÁ999 U.S. Dist. LEXIS 17355, **1

HN13 [blue document icon] **Transportation Law, Rail Transportation**

See [49 C.F.R. § 1150.1\(a\)](#).

Transportation Law > Rail Transportation > Lands & Rights of Way

HN14 [blue document icon] **Rail Transportation, Lands & Rights of Way**

See [49 U.S.C.S. § 10901 \(d\)\(1\)](#).

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN15 [blue document icon] **Regulated Industries, Transportation**

A private antitrust action alleging anticompetitive rate fixing by motor carriers does not lie when those rates take the form of tariffs filed with and approved by the Interstate Commerce Commission.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Common Carriers

Transportation Law > Carrier Duties & Liabilities > Damages

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

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

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

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN16 [blue document icon] **Filed Rate Doctrine, Common Carriers**

The filed rate doctrine merely prevents private shippers from sustaining an award of treble damages by claiming that Interstate Commerce Commission (ICC)-approved rates were the product of an antitrust violation. That does not preclude liability based on non-rate anticompetitive activity. The court recognizes that the success of anticompetitive non-rate activity would coincidentally implicate rates promulgated under the jurisdiction of the ICC. It is fully consistent with the filed rate doctrine, however, to accept these rates as lawful and nonetheless to conclude that through non-rate activities, particularly the refusal to deal with potential competitors, the defendants effectively retarded entry of lower-cost competitors to the market. The instrument of damage was the absence of the lower-cost combination.

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

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

HN17 [blue document icon] **Private Actions, Standing**

73 F. Supp. 2d 512, *512LÁ999 U.S. Dist. LEXIS 17355, **1

Antitrust injury is a necessary condition of antitrust standing. It has been defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

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

HN18 [] **Private Actions, Remedies**

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 > ... > Private Actions > Standing > General Overview

HN19 [] **Private Actions, Standing**

A supplier of a product does not become a competitor of the purchaser merely because the purchaser in turn sells the product to the ultimate user.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN20 [] **Regulated Industries, Transportation**

A purchaser of rail service does not become a competitor of the seller merely because the seller is the conduit between the purchaser and the interstate rail network.

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

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

It requires a long stretch to call an individual refusal to deal "monopolizing" when it does nothing to increase the refuser's monopoly power and nothing to increase his position in any market.

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

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

To state an essential facilities claim under § 2 of the Sherman Act, a plaintiff must show: (1) control of the essential facility by a monopolist; (2) the competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

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

HN23 [] **Monopolies & Monopolization, Actual Monopolization**

The essential facilities doctrine, as a matter of law, inures only to the benefit of potential or actual competitors of an antitrust defendant.

Counsel: For BAR TECHNOLOGIES INC., plaintiff: Ralph A. Finizio, Houston Harbaugh, Pittsburgh, PA.

For BAR TECHNOLOGIES INC., plaintiff: Michele Ann Smolin, R. Jeffrey Pollock, McDonald, Hopkins, Burke & Haber, Cleveland, OH.

For CONEMAUGH & BLACK LICK RAILROAD COMPANY, defendant: Sheila Smith DiNardo, Buchanan Ingersoll, Pittsburgh, PA.

Judges: D. Brooks Smith, United States District Judge.

Opinion by: D. Brooks Smith

Opinion

[*513] MEMORANDUM OPINION AND ORDER

D. BROOKS SMITH, *District Judge.*

In this case, plaintiff, Bar Technologies, Inc. ("BarTech"), claims that the alleged refusal of defendant, Conemaugh & Black Lick Railroad Company ("C&BL"), to allow the proposed rail line of plaintiff to cross its existing line at grade, despite an easement requiring the C&BL to permit grade crossings, violates **antitrust law**. Defendant has filed a motion to dismiss, dkt. no. 5, which argues on the merits that BarTech has stated no valid claims, and also strenuously asserts that the issues presented in plaintiff's complaint are committed to the exclusive primary jurisdiction of [*2] the Surface Transportation Board ("STB") incident to its plenary power to regulate the construction, operation and abandonment of rail lines. For the following reasons, I will grant the motion.

I.

Stated in the light most favorable to plaintiff, the complaint reveals that BarTech is a manufacturer of "bar quality hot rolled steel" which it produces in a Johnstown, Pennsylvania factory it acquired from Bethlehem Steel in 1994. The C&BL, a wholly owned subsidiary of Bethlehem, provides the only rail link between the BarTech plant, on which it operates upon an easement, and the interstate rail transportation network. Believing that it could provide this link more cost-effectively than can the C&BL with its filed tariffs, BarTech sought to construct its own private rail line to the main line tracks. This, however, required BarTech's proposed trackage to cross the C&BL tracks at grade. BarTech was permitted to do this pursuant to its reserved rights in the C&BL easement, but the C&BL nevertheless refused its permission, citing operational and safety concerns.¹ To BarTech, however, this refusal was a naked attempt to restrain competition and force it to accept the C&BL's monopolistic [*3] tariff rates.

Accordingly, BarTech filed the instant suit, alleging in four counts that C&BL violated section 2 of the Sherman Anti-Trust Act, breached its contract with BarTech and interfered with BarTech's "servient owner rights." BarTech seeks both compensatory and treble damages, as well as declaratory and injunctive relief. Defendant has filed a motion to dismiss, which is now fully briefed and [*4] ready for disposition.

II.

HN1 A motion to dismiss cannot be granted unless the allegations in the complaint taken as true fail to state any claim upon which relief can be granted. *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir. 1985) (citing **HN2** *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). In ruling upon a

¹ A crossing at grade is not unlike a common intersection of two streets, except that the inherent limitations of track and rolling stock preclude turns and other maneuvers. If a BarTech train is using the grade crossing, C&BL's trains will be blocked from doing so until the BarTech train safely exits the crossing. Moreover, it is possible for one train to have a side-on collision with another railroad's train that happens to be in the crossing. Thus, the safety and operational concerns are not without basis. Nevertheless, grade crossings have been common in the railroad industry, probably from its earliest days.

motion to dismiss, a district court must accept as true all facts alleged in the complaint, and view them in the light most favorable to the plaintiff. *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990). A court "need not credit a complaint's 'bald assertions' or 'legal conclusions.'" *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997) (quoting *Glassman v. Computervision* [*514] Corp., 90 F.3d 617, 628 (1st Cir. 1996)).

III.

Defendant spends the bulk of its brief on its argument that the entire case must be dismissed for lack of subject matter jurisdiction. It asserts, first, that the construction and operation of rail lines and grade crossings is committed to the exclusive primary jurisdiction of the STB. [**5] Because BarTech never sought STB approval to build its rail line and grade crossing, defendant contends essentially that BarTech's problems are solely of its own making and that any damages it suffered are not the C&BL's fault. Alternatively, defendant argues that even if BarTech had sought regulatory approval, the question of whether it can build its rail line and grade crossing can and must be decided only by the STB.

Defendant relies on [HN3](#) [↑] [49 U.S.C. § 10901\(a\)](#), which provides that:

A person may-

- (1) construct an extension to any of its railroad lines;
- (2) construct an additional railroad line;
- (3) provide transportation over, or by means of, an extended or additional railroad line; or
- (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity under subsection (c).

It also relies on [HN4](#) [↑] subsection (d)(1), which recites:

When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any [**6] construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if-

- (A) the construction does not unreasonably interfere with the operation of the crossed line;
- (B) the operation does not materially interfere with the operation of the crossed line; and
- (C) the owner of the crossing line compensates the owner of the crossed line.

Based on this statutory text, defendant argues that BarTech was and is forbidden from building either its rail line or crossing without STB approval. This contention, while initially plausible, is incomplete in its consideration and analysis of the statute.

[HN5](#) [↑] [Section 10501](#) sets forth a grant of general jurisdiction to the STB. [HN6](#) [↑] Subsection (a)(1) provides that "the Board has jurisdiction over transportation *by rail carrier* that is . . . by railroad." (Emphasis added.) Subsection (a)(2) then limits that jurisdiction to, for present purposes, transportation over the interstate rail network. [HN7](#) [↑] Subsection (b) then provides that:

The jurisdiction of the Board over-

- (1) transportation *by rail carriers* . . . ; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance [**7] of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt remedies provided under Federal or State law.

[49 U.S.C. § 10501\(b\)](#) (emphasis added).

Taken together, the exclusivity granted in subsection (b)-which would appear to encompass the "industrial" or "spur" track BarTech wishes to construct-must be read as subject to the limits of the general jurisdiction granted in

subsection (a)(1). This means that [HN8](#)[↑] the STB's jurisdiction over the construction of spur or industrial track is exclusive only to the extent the Board has jurisdiction at all, that is, to the extent that the proposed tracks implicate "transportation by rail carrier that is . . . [\[*515\]](#) by railroad." [49 U.S.C. 10501\(a\)\(1\)](#)(emphasis added).

[HN9](#)[↑] [Section 10102\(5\)](#) defines a "rail carrier" as "a person providing common carrier railroad transportation for compensation." Both judicial decisions and administrative [\[**8\]](#) adjudications have further defined a "common carrier" "as an entity that offers its services for compensation to all members of the public that are in a position to use them." *Chicago Terminal Corp.*, ICC Finance Docket No. 32495, 1994 WL 732863, p.6 (ICC, served Jan. 12, 1995) (citing agency decisions); see [Lone Star Steel Co. v. McGee](#), *380 F.2d 640, 643 (5th Cir. 1967)* (FELA case) (quoting [Kelly v. General Elec. Co.](#), *110 F. Supp. 4, 6* (E.D. Pa.) (FELA), aff'd as circuit precedent, *204 F.2d 692* (3d Cir. 1953) (per curiam)); [Duffy v. Armco Steel Corp.](#), *225 F. Supp. 737, 738 (W.D. Pa. 1964)* (Willson, J.). [HN10](#)[↑] Mere construction of track by a company on its own property does not, without more, turn that company into a common carrier. [Ciaccio v. New Orleans Public Belt R.R.](#), *285 F. Supp. 373, 375 (E.D. La. 1968)* (FELA, discussing *Kelly*). As the *Kelly* court put it:

[HN11](#)[↑] A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the [\[**9\]](#) public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed.

[110 F. Supp. at 6](#) (citation omitted).

Here, BarTech has no intention of operating its rail line as a common carrier for hire to shippers, but seeks only a means of transporting its own carloads of steel from its Johnstown plant onto the interstate rail network. As such, it is not a rail carrier and the jurisdictional prerequisite of [§ 10501\(a\)\(1\)](#) is not satisfied. That being the case, the Board simply has no jurisdiction under [§ 10901\(a\)](#) to either approve or disapprove BarTech's proposed construction of its rail line.

This construction is consistent with the former ICC's interpretation of the statute, before its amendment by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub. L. 108-88, 109 Stat. 807. In its *Chicago Terminal* opinion issued less than a year before the enactment of the ICCTA, the [\[**10\]](#) Commission held:

The Commission may approve or exempt only a transaction that is within its jurisdiction. . . . The Commission's jurisdiction over railroads is limited to common carriers.

1994 WL 732863 at p.3; accord *Hanson Natural Resources Co.*, ICC Finance Docket No. 32248, 1994 WL 673712 (ICC, served Dec. 5, 1994); *Northern Plains R.R. Co.*, ICC Finance Docket No. 32077, 1992 WL 383329 (ICC, served Dec. 28, 1992); [State of Maine](#), *8 I.C.C. 2d 835, 836-37*, 1991 WL 84430 (ICC 1991).

Defendant cites two cases purportedly to the contrary, but both are inapposite. In [CSX Transp., Inc. v. Georgia Pub. Serv. Comm.](#), *944 F. Supp. 1573 (N.D. Ga. 1996)*, the issue was not whether the STB could regulate the construction of private industrial track, but "whether the ICC Termination Act of 1995 preempted the state's authority to regulate railroad agency closings in Georgia." [Id. at 1580](#). In that case, the railroad—one of the nation's largest—was clearly a common carrier. To the same effect is [Village of Ridgefield Pk. v. New York, S. & W. Ry. Corp.](#), *318 N.J. Super. 385, 724 A.2d 267, 277* [\[**11\]](#) (N.J. Super. Ct., App. Div.), cert. granted, *160 N.J. 476, 734 A.2d 791*, 1999 N.J. LEXIS 716 (N.J. 1999), in which the question was whether local authorities could exercise general police powers to abate an alleged public nuisance arising from the operation of a locomotive refueling facility. In both cases, preemption was found, but as both railroads were common carriers, neither case provides support for defendant's argument.

[\[*516\]](#) Even if [§ 10501](#) did grant jurisdiction to the STB over a non-rail carrier like BarTech, [§ 10901](#) would still be unavailing to the C&BL's position. [HN12](#)[↑] [Section 10906](#), formerly codified as § 10907(b)(1), states:

The Board does not have authority under this chapter² over construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks.

Under this section, the STB simply has no jurisdiction over BarTech's industrial track. Cf. *Hughes v. Consol-Pa. Coal Co.*, 945 F.2d 594, 612 (3d Cir. 1991) (no jurisdiction over railroad-operated spur track connecting main railroad line only with a single company's coal mine).

[**12] Defendant places great reliance on the language of [§ 10901](#) itself, correctly pointing out that nothing in the express language of that section limits its applicability to common carriers. Indeed, the prior version of that section referred specifically to "rail carriers" as the only parties which needed ICC approval to construct a rail line, while the present version refers instead to "persons." Dkt. no. 11, at 4. Defendant also cites to the administrative regulations promulgated under [§ 10901](#) in support of this argument. Specifically, it focuses upon [HN13](#)[↑] [49 C.F.R. § 1150.1\(a\)](#), which states that "noncarriers require Board approval to construct, acquire or operate a rail line in interstate commerce." From this, and one ICC administrative decision, *Kansas City S. Ry. Co.*, ICC Finance Docket No. 32547, 1995 WL 348732 (ICC, served June 2, 1995), it claims that "the Act includes no exemption for construction of a rail line on one's own property." Dkt. no. 11, at 5. Although defendant's argument may well hold true under different circumstances, it must fail under the facts of the case *sub judice*.

First, the legislative history of the ICCTA states explicitly that, as [**13] to [§ 10901](#), no change was intended vis-a-vis existing law, and that "non-railroad companies who construct rail lines to serve their own facilities, whether or not such lines would be classified as a spur or other auxiliary track exempt from agency jurisdiction [under [§ 10906](#)], are not required to obtain agency approval to engage in such construction." H.R. Conf. Rep. No. 311, 104th Cong, 1st Sess. 179, reprinted in 1995 U.S.C.C.A.N. 793, 864. Indeed, the change from "rail carrier" to "person" must have been intended to correct the ambiguity concerning whether a non-carrier who acquires an active common carrier rail line is subject to STB jurisdiction. Many courts answered that question in the affirmative, see *United Transp. Union v. ICC*, 311 U.S. App. D.C. 229, 52 F.3d 1074, 1078 (D.C. Cir. 1995), and the amended statute, by referring to "persons" in [§ 10901\(a\)](#) and "person other than a rail carrier" in [§ 10901\(a\)\(4\)](#), merely codifies that result by requiring such a person to seek Board approval. This is also the obvious import of [49 C.F.R. § 1150.1\(a\)](#), cited by defendant and quoted *supra*. Accordingly, I conclude that neither the 1995 amendment nor the [**14] administrative regulation confers Board jurisdiction over BarTech.

As for *Kansas City Southern*, it is simply inappropriate to this proceeding. There, a railroad wished to construct what it considered to be an exempt spur track on its own property to serve an Exxon plastics plant that was already served by another railroad, and the Board held that the proposed track was an extension of its common carrier line, not a spur. 1995 WL 348732. Nowhere in that opinion did the Board hold that a customer's proposed construction of an industrial track to a common carrier rail line was within its jurisdiction.

Accordingly, I conclude that the STB has no jurisdiction over whether BarTech can construct its industrial track. That leaves defendant's related argument, which contends that STB approval is required [*517] before BarTech can build a grade crossing over the C&BL line, regardless of whether BarTech can simply construct track *vel non*.

Defendant relies exclusively upon [HN14](#)[↑] [49 U.S.C. § 10901 \(d\)\(1\)](#), which states (emphasis added):

When a certificate has been issued by the Board under this section authorizing the construction or extension of a [**15] *railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if-*

- (A) the construction does not unreasonably interfere with the operation of the crossed line;
- (B) the operation does not materially interfere with the operation of the crossed line; and
- (C) the owner of the crossing line compensates the owner of the crossed line.

This subsection of [§ 10901](#), like subsection (a) discussed *supra*, does not come to the aid of defendant's cause.

² "This chapter[.]" as used in [§ 10906](#), refers to chapter 109 of the statute, which includes §§ 10901-10907.

I must first note that any reliance on subsection (d)(1) suffers from the same deficiency as that on subsection (a), specifically, that [§ 10906](#) removes industrial track from the Board's jurisdiction, as do the common carrier limitations of [§§ 10501\(a\)\(1\)](#) and [10102\(5\)](#). Beyond that, the language of subsection (d)(1) does not contain a jurisdictional grant over the construction of crossings, and merely recites the legal duties of the "crossed" railroad once the Board has authorized the construction. Defendant's citation to this subsection, then, merely begs the question of whether that authorization is required in the first instance. [\[**16\]](#) For the reasons I have already set forth, no such authorization is needed and subsection (d)(1) is therefore inapposite.³

Because the STB has no jurisdiction over either the construction of the proposed BarTech track or the installation of the crossing, I reject defendant's jurisdictional arguments in their entirety and will deny that portion of its motion to dismiss.

IV.

A.

Defendant next argues that plaintiff's entire complaint fails because the actions of the C&BL were not the proximate cause of any damages to BarTech. In part, this contention rests on the theory that, because the STB has exclusive jurisdiction to approve BarTech's proposed rail line and BarTech has not even sought such approval, BarTech is not legally entitled to build the line in the first [\[**17\]](#) instance. Accordingly, defendant asserts that "any damages allegedly sustained by BarTech from having to use the C&BL Railroad are the proximate result of BarTech's own conduct, not any conduct of C&BL." Dkt. no. 6, at 11-12. For the reasons already stated, I cannot accept this argument.

B.

The other part of defendant's no-damages argument requires further discussion. Defendant contends that because the C&BL's freight rates are set by tariffs filed with the STB, any "damages" BarTech has or will incur are barred under the filed rate doctrine, under which a court may not grant damages based upon, or otherwise interfere with, a tariff approved by an administrative agency charged with that duty. As defendant puts it, "a court is distinctly unqualified to determine in a highly regulated industry what a reasonable, fair (or in this case, 'competitive') rate might be." [Id. at 13](#) (emphasis deleted); see generally [Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm.](#), [837 F.2d 600, 606 \(3d Cir. 1988\)](#); [Keogh v. Chicago & N.W. Ry. Co.](#), [260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 \(1922\)](#). Thus, in [Square D Co. v. Niagara Frontier Tariff Bureau, Inc.](#), [476 U.S. 409, \[*518\] 90 L. Ed. 2d 413, 106 S. Ct. 1922 \(1986\)](#), [\[**18\]](#) the Supreme Court held that [HN15](#)⁴ a private antitrust action alleging anticompetitive rate fixing by motor carriers would not lie when those rates took the form of tariffs filed with and approved by the ICC. Accord [Wegoland, Ltd. v. Nynex Corp.](#), [806 F. Supp. 1112, 1113-16, 1125 \(S.D.N.Y. 1992\)](#), aff'd, [27 F.3d 17, 18-22 \(2d Cir. 1994\)](#).

Here, however, BarTech is not challenging the rates charged by the C&BL for the shipment of steel, at least not directly.⁴ It is simply proposing to construct its own rail line, in the hopes of meeting its steel shipping needs more cost-effectively, and the C&BL has blocked those efforts. Put simply, BarTech's attempt to avoid a monopoly price--and the litigation that has resulted from it--does not put this court in the position of second-guessing the tariff rates approved by the STB. As the Third Circuit has stated:

[\[HN16\]](#) The filed rate doctrine] merely prevents private shippers from sustaining an award of treble damages by claiming that ICC-approved rates were the product of an antitrust violation. That . . . does not preclude

³This does not render subsection (d)(1) superfluous. In the more typical case, one common carrier railroad will be seeking to cross the line of another. In that scenario, Board approval will be required and subsection (d)(1) will come into play.

⁴I am mindful of the possibility that BarTech might not actually intend to construct its proposed rail line, but is using the threat of doing so to induce the C&BL to lower its tariff rates. Whether or not this is a feasible strategy (the C&BL would likely have to change its tariff for all shippers), it still is not the same as one shipper's direct, litigation-based attack on a carrier's rates that could result in price discrimination and implicate the filed rate doctrine.

liability based on non-rate anticompetitive activity. . . . We recognize that the success [**19] of anticompetitive non-rate activity would coincidentally implicate rates promulgated under the jurisdiction of the ICC. It is fully consistent with [the filed rate doctrine], however, to accept these rates as lawful and nonetheless to conclude that through non-rate activities, particularly the . . . refusal to deal with potential competitors, the [defendants] effectively retarded entry of lower-cost competitors to the market. The instrument of damage . . . was the absence of the lower-cost combination.

In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1159 (3d Cir. 1993). Accordingly, the filed rate doctrine does not apply on the facts of this case.

[**20] C.

Defendant's more substantial argument is that "BarTech's antitrust claim should . . . be dismissed because it has not . . . suffered a cognizable antitrust injury."⁵ Dkt. no. 6, at14. That is, while BarTech may have suffered some injury individually because of the CB&L's refusal to deal on a grade crossing, defendant contends that there was no injury to competition and hence no damage of the type the antitrust laws were designed to protect. After careful consideration, I conclude this assertion has merit.

"Antitrust [HN17](#) injury is a necessary . . . condition of antitrust standing." *Barton & Pittinos, Inc. v. Smithkline Beecham Corp.*, 118 F.3d 178, 182 (3d Cir. 1997). It has been defined as "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. [**21]" [Mathews v. Lancaster General Hosp.](#), 87 F.3d 624, 641 (3d Cir. 1996) (citations omitted).⁶ As the Third Circuit has said,

[*519] because antitrust law aims to protect competition, not competitors, a court must analyze the antitrust injury question from the viewpoint of the consumer. [HN18](#) 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). If an antitrust plaintiff is neither a consumer nor a competitor of the defendant in the relevant market, its damages cannot constitute "antitrust injury." *Barton & Pittinos, Inc.*, 118 F.3d at 184.

[**22] Defendant relies on two Third Circuit cases to argue that, when a market itself is by law not competitive, a plaintiff cannot claim antitrust injury by asserting that the defendant's practices (here, the refusal to permit the grade crossing) restrained competition. See *City of Pittsburgh v. West Penn Power Comp.*, 147 F.3d 256, 265-68 (3d Cir. 1998); *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405 (3d Cir. 1997). In *West Penn*, plaintiff claimed that a proposed merger of two power companies restrained competition in the market, but the court pointed out that, at that time, the market was regulated and not competitive, dismissing plaintiff's claim. [147 F.3d at 266-68](#). Similarly, in *Schuylkill*, the court disagreed with a cogenerator's contention that a power company's refusal to purchase its power during periods of low demand was anticompetitive, again because the power market was, by regulatory design, not competitive. [113 F.3d at 415](#).

⁵ To the extent that defendant's antitrust arguments are meritorious, only the antitrust claim can be dismissed, leaving the pendent state law claims for further adjudication.

⁶ This standard applies regardless of whether treble damages are sought under section 4 of the Clayton Act, [15 U.S.C. § 15](#), or injunctive relief is requested under section 16, [15 U.S.C. § 26](#). *Pennsylvania v. Milk Indus. Mgt. Corp.*, 812 F. Supp. 500, 506 (E.D. Pa. 1992); *Remington Prods., Inc. v. North Am. Philips Corp.*, 717 F. Supp. 36, 44-45 (D. Conn. 1989) (citing *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 111, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986) (sec. 16); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) (sec. 4)), on reconsideration, [755 F. Supp. 52, 55](#) (D. Conn. 1991); *Alaska Teamsters Local 959 v. Atlantic Richfield Co.*, 616 F. Supp. 593, 609 (D. Alaska 1985); *Kelly v. General Motors Corp.*, 425 F. Supp. 13, 18 n.5 (E.D. Pa. 1976).

Here, it is evident that BarTech is not a present or potential competitor of the CB&L, but rather a customer. As the *Schuylkill* court stated, [HN19](#) "[a] [**23] supplier of a product does not become a competitor of the purchaser merely because the purchaser in turn sells the product to the ultimate user." *Id.* Conversely, [HN20](#) a purchaser of rail service does not become a competitor of the seller merely because the seller is the conduit between the purchaser and the interstate rail network. Indeed, if BarTech were a competitor of the CB&L, I could not have reached the conclusion I did, *supra*, with respect to the jurisdiction of the STB. Accordingly, in the absence of any other competition, CB&L's present rail market must be deemed as lawfully non-competitive.

Nor can it be said that the C&BL's refusal to allow a grade crossing will expand its monopoly, because it currently has and will continue to have 100% of the common carrier freight market between the main line and its customers. This makes BarTech's antitrust damages problematic; as the Eleventh Circuit has aptly commented, "it [HN21](#) requires a long stretch to call an individual refusal to deal 'monopolizing' when it does nothing to increase the refuser's monopoly power and nothing to increase his position in any market." [*Mr. Furniture Whse., Inc. v. Barclays Am./Comm'l Inc.*, 919 F.2d 1517, 1523 \(11th Cir. 1990\)](#) [**24] (quoting P. Areeda, *Antitrust Law* P 736, at 274 (1978) (internal quotation marks omitted)); accord Kenneth L. Glazer & Abbot B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 Antitrust L.J. 749, 783-84 (1995) (noting that most courts "have been quick to dismiss" such claims).

In [*Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 \(1st Cir. 1987\)](#), a charter airline sought access to services at Logan Airport's Terminal C. When Massport refused and required the airline to use another, less favorable terminal, plaintiff sued, claiming attempted monopolization under § 2 of the Sherman Act. The First Circuit, speaking through then-circuit Judge Breyer, affirmed the dismissal of this claim, opining:

It is difficult to see how denying a facility to one who, like Interface, is not an actual or potential competitor could enhance or reinforce the monopolist's market power. . . . Thus, we do not see how the facts alleged could make out the actual or potential injury to the competitive [\[*520\]](#) process necessary to show a violation of Sherman Act § 2.

Id. at 12 (citing P. Areeda & H. [\[**25\]](#) *Hovenkamp, Antitrust Law* PP 736.2d, 736.2e (Supp.1986)).

I agree with the reasoning of these cases. Because the C&BL's refusal to permit the grade crossing did not expand its market power beyond that which it already had, any injury to BarTech from that refusal was simply not "of the type the antitrust laws were intended to prevent." Accordingly, BarTech has not suffered antitrust injury as a matter of law.⁷

D.

Finally, defendant argues that, to the extent plaintiff premises its antitrust claim on the "essential facilities doctrine," the claim must also be dismissed. I agree. [HN22](#) To state an essential facilities claim [\[**26\]](#) under § 2 of the Sherman Act, a plaintiff must show:

(1) control of the essential facility by a monopolist; (2) the competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

[*Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 \(3d Cir. 1996\)](#) (emphasis added). Here, plaintiff asserts that the grade crossing is the essential facility, that it is controlled by the CB&L, a monopolist, that BarTech cannot duplicate the crossing, as, for example by choosing an alternate route, and that the crossing can be feasibly provided. Yet, plaintiff ignores the fact that [HN23](#) the essential facilities doctrine, as a matter of law, inures only to the benefit of potential or actual competitors of an antitrust defendant. See [*Garsman v. Universal Resources*](#)

⁷ I "recognize that the existence of antitrust injury is not typically resolved through motions to dismiss." [*Schuylkill*, 113 F.3d at 417](#). But, as in that case, the issue truly is a pure question of law, and the construction of a factual record could not change the result. Hence, the court sees little reason to put the parties to the time and expense of discovery on this issue.

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Holding Inc., 824 F.2d 223, 230 (3d Cir. 1987); accord Thomas v. Network Solutions, Inc., 176 F.3d 500, 509 (D.C. Cir. 1999), cert. denied, 145 L. Ed. 2d 813, 120 S. Ct. 934 (1999); see generally Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 376-77 (7th Cir. 1986) [**27] (Posner, J.). As stated *supra*, BarTech is merely a customer of the CB&L, not its competitor. As such, its essential facilities claim fails. *Id.*

E.

Accordingly, for the foregoing reasons, I will dismiss plaintiff's antitrust claims with prejudice.

V.

Given my disposition of the antitrust claims and my denial of defendant's motion on the jurisdictional issue, plaintiff's pendent state law claims remain for adjudication. The parties have not briefed the question of supplemental jurisdiction under 28 U.S.C. § 1337, and hence I will direct them to file briefs within twenty days on whether I should retain supplemental jurisdiction.

An appropriate order follows.

ORDER

AND NOW, this ninth day of November 1999, upon consideration of defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(6), dkt. no. 5, plaintiff's unopposed motion for hearing, dkt. no. 14, and the parties' arguments relative thereto, it is hereby ORDERED AND DIRECTED that:

1. the aforesaid motion to dismiss, dkt. no. 5, is GRANTED;
2. plaintiff's antitrust claims are DISMISSED WITH PREJUDICE;
3. the parties shall submit briefs on or before November 29, 1999 on the question [**28] of whether this court should, in its discretion, retain supplemental jurisdiction over the remaining pendent state law claims under 28 U.S.C. § 1337.
- [*521] 4. the aforesaid motion for hearing is DENIED.

BY THE COURT:

D. Brooks Smith

United States District Judge

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Park Ave. Radiology Assocs., P.C. v. Methodist Health Sys.

United States Court of Appeals for the Sixth Circuit

November 10, 1999, Filed

No. 98-5668

Reporter

1999 U.S. App. LEXIS 29986 *; 1999-2 Trade Cas. (CCH) P72,712

PARK AVENUE RADIOLOGY ASSOCIATES, P.C.; DR. IAN F. MURRAY; and DR. DANIEL K. WESTMORELAND, Plaintiffs-Appellants, v. METHODIST HEALTH SYSTEMS, INC.; HEALTH CHOICE, INC.; METROCARE, INC.; MEMPHIS RADIOLOGICAL PROFESSIONAL CORP.; and METHODIST HOSPITALS OF MEMPHIS, Defendants-Appellees.

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) 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: [1999 U.S. App. LEXIS 35494](#).

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE. 92-0288. Gibbons. 4-14-98.

Disposition: AFFIRMED.

Core Terms

antitrust, patients, district court, Plaintiffs', radiology, anti trust law, providers, Defendants', third-party, consumers, referrals, staff privileges, contractors, non-Health, inasmuch, damages, parties, anticompetitive, violations, pain, amended complaint, Sherman Act, competitors, privileges, plans

LexisNexis® Headnotes

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

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

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

[HN1](#) [?] Standards of Review, De Novo Review

The appellate court reviews a district court's decision to dismiss a lawsuit for failure to state a claim upon which relief can be granted under [Fed. R. Civ. P. 12\(b\)\(6\)](#) de novo. In conducting its review, the court must construe the complaint in the light most favorable to the plaintiff, accept as true all of the plaintiff's well-pleaded factual

allegations, and determine whether plaintiff can prove no set of facts supporting his claims which would entitle him to relief.

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

HN2 [down arrow] **Private Actions, Standing**

The test for antitrust standing includes five factors: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury, including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN3 [down arrow] **Private Actions, Remedies**

Plaintiffs seeking to recover damages in a private action against a violator of antitrust laws must demonstrate more than that they are in a worse position than they would have been had the violator not committed the antitrust conduct. Specifically, private antitrust plaintiffs must prove more than injury causally linked to an illegal presence in the market. 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. It should, in short, be the type of loss that the claimed violations would be likely to cause.

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

HN4 [down arrow] **Private Actions, Remedies**

Antitrust injury is necessary to sustain an antitrust cause of action because the antitrust laws were enacted for the protection of competition, not competitors.

Counsel: For PARK AVENUE RADIOLOGY ASSOCIATES, P.C., IAN F. MURRAY, Dr., DANIEL K. WESTMORELAND, Dr., Plaintiffs - Appellants: Janet L. McDavid, John G. Roberts, Jr., Sharis Arnold Pozen, Catherine E. Stetson, Hogan & Hartson, Washington, DC.

For METHODIST HEALTH SYSTEMS, INC., HEALTH CHOICE, INC. METROCARE, INC., METHODIST HOSPITAL OF MEMPHIS, Defendants - Appellees: Thomas R. Prewitt, Jr., Armstrong, Allen, Prewitt, Gentry, Johnstone & Holmes, Memphis, TN. S. Russell Headrick, Hale, Headrick Dewey & Wolf, Memphis, TN.

For METROCARE, INC., Defendant - Appellee: Robert K. Alvarez, Lancelot L. Minor, III, Bourland, Heflin, Alvarez, & Minor, Memphis, TN.

For MEMPHIS RADIOLOGICAL PROFESSIONAL CORPORATION, Defendant - Appellee: John I. Houseal, Jr., J. N. Raines, Glankler & Brown, Memphis, TN.

Judges: BEFORE: RYAN, BATCHELDER, and CLAY, Circuit Judges. * [*2]

Opinion by: CLAY

Opinion

CLAY, Circuit Judge. Plaintiffs, Dr. Ian Murray, Dr. Daniel Westmorland and their radiology business, Park Avenue Radiology Associates, P.C., appeal from the judgment dismissing Plaintiffs' claim for lack of antitrust standing, in this antitrust action brought against Defendants, Health Choice, Inc., Metrocare, Inc., Methodist Hospitals of Memphis, its parent corporation Methodist Health Systems, Inc., and Memphis Radiological Professional Corporation. For the reasons set forth below, we AFFIRM the judgment of the district court.

BACKGROUND

Plaintiffs provide outpatient radiology services for patients referred to them by primary care physicians in and around Shelby County, Tennessee. Plaintiffs directly compete with Memphis Radiological Professional Corporation ("Memphis") for physician referrals. Memphis is the exclusive provider of radiology services at five hospitals in Shelby County, collectively called the "Methodist Hospitals." All five Methodist Hospitals are owned by Methodist Hospitals of Memphis ("Methodist of Memphis"), a subsidiary of Methodist Health Systems ("Methodist Health" hereinafter referred to collectively with Methodist of Memphis [*3] as "Methodist"). A sixth hospital, Crittenden Memorial Hospital in West Memphis, Arkansas, is also affiliated with Methodist.

The physicians with staff privileges at Methodist Hospitals or Crittenden Memorial are members of Metrocare, Inc., a company which negotiates with third-party payors of managed health care programs on behalf of its member physicians. Along with Methodist Health, Metrocare is a member of Health Choice, Inc., which operates a preferred provider organization ("PPO"). Plaintiffs allege that Health Choice contracts with third-party payors -- employers, insurance companies, and the like -- to make Methodist Health's hospital services and Meterocare's physician services available at discounted rates to hundreds of thousands of beneficiaries in the relevant market group. Plaintiffs also allege that before Metrocare entered into a contract with Health Choice, its physicians referred patients to Plaintiffs, as well as to Memphis for radiology services, but after it entered into the Health Choice contract, Metrocare stopped making referrals to Plaintiffs inasmuch as Health Choice physicians are required to send all Health Choice enrollees, as well as those patients who [*4] are not members of Health Choice, to Memphis.

In October of 1992, Plaintiffs filed suit against Defendants alleging that based on their defined relevant market, Defendants' contractual agreements violated § 1 of the Sherman Act, 15 U.S.C. § 1, because the contractual agreements amounted to a group boycott, and exclusive dealing arrangement, a tying arrangement and price fixing. Plaintiffs also alleged a § 2 violation of the Sherman Act, 15 U.S.C. § 2, claiming that the Health Choice defendants possess or conspired to possess monopoly power in the relevant market. Finally, Plaintiffs alleged several state law claims. Defendants filed motions to dismiss or for summary judgment, and the district court -- while denying Plaintiffs' Rule 56(f) request for discovery -- granted summary judgment against Plaintiffs on all counts. Plaintiffs appealed the district court's order to this Court and, in January of 1995, this Court reversed the district court's decision. See Park Ave. Radiology Assoc. v. Methodist Health Sys., Inc., 1995 U.S. App. LEXIS 957, No. 93-6458, 1995 WL 16844 (6th Cir. Jan. 17, 1996) (*per curiam* unpublished table decision). The Court [*5] also found the district court abused its discretion when it denied Plaintiffs' Rule 56(f) motion, and remanded the case. *Id.*

Upon remand, Plaintiffs filed a second amended complaint challenging Defendants' allegedly anticompetitive referral policies. First, the amended complaint alleged that Defendants coerce Metrocare physicians into referring Health Choice patients to Methodist -- and thus to Memphis -- for radiology services, despite contracts that would

* Honorable Alice M. Batchelder recused herself from this case after oral argument was heard.

allow Health Choice beneficiaries to use Plaintiffs' radiology services. Second, the complaint alleged that Defendants coerce Metrocare physicians into referring not only Health Choice enrollees to Methodist and Memphis; they also coerce those doctors into steering a large percentage of patients who are not enrolled with Health Choice, but with other competing plans -- plans for which Plaintiffs are a provider -- to Methodist and Memphis. Plaintiffs alleged that the effect of Defendants' arrangement is twofold: (1) Health Choice enrollees who may have chosen Plaintiffs are precluded from doing so; and (2) non-Health Choice participants whose plan options include Plaintiffs are also precluded from choosing Plaintiffs.

Plaintiffs [*6] also challenged Defendants' market allocation in its second amended complaint, noting that Doctors Murray and Westmoreland provided radiology services at Crittenden Memorial Hospital, which had affiliated with Methodist in 1995. Although Crittenden's affiliation with Methodist enabled Murray and Westmoreland to serve Health Choice patients at Crittenden, Plaintiffs were completely prevented from receiving any referrals in Shelby County, despite Murray and Westmoreland's participation in Health Choice at Crittenden.

The amended complaint also charged Defendants with several violations of §§ 1 and 2 of the Sherman Act. Counts One through Six specifically dealt with the § 1 violations and claimed that Defendants' referral practices 1) constituted a group boycott; 2) were an unlawful exclusive dealing arrangement between the Defendants and the Metrocare physicians; 3 &4) unlawfully tied, in two respects, radiology services to non-radiology services the physicians provide; 5) unreasonably restrained trade and competition in the market for radiology services; and 6) reflected a *per se* unlawful geographic market allocation of competitors, in view of Murray and Westmoreland's inability [*7] to service Health Choice enrollees in Shelby County, Tennessee.

In Counts Seven through Nine, Plaintiffs brought claims under § 2 of the Sherman Act, alleging specifically that Defendants had monopolized, attempted to monopolize, and conspired to monopolize the market for radiology services. Count Ten of the complaint stated a common law claim for tortious interference with business relationships. Plaintiffs sought treble damages under § 4 of the Clayton Act, [15 U.S.C. § 15](#), and injunctive relief under § 16 of the Clayton Act, [15 U.S.C. § 26](#).

Defendants filed a motion to dismiss Plaintiffs' amended complaint under [Fed. R. Civ. P. 12\(b\)\(6\)](#). The district court granted Defendants' motion, and dismissed Plaintiffs' action for lack of antitrust standing, finding that Plaintiffs failed to allege an antitrust injury and that, moreover, Plaintiffs were not an "efficient enforcer of the antitrust laws." Because the district court found that Plaintiffs lacked standing to pursue their federal antitrust claims, the court declined to exercise supplemental jurisdiction over the remaining pendent state-law claims. Plaintiffs filed this timely appeal.

[*8] ANALYSIS

HN1 [↑] This Court reviews a district court's decision to dismiss a lawsuit for failure to state a claim upon which relief can be granted under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) *de novo*. See [Cline v. Rogers](#), 87 F.3d 176, 179 (6th Cir.), cert. denied, 519 U.S. 1008, 117 S. Ct. 510, 136 L. Ed. 2d 400 (1996). In conducting its review, the Court must construe the complaint in the light most favorable to the plaintiff, accept as true all of the plaintiff's well-pleaded factual allegations, and determine whether plaintiff can prove no set of facts supporting his claims which would entitle him to relief. See *id.* (citing [In re DeLorean Motor Co.](#), 991 F.2d 1236, 1240 (6th Cir. 1993)).

In *HyPoint Tech., Inc. v. Hewlett-Packard Co.*, this Court succinctly described antitrust standing as follows:

Antitrust standing to sue is at the center of all **antitrust law** and policy. It is not a mere technicality. It is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws. *The requirement of antitrust standing ensures that antitrust litigants use the laws to prevent anticompetitive action and makes certain* [*9] *that they will not be able to recover under the antitrust laws when the action challenged would tend to promote competition in the economic sense.* Antitrust laws reflect considered policies regulating economic matters. The antitrust standing requirement makes certain that the laws are used only to deal with the economic problems whose solutions these policies were intended to effect.

949 F.2d 874, 877 (6th Cir. 1991) (emphasis added). In Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079 (6th Cir. 1983), this Court summarized HN2¹ the test for antitrust standing as set forth by the Supreme Court in Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), by enunciating the following five-factor inquiry.

(1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry [*10] of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

Southhaven Land Co., Inc., 715 F.2d 1079 at 1085 (citing Associated Gen. Contractors, 459 U.S. 519 at 537-44, 103 S. Ct. 897 at 908-13, 74 L. Ed. 2d 723; see Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1022 (6th Cir. 1999)).

Here, as found by the district court, Plaintiffs have failed to allege that they have antitrust standing so as to survive Defendants' motion to dismiss. Under the first *Southhaven* factor, the causal connection between the non Health Choice patients -- the group of patients for which Plaintiffs take particularly exception -- being referred improperly to Memphis and Plaintiffs decrease in patients, is tenuous. If, as Plaintiffs allege, they provide a superior product for a more competitive price, the non-Health Choice patient, either by direction of their own third-party provider or at their own economic directive, will seek Plaintiffs' services.

Next, under the second *Southhaven* factor, Plaintiffs have failed to sufficiently [*11] allege that they suffered an antitrust injury caused by Defendants' alleged anticompetitive conduct. The "antitrust injury" requirement was first explained by the Supreme Court in Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977), where the Court found that HN3¹ plaintiffs seeking to recover damages in a private action against a violator of antitrust laws must demonstrate more than they are in a worse position than they would have been had the violator not committed the antitrust conduct. Specifically, the Court stated that private antitrust plaintiffs must

prove more than injury causally linked to an illegal presence in the market. 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. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. at 489 (citation omitted). HN4¹ Antitrust injury [*12] is necessary to sustain such a cause of action because the "antitrust laws . . . were enacted for 'the protection of competition not competitors.'" *Id.* (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)).

The district court found that Plaintiffs failed to allege antitrust injury as a matter of law inasmuch as, reduced to its essence, plaintiffs' complaint challenges the fundamental structure of the modern PPO, in that requiring in-plan referrals for plan patients is one of the primary means by which a PPO is able to fulfill its promise of increased patient volume for the preferred providers. The district court therefore concluded that when Plaintiffs asked the court to declare Health Choice's in-plan referral requirement an antitrust violation, they asked the court to remove the primary bargaining tool by which PPOs are able to reduce health care providers' prices and, as a result, consumers would therefore suffer if Plaintiffs were to prevail in this litigation, which is contrary to the purpose of antitrust laws. Relying upon several cases from various circuit courts which found that doctors who were denied [*13] staff privileges at a hospital lacked antitrust standing to sue, the district court found the case at hand indistinguishable in that here Plaintiffs -- two doctors -- were denied staff privileges at a hospital and consequently denied membership in the PPO comprised of staff doctors at that hospital.¹

¹ See, e.g., Balaklaw v. Lovell, 14 F.3d 793, 801-02 (2d Cir. 1994) (holding that anesthesiologist lacked antitrust standing to challenge exclusive contract awarded to competing group of anesthesiologists); Oksanen v. Page Mem'l Hosp., 945 F.2d 696,

One such case upon which the district court relied is *Leak v. Grant Medical Center*, 893 F. Supp. 757 (S.D. Ohio 1995), aff'd, 103 F.3d 129 (6th Cir. 1996) (affirming for the reasons set forth in the district court's [*14] decision); cert. denied 520 U.S. 1251, 117 S. Ct. 2408, 138 L. Ed. 2d 175 (1997). In *Leak*, the plaintiff physician specializing in pain medicine sued when he was denied medical staff privileges at the defendant hospital. *893 F. Supp. at 759*. The district court found that the plaintiff lacked antitrust standing to sue inasmuch as he had staff privileges at two other area hospitals and was therefore able to fully compete with other doctors offering pain-related medical services in the area, and accordingly failed to allege antitrust injury. *Id. at 763*. The *Leak* court further found that even though some patients' managed care insurance plans may effectively limit them to services offered at the defendant hospital, this did not alter its conclusion. *Id.* The court reasoned that as follows:

If plaintiffs' practice of pain medicine is, as Dr. Leak avers, truly more cost effective than traditional pain management used by anesthesiologists, then both the hospitals at which plaintiffs have privileges and plaintiffs have a competitive advantage over the defendant anesthesiologists. If pain medicine is more cost-effective than traditional [*15] pain management, then in an open and competitive marketplace managed care insurance plans should eventually be more inclined to designate those hospitals at which pain medicine is practiced. In these circumstances, the Court concludes that plaintiffs have failed to allege, or adduce evidence of, the kind of injury that antitrust laws were designed to protect.

Id. (citations and footnotes omitted).

The district court in the case at hand found that, likewise, Plaintiffs should enjoy a competitive advantage if what they allege is true. On appeal, Plaintiffs claim that the district court's holding and reasoning was short-sighted in that the court failed to consider the "non-Health Choice" patients who were being referred to Defendants. Plaintiffs claim that while it may be true that Health Choice patients are part of the PPO system, non-Health Choice patients are not and these patients are suffering because they, too, are being referred to Defendants and away from Plaintiffs who offer a better product at a more competitive price. We disagree.

Whether the patients are members of the Health Choice PPO, or whether they are members of some other third-party provider for which [*16] Plaintiffs are participants, the fact remains that if Plaintiffs are providing a superior and more cost efficient product as they allege, then the third-party providers for which the non-Health Choice members are participants will direct their members to Plaintiffs, and those patients who may not have any third party coverage will do the same in a competitive market. This is particularly true in today's health care industry where third party providers are acutely aware of costs associated with physician's services, which is precisely the reason behind the advent of PPOs and HMOs (Health Maintenance Organizations). The competition between Plaintiffs and Defendants for members and the related services will ultimately keep costs down. See *Leak*, 893 F. Supp. at 763-64 (citing *Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc.*, 725 F. Supp. 669, 673 (N.D. N.Y. 1989) (recognizing that the selective nature of managed care insurance plans is pro-competitive and reduces health care costs); see also *Valley Prods. Co., Inc. v. Landmark, a Div. of Hospitality Franchise Sys., Inc.*, 128 F.3d 398 (6th Cir. 1997); *Axis v. Micafil, Inc.*, 870 F.2d 1105 (6th Cir. 1989)). [*17] Plaintiffs are competitors in this action, not consumers and, accordingly, Plaintiffs have failed to sufficiently allege antitrust injury.

Under the third *Southaven* factor, whether the injury was direct or indirect, Plaintiffs' claim fails. Plaintiffs in this case have alleged only indirect harm inasmuch as their claimed lost profits are derivative of the alleged harm inflicted on the third parties -- the healthcare consumers and their third-party providers, if any. In *Associated General Contractors*, two unions brought suit against an association of building and construction contractors who entered into contracts with nonunion subcontractors, claiming that as a result of these contracts, some general contractors, the union contractors, and the unions were harmed. *459 U.S. at 540-41*. The Court noted that according to the plaintiffs' complaint, the defendants "applied coercion against certain landowners and other contracting parties in order to cause them to divert business from certain union contractors to nonunion contractors. As a result, the Union's complaint alleges, the Union suffered unspecified injuries in its 'business activities.'" *Id.* The Court

concluded [*18] that such injuries were only an indirect result of whatever harm may have been suffered by "certain" construction contractors and subcontractors. *Id.*

Similarly, in this case, the parties directly harmed due to the alleged violations are the healthcare consumers -- both Health Choice members and nonmembers -- and their third-party providers. Although Plaintiffs may ultimately suffer from a loss of patients and profits, their lost profits are derivative of the alleged harm inflicted on the third parties, the harm is not sufficiently causally related to the violation, and their damages are speculative in that the number of lost referrals is not easy to measure. See [Associated Gen. Contractors, 459 U.S. at 551-52](#); see also [Southaven Land, 715 F.2d at 1085](#); compare [ReMax Int'l, Inc., 173 F.3d at 1023](#).

We are not persuaded otherwise by Plaintiffs' reliance upon this Court's decision in [Potters Medical Center v. City Hosp. Assoc., 800 F.2d 568 \(6th Cir. 1986\)](#). Plaintiffs contend that the district court's holding in this case is contrary to *Potters*; however, we disagree with Plaintiff and find *Potters* distinguishable. [*19] *Potters* was a small hospital which brought an antitrust action against a larger hospital alleging that the defendant larger hospital had, among other things, refused to grant staff privileges to doctors with privileges at *Potters* and pressured doctors not to seek privileges at *Potters*. [Id. at 575](#). *Potters* brought Sherman Act claims against the defendant hospital claiming as damages lost admissions and revenues. *Id.* The district court concluded that *Potters* lacked antitrust standing because the only competition directly restrained was between doctors; however, this Court reversed the district court. *Id.* In doing so, the Court specifically noted that the parties actually competed for physicians, not patients, inasmuch as the more physicians a hospital had on staff, the more admissions it would receive. *Id.* In this context, the Court stated, the parties were in direct competition for scarce resources -- physicians -- and that it was not unreasonable to assume that doctors, if they felt compelled to choose between *Potters* and the much larger defendant hospital, would likely opt for the latter. *Id.* The Court concluded that, under these facts, it was [*20] conceivable that the defendant hospital sought to restrict physicians' staff privileges in order to foreclose competition from *Potters* in the hospital inpatient services market. *Id.* The Court then found that, under the *Southaven* factor of directness of the injury, the district court erred in finding that *Potters* was not the party directly injured. [Id. at 576](#). The Court reasoned that if, as the defendant hospital stated, patients could only be admitted by a doctor with staff privileges, then lost admissions and revenue could be a direct result of a policy which seeks to limit the number of doctors with privileges at *Potters*. *Id.*

However, in the instant case, unlike the hospitals in *Potters*, it is the health care patient -- both Health Choice and non-Health Choice -- who is the party most directly injured by the alleged harm. The *Potters* Court never considered patients -- or "consumers" if you will -- as being the party directly injured. We agree with the district court that a more analogous case to be applied here is [Todorov v. DCH Healthcare Authority, 921 F.2d 1438 \(11th Cir. 1991\)](#). There, under analogous facts, the Court [*21] of Appeals for the Eleventh Circuit found that the plaintiff, a radiologist, lacked antitrust standing to sue inasmuch as he did not allege an antitrust injury, and was not an efficient enforcer of the antitrust laws. [Id. at 1450-52](#). Focusing on the directness of the injury asserted, the Eleventh Circuit stated as follows:

Dr. Todorov is simply looking to increase his profits, like any competitor. As such, Dr. Todorov is a particularly poor representative of the patients; indeed, his interests in this case are so at odds with the patients' interests that it is unlikely that he would have standing under article III of the Constitution to present their claims. Dr. Todorov is thus no champion for the cause of consumers. If the radiologists or DCH are acting anti-competitively ... then the *patients*, their insurers or the government, all of whom are interested in ensuring that consumers pay a competitive price, may bring an action to enjoin such practice.

[Id. at 1455](#) (emphasis added). Likewise, in the case at hand, the injury is directed to the patients, or third-party insurers as the case may be, as opposed to Plaintiffs. See *id.*

[*22] Next, under the fourth and fifth *Southaven* factors, as noted above, the direct victims, if any, are the healthcare consumers -- both Health Choice and non-Health Choice -- as well as their third-party providers who may not be receiving the best service for the best price. As such, the potential for duplicative recovery or complex apportionment of damages exists if Plaintiffs were allowed to go forward inasmuch as the parties directly harmed would also have a cause of action.

CONCLUSION

In summary, considering Plaintiffs antitrust claim under the *Southaven* factors, they have failed to allege antitrust standing. We therefore AFFIRM the judgment of the district court dismissing Plaintiffs' claim.

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Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris

United States Court of Appeals for the Seventh Circuit

September 21, 1999 *, Argued ; November 15, 1999, Decided

Nos. 99-1014, 99-1197, 99-3396 & 99-3397

Reporter

196 F.3d 818 *; 1999 U.S. App. LEXIS 29907 **; 2000-1 Trade Cas. (CCH) P72,754; 23 Employee Benefits Cas. (BNA) 2405
International Brotherhood of Teamsters, Local 734 Health and Welfare Trust Fund and Central States Joint Board
Health and Welfare Trust Fund, Plaintiffs-Appellants, v. Philip Morris Incorporated, et al., Defendants-Appellees.
Arkansas Blue Cross and Blue Shield, et al., Plaintiffs-Appellees, v. Philip Morris Incorporated, et al., Defendants-
Appellants.

Subsequent History: [\[**1\]](#) Rehearing Denied (99-3396, 99-3397) December 26, 1999, Reported at: [1999 U.S. App. LEXIS 33549](#).

Prior History: Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 97 C 8113 &
97 C 8114. Blanche M. Manning, Judge. No. 98 C 2612. Elaine E. Bucklo, Judge.

Disposition: Funds' case affirmed. Blues' order reversed and the case remanded with instructions.

Core Terms

insurers, smokers, Funds, cigarettes, tobacco, costs, antitrust, smoking, suits, products, anti trust law, damages,
manufacturers, cancer, remote, safer, pack, medical care, effective, cigarette manufacturer, medical costs, medical
bill, federal law, conspiracy, consumer, disease, cases

LexisNexis® Headnotes

Contracts Law > Third Parties > Subrogation

Insurance Law > Claim, Contract & Practice Issues > Subrogation > General Overview

[**HN1**](#) **Third Parties, Subrogation**

The victim of a tort is the proper plaintiff, and insurers or other third-party providers of assistance and medical care to the victim may recover only to the extent their contracts subrogate them to the victim's rights.

* Appeals No. 99-1014 and 99-1197 were orally argued. The other two appeals were submitted on the briefs on October 15, 1999, because the court concluded that a second oral argument on the same subject was unnecessary.

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN2 [down] **Private Actions, Standing**

Only the immediate purchaser of goods may sue under the antitrust laws.

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

HN3 [down] **Private Actions, Remedies**

To recover under the antitrust laws, the plaintiff must show that its injury flows from that which makes the conduct an antitrust problem: higher prices and lower output.

Counsel: For CENTRAL STATES JOINT BOARD HEALTH AND WELFARE TRUST FUND, LOCAL 734 INTERNATIONAL BROTHERHOOD OF TEAMSTERS HEALTH AND WELFARE TRUST FUND, Plaintiffs - Appellants (99-1197): Kathy Byrne, COONEY & CONWAY, Chicago, IL USA.

For PHILIP MORRIS INCORPORATED, Defendant - Appellee (99-1197): Stuary Altschuler, WINSTON & STRAWN, Chicago, IL USA. Herbert M. Wachtell, WACHTELL, LIPTON, ROSEN & KATZ, New York, NY USA.

For R.J. REYNOLDS TOBACCO, Defendant - Appellee (99-1197): Sydney B. McDole, JONES, DAY, REAVIS & POGUE, Dallas, TX USA.

For BROWN & WILLIAMSON TOBACCO, CORPORATION, Defendant - Appellee (99-1197): Kenneth N. Bass, KIRKLAND & ELLIS, Washington, DC USA.

For B.A.T. INDUSTRIES P.L.C., Defendant - Appellee (99-1197): Michael T. Hannafan, HANNAFAN & ASSOCIATES, Chicago, IL USA.

For LORILLARD TOBACCO COMPANY, INCORPORATED, Defendant - Appellee (99-1197): George R. Dougherty, GRIPPO & ELDON, Chicago, IL USA.

For LIGGETT & MYERS, INCORPORATED, Defendant - Appellee (99-1197): Harold C. Wheeler, BUTLER, RUBIN, SALTARELLI & BOYD, Chicago, IL.

For U.S. TOBACCO COMPANY, Defendant - Appellee (99-1197): Edward M. Crane, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Chicago, IL USA.

For TOBACCO INSTITUTE, INCORPORATED, Defendant - Appellee (99-1197): Larry E. Hepler, BURROUGHS, HEPLER, BROOM, MACDONALD & HEBRANK, Edwardsville, IL USA.

For SMOKELESS TOBACCO COUNCIL INCORPORATED, Defendant - Appellee (99-1197): Frank L. Butler, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Chicago, IL USA.

For HILL AND KNOWLTON, INCORPORATED, Defendant - Appellee (99-1197): Deborah L. Kuhn, ALTHEIMER & GRAY, Chicago, IL USA.

For ADAMS APPLE DISTRIBUTING MANAGEMENT CORPORATION, Defendant - Appellee (99-1197): Michael A. Pope, MCDERMOTT, WILL & EMERY, Chicago, IL USA.

For CENTRAL STATES JOINT BOARD HEALTH AND WELFARE TRUST FUND, LOCAL 734 INTERNATIONAL BROTHERHOOD OF TEAMSTERS HEALTH AND WELFARE TRUT FUND, Plaintiffs - Appellants (99-1014): Kathy Byrne, COONEY & CONWAYS, Chicago, IL USA.

For PHILP MORRIS INCORPORATED, Defendant - Appellee (99-1014): Stuart Altschuler, WINSTON & STRAWN, Chicago, IL USA. Herbert M. Wachtell, Herbert M. Wachtell, WACHTELL, LIPTON, ROSEN & KATZ, New York, NY USA.

For R.J. REYNOLDS TOBACCO, Defendant - Appellee (99-1014): Sydney B. McDole, JONES, DAY, REAVIS & POGUE, Dallas, TX USA.

For BROWN & WILLIAMSON TOBACCO, CORPORATION, Defendant - Appellee (99-1014): Kenneth N. Bass, KIRKLAND & ELLIS, Washington, DC USA.

For B.A.T. INDUSTRIES P.L.C., Defendant - Appellee (99-1014): Michael T. Hannafan, HANNAFAN & ASSOCIATES, CHicago, IL USA.

For LORILLARD TOBACCO COMPANY, INCORPORATED, Defendant - Appellee (99-1014): Dawn E. Gard, GRIPPO & ELDEN, Chicago, IL USA.

For LIGGETT & MYERS, INCORPORATED, Defendant - Appellee (99-1014): Harold C. Wheeler, BUTLER, RUBIN, SALTARELLI & BOYD, Chicago, IL.

For U.S. TOBACCO COMPANY, Defendant - Appellee (99-1014): Edward M. Crane, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Chicago, IL USA.

For TOBACCO INSTITUTE, INCORPORATED, Defendant - Appellee (99-1014): Larry E. Hepler, BURROUGHS, HEPLER, BROOM, MACDONALD & HEBRANK, Edwardsville, IL USA.

For SMOKELESS TOBACCO COUNCIL INCORPORATED, Defendant - Appellee (99-1014): Frank L. Butler, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Chicago, IL USA.

For HILL AND KNOWLTON, INCORPORATED, Defendant - Appellee (99-1014): Deborah L. Kuhn, ALTHEIMER & GRAY, Chicago, IL USA.

For ADAMS APPLE DISTRIBUTING MANAGEMENT CORPORATION, Defendant - Appellee (99-1014): Michael A. Pope, MCDERMOTT, WILL & EMERY, Chicago, IL USA.

For COUNCIL FOR TOBACCO RESEARCH-U.S.A., INCORPORATED, Defendant - Appellee (99-1014): Royal B. Martin, Jr., MARTIN, BROWN & SULLIVAN, Chicago, IL USA.

For ARKANSAS BLUE CROSS BLUE SHIELD, VLUE CROSS BLUE SHILED OF MISSOURI, INCORPORATED, BLUE CROSS & BLUE SHIELD OF KANSAS CITY, HEALTH CARE SERVICE, ANTHEM INSURANCE COMPANIES, Plaintiffs - Appellees (99-3396): William R. Quinlan, QUINLAN & CRISHAM, LTD., Chicago, IL.

For BROWN & WILLIAMSON TOBACCO, CORPORATION, Defendant - Appellant (99-3396): Fred A. Smith, III, SEDGWICK, DETERT, MORAN & ARNOLD, Chicago, IL USA.

For B.A.T. INDISTRIES P.L.C., Defendant - Appellant (99-3396): Michael T. Hannafan, HANNAFAN & ASSOCIATES, Chicago, IL USA.

For LORILLARD TOBACCO COMPANY, Defendant - Appellant (99-3396): George R. Dougherty, GRIPPO & ELDON, Chicago, IL USA.

For U.S. TOBACCO COMPANY, INCORPORATED, Defendant - Appellant (99-3396): Edward M. Crane, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Chicago, IL USA.

For COUNCIL FOR TOBACCO RESEARCH-U.S.A., INCORPORATED, Defendant - Appellant (99-3396): Royal B. Martin, Jr., MARTIN, BROWN & SULLIVAN, Chicago, IL USA.

For HILL & KNOWLTON, INCORPORATED, Defendant - Appellant (99-3396): Deborah L. Kuhn, ALTHEIMER & GRAY, Chicago, IL USA.

For SMOKELESS TOBACCO COUNCIL, INCORPORATED, Defendant - Appellant (99-3396): Michael T. Trucco, STAMOS & TRUCCO, Chicago, IL USA.

For TOBACCO INSTITUTE, INCORPORATED, Defendant - Appellant (99-3396): Larry E. Helper, BURROUGHS, HELPER, BROOM, MACDONALD & HEBRANK, Edwardsville, IL.

For LIGGETT & MYERS, INCORPORATED, Defendant - Appellant (99-3396): Harold C. Wheeler, BUTLER, RUBIN, SALTARELLI & BOYD, Chicago, IL.

For PHILIP MORRIS INCORPORATED, Defendant - Appellant (99-3396): Stuart Altschuler, WINSTON & STRAWN, Chicago, IL USA.

For R.J. REYNOLDS TOBACCO COMPANY, Defendant - Appellant (99-3396): Michael A. Pope, MCDERMOTT, WILL & EMERY, Chicago, IL USA.

For AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, NATIONAL CENTER FOR TOBACCO-FREE KIDS, AMERICAN COLLEGE OF PHYSICIANS, AMERICAN SOCIETY OF INTERNAL MEDICIN, Amicus Curiae (99-3396): Leonard A. Nelson, AMERICAN MEDICAL ASSOCIATION, Office of the General Counsel, Chicago, IL USA.

For ARKANSAS BLUE CROSS BLUE SHIELD, BLUE CROSS BLUE SHILED OF MISSOURI, INCORPORATED, BLUE CROSS & BLUE SHIELD OF KANSAS CITY, HEALTH CARE SERVICE, ANTHEM INSURANCE COMPANIES, Plaintiffs - Appellees (99-3397): William R. Quinlan, QUINLAN & CRISHAM, LTD., Chicago, IL.

For BROWN & WILLIAMSON TOBACCO, CORPORATION, Defendant - Appellant (99-3397): Fred A. Smith, III, SEDGWICK, DETERT, MORAN & ARNOLD, Chicago, IL USA.

For B.A.T. INDISTRIES P.L.C., Defendant - Appellant (99-3397): Michael T. Hannafan, HANNAFAN & ASSOCIATES, Chicago, IL USA.

For LORILLARD TOBACCO COMPANY, Defendant - Appellant (99-3397): George R. Dougherty, GRIPPO & ELDON, Chicago, IL USA.

For U.S. TOBACCO COMPANY, INCORPORATED, Defendant - Appellant (99-3397): Edward M. Crane, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Chicago, IL USA.

For COUNCIL FOR TOBACCO RESEARCH-U.S.A., INCORPORATED, Defendant - Appellant (99-3397): Royal B. Martin, Jr., MARTIN, BROWN & SULLIVAN, Chicago, IL USA.

For HILL & KNOWLTON, INCORPORATED, Defendant - Appellant (99-3397): Deborah L. Kuhn, ALTHEIMER & GRAY, Chicago, IL USA.

For SMOKELESS TOBACCO COUNCIL, INCORPORATED, Defendant - Appellant (99-3397): Michael T. Trucco, STAMOS & TRUCCO, Chicago, IL USA.

For TOBACCO INSTITUTE, INCORPORATED, Defendant - Appellant (99-3397): Larry E. Helper, BURROUGHS, HELPER, BROOM, MACDONALD & HEBRANK, Edwardsville, IL.

For LIGGETT & MYERS, INCORPORATED, Defendant - Appellant (99-3397): Harold C. Wheeler, BUTLER, RUBIN, SALTARELLI & BOYD, Chicago, IL.

For PHILIP MORRIS INCORPORATED, Defendant - Appellant (99-3397): Stuart Altschuler, WINSTON & STRRAWN, Chicago, IL USA.

For R.J. REYNOLDS TOBACCO COMPANY, Defendant - Appellant (99-3397): Michael A. Pope, MCDERMOTT, WILL & EMERY, Chicago, IL USA.

For AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, NATIONAL CENTER FOR TOBACCO-FREE KIDS, AMERICAN COLLEGE OF PHYSICIANS, AMERICAN SOCIETY OF INTERNAL MEDICIN, Amicus Curiae (99-3397): Leonard A. Nelson, AMERICAN MEDICAL ASSOCIATION, Office of the General Counsel, Chicago, IL USA.

Judges: Before Easterbrook, Kanne, and Evans, Circuit Judges.

Opinion by: EASTERBROOK

Opinion

[*820] Easterbrook, *Circuit Judge*. States that sued tobacco companies have been promised more than \$ 200 billion in settlement over a 25-year period. Awed by this success, health insurers (including ERISA welfare benefit funds) have filed me-too suits, contending that the tobacco producers must compensate the insurers for the costs of smokers' health care. Defendants have been unwilling to settle these suits, however, and insurers have lost all three cases that have reached appellate courts. See [*Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*](#), [*821] 171 F.3d 912 (3d Cir. 1999); [*Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*](#), 185 F.3d 957 (9th Cir. 1999); [**2] [*Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*](#), 191 F.3d 229, 1999 U.S. App. LEXIS 19576 (2d Cir. Aug. 18, 1999). Each court held that the loss suffered by insurers is too remote from the activity of making and promoting cigarettes--for insurers do not buy cigarettes but are affected only indirectly, through reverberations from smokers' decisions. Insurers usually may elect to litigate tort claims on behalf of their insureds, using the proceeds first to cover medical costs, but they have disdained the option. They want to recover directly from tobacco producers precisely in order to bypass the elements of subrogation actions--principally, that the insurer demonstrate the existence of a tort and the lack of any defenses to liability. By suing directly, plaintiffs seek to recover even if none of their beneficiaries could prevail in tort litigation. The three appellate decisions disapprove this maneuver and hold that insurers may recover only to the extent that they can step into the shoes of their insureds. Plaintiffs in cases that we have consolidated for consideration want us to depart from these decisions.

Welfare benefit funds usually turn heaven and earth to ensure [**3] that litigation against them proceeds in federal court. Funds appear to believe that state judges are more liberal than federal judges with other people's money. Demonstrating consistency in this belief, the Teamsters Health and Welfare Trust Fund and the Central States Joint Board Health and Welfare Trust Fund filed suit against the cigarette manufacturers in an Illinois court. None of the tobacco manufacturers is incorporated or has a principal place of business in Illinois, so to forestall removal under the diversity jurisdiction the Funds named as defendants several local distributors. Defendants removed the suit anyway, contending that the distributors should be ignored because they are not realistically exposed to liability. See [*Poulos v. Naas Foods, Inc.*](#), 959 F.2d 69 (7th Cir. 1992). The Funds submit that the manufacturers collusively suppressed research into the health effects of tobacco, lied to the public about these effects, and conspired to suppress the output (and increase the price) of safer cigarettes. District Judge Manning concluded that the distributors' presence is an instance of fraudulent joinder, that the claim comes within the federal court's [**4] original jurisdiction, see [28 U.S.C. § 1332\(a\)](#), and therefore that it was properly removed under [28 U.S.C. § 1441](#). [1998 U.S. Dist. LEXIS 6831](#). She added that the complaint also alleges claims under federal law, so that § 1331 likewise supplies original jurisdiction. Judge Manning then dismissed the complaint under [Fed. R. Civ. P. 12\(b\)\(6\)](#), ruling that all of the Funds' alleged injuries are too remote from the manufacturers' supposed wrongdoing.

While the Funds were trying to avoid federal court, several health insurers were eagerly seeking it out. The Blue Cross and Blue Shield associations of Arkansas, Connecticut, Illinois, Kentucky, Missouri, and North Dakota, joined by affiliated insurers (collectively "the Blues"), filed suit in the Northern District of Illinois under [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C. § 1](#), and the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C. §§ 1961-68](#). Why federal court in Illinois as the venue for litigation against the tobacco industry? The answer appears to be [*Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*](#), 65 F.3d 1406 (7th Cir. 1995), [**5] which the Blues read as holding that they are entitled to sue directly for wrongs done to their insureds. This suit was assigned to District Judge Bucklo, who shares the Blues' understanding of *Marshfield Clinic* and denied the cigarette manufacturers' motions to dismiss. [47 F. Supp. 2d 936](#). Judge Bucklo concluded that the issue is debatable, however, and certified the issue for interlocutory appeal under [28 U.S.C. § 1292\(b\)](#) so that we could resolve the [*822] question. [1999 U.S. Dist. LEXIS 12096](#). A motions panel accepted the appeals and consolidated the Blues' suit with the Funds' for appellate resolution. Although the rationale for certification was the desirability of obtaining a prompt answer to the question whether *Marshfield Clinic* commits this circuit to a position

at variance with the other courts of appeals, our authority extends beyond this subject: we review the order, not the issue. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-05, 133 L. Ed. 2d 578, 116 S. Ct. 619 (1996); *Edwardsville National Bank & Trust Co. v. Marion Laboratories, Inc.*, 808 F.2d 648, 650-51 (7th Cir. 1987). Thus [**6] both sides have briefed the appeals on the assumption that we will decide whether the Blues' complaint should be dismissed outright for failure to state a claim on which relief may be granted.

Federal jurisdiction is the first order of business, but discussion does not take long. Because the Funds' complaint explicitly invokes federal law, their suit "arises under" federal law for purposes of § 1331 and therefore was properly removed under § 1441. For example, P261 of the lengthy complaint asserts that "unless enjoined from doing so, Defendants will continue to engage in a contract, combination, or conspiracy in violation of 15 U.S.C. § 1". Paragraph 8 of the complaint asserts that the claim arises under "federal and state laws, including civil RICO". The reference to federal law and RICO is telling. So defendants were entitled to remove--and this without any need for us to consider either fraudulent joinder or the complex question whether a claim of this nature by an ERISA welfare benefit fund arises under ERISA itself. Cf. *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703 (7th Cir. 1999).

Because three other appellate courts [**7] have issued comprehensive opinions on the merits of plaintiffs' claims, we just hit the highlights, mentioning only our principal reasons for agreeing with these decisions.

For more than 100 years state and federal courts have adhered to the principle (under both state and federal law) that HN1[] the victim of a tort is the proper plaintiff, and that insurers or other third-party providers of assistance and medical care to the victim may recover only to the extent their contracts subrogate them to the victim's rights. See, e.g., *United States v. Standard Oil Co.*, 332 U.S. 301, 91 L. Ed. 2067, 67 S. Ct. 1604 (1947) (holding that only Congress can authorize a direct claim by the United States to recover the cost of medical care furnished to soldiers); *Mobile Life Insurance Co. v. Brame*, 95 U.S. 754, 24 L. Ed. 580 (1877) (federal common law); *Rock Island Bank v. Aetna Casualty & Surety Co.*, 692 F.2d 1100, 1106-07 (7th Cir. 1982) (Illinois law); *Anthony v. Slaid*, 52 Mass. 290 (1846). But plaintiffs forswear subrogation, denouncing that mechanism as inadequate because smokers' suits against cigarette manufacturers usually are [**8] unsuccessful. Indeed they are; juries in these suits tend to believe that, although tobacco is an inherently dangerous product, the smokers knew and accepted the risks of their activity. See W. Kip Viscusi, *Smoking: Making the Risky Decision* 62-86 (1992) (finding that smokers overestimate the hazards); John Z. Ayanian & Paul D. Cleary, *Perceived Risks of Heart Disease and Cancer Among Cigarette Smokers*, 281 J. Am. Medical Ass'n 1019 (1999) (finding that smokers are substantially more likely than nonsmokers to predict health problems for themselves, but that a large portion of smokers view themselves as having an average likelihood of avoiding heart disease and cancer). The hazards of tobacco are today widely known, reflected in stern warnings on every package of cigarettes; the Surgeon General issued a public alert 35 years ago; many smokers who got into the habit before then were aware of tobacco's reputation as a dangerous product.

The outcome of smokers' suits is why the Funds and Blues want to sue in [*823] their own names; they choose antitrust and RICO because, in the Blues' words, "assumption of the risk, contributory negligence and similar defenses are not pertinent". [**9] This is exactly why plaintiffs must lose. A third-party payor has no claim if its insured did not suffer a tort; no rule of law requires persons whose acts cause harm to cover all of the costs, unless these acts were legal wrongs. The food industry puts refined sugar in many products, making them more tasty; as a result some people eat too much (or eat the wrong things) and suffer health problems and early death. No one supposes, however, that sweet foods are defective products on this account; chocoholics can't recover in tort from Godiva Chocolatier; it follows that the Funds and the Blues can't recover from Godiva either. The same reasoning applies when the defendant is Philip Morris. If, as the Funds and the Blues say, the difference is that Philip Morris has committed civil wrongs while Godiva has not, then the way to establish this is through tort suits, rather than through litigation in which the plaintiffs seek to strip their adversaries of all defenses. Given the posture of these cases we must assume, as the complaints allege, that the cigarette manufacturers have lied to the public about the safety of their products. But lies matter only if customers are deceived. Whether [**10] smokers relied to their detriment on tobacco producers' statements is a central question in tort litigation, a question that cannot be dodged by the device of an insurers' direct suit.

Multiple rules of antitrust law interdict plaintiffs' efforts to enlist the Sherman Act in their campaign. The most obvious is the direct-purchaser rule of Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977), and Kansas v. Utilicorp United Inc., 497 U.S. 199, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990). These cases hold that HN2[¹] only the immediate purchaser of goods may sue under the antitrust laws. Any other approach, the Court concluded, poses a risk of double recovery and makes calculation of damages a nightmare. Just so here. Plaintiffs allege that the cigarette manufacturers conspired to keep safer products off the market. The direct purchaser--the consumer who either paid too much for the product, or did not have access to a better product at the same price--is the smoker. Insurers' injury arises only indirectly. Permitting the insurers to recover creates a risk of multiple recovery, for smokers could file antitrust actions on their **11 own behalf. Reiter v. Sonotone Corp., 442 U.S. 330, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979). (Plaintiffs' contention that smokers could not recover under the antitrust laws because they are not injured in their "business or property", 15 U.S.C. § 15(a), is silly. Paying too much, or getting an inferior product for the same money, or getting a product that causes deferred injury and medical expenses, causes a loss of one's money, which is "property." That's the point of *Reiter*, a consumer suit.) Insurers' recovery also would create a horrible problem of damages calculation-and difficulty in calculating damages because the plaintiff's injury is remote from the antitrust violation is an independent obstacle to recovery. See Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983).

Plaintiffs say that they are injured by the amount they pay to provide medical care for smokers afflicted by lung cancer, heart disease, and other ailments. Put to one side the difficulty of determining what portion of these diseases is attributable to cigarettes. **12 Statistical methods could provide a decent answer--likely a more accurate answer than is possible when addressing the equivalent causation question in a single person's suit. No, the problem for insurers is determining what it means for a financial intermediary to be injured by paying for medical care. Everyone dies eventually, usually after illness. An insurer must cover these costs even if the cause is natural. To determine damages, therefore, it is essential to compare the costs *824 the insurers actually incurred against the costs they would have incurred had cigarettes been safer. Is death from lung cancer at age 60 more costly to an insurer than the same person's death from a different kind of cancer later in life? The longer an insured lives in good health, the more reserves an insurer accumulates to cover eventual illness; it is necessary to consider both the income and the expenditure sides of the insurer's balance sheet. The income side of the balance sheet includes higher premiums paid by smokers (or employers on smokers' behalf). Having collected extra money *from the smokers* (or groups of employees that comprise smokers) to cover the eventual illness, an insurer can't turn **13 around and collect from the tobacco manufacturer for the same outlay. Insurers have actuaries whose life work is making accurate estimates of the costs of smoking (and other risky activities) and enabling the insurer to collect these in advance from insureds. An auto insurer that charges male drivers under the age of 26 an extra premium to reflect the increased probability of dangerous driving can't also sue auto manufacturers for selling cars to these drivers and putting the youths in a position to cause accidents. Logically insurers could collect only for the net outlay produced by the risky activity; but there will be such a net outlay only if the insurers' actuaries are not calculating rates correctly. Difficulties in determining damages for our plaintiffs would dwarf the difficulties that the Court held in *Associated General Contractors* prevented unions from collecting damages from employers that promoted non-union firms and thus undercut the unions' "business."

We do not doubt that cigarette smoking causes heart disease, lung cancer, other medical problems, and early death--all of which are costly to smokers, employers, and society as a whole. Smokers lose years of their **14 lives; employers lose years of productivity; society loses not only this productivity but also the companionship and other benefits that the smokers provide to their families and loved ones. We may assume that at least in retrospect many smokers conclude that these costs exceed the pleasures of smoking. Our point is that smokers (and their employers) pay for the medical costs, in advance, through higher insurance rates (or, equivalently, lower wages in a medical-care-plus-wage compensation package). The Funds and the Blues are just financial intermediaries. They collect the premiums and spend them to provide the contracted-for care; their books balance whether the costs of care are high or low. Smokers, employers, and other purchasers of insurance, not the Funds and the Blues, foot the medical bill in the end.

Plaintiffs and a number of medical groups (such as the American Cancer Society) appearing on their behalf as *amici curiae* contend that this litigation will ensure that tobacco companies rather than smokers pay for the costs of illness. We very much doubt that courts have any ability to shift the costs of smoking in the long run. *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 282 (7th Cir. 1992). [**15] If tobacco companies must supply insurance with every pack, then the price of cigarettes will rise by the cost of that insurance (plus the administrative costs of providing insurance via the tort system); smokers still bear the costs in the end. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960). The *amicus* brief views the higher price per pack as a benefit, because people smoke less as price rises. See Gary S. Becker, Michael Grossman & Kevin M. Murphy, *An Empirical Analysis of Cigarette Addiction*, 84 Am. Econ. Rev. 396 (1994); Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: An Empirical Case for Ex Post Incentive-Based Regulation*, 107 Yale L.J. 1163, 1213-14, 1218 (1998) (citing other studies of demand elasticities). But rational smokers respond to real prices, not nominal ones. A pack of cigarettes that costs \$ 1 and carries a deferred medical bill [*825] with a present value of \$ 2 costs the smoker \$ 3 in all; changing the price to \$ 3 with no medical bill (because the seller will cover medical costs) does not affect the real price and therefore will not alter behavior unless consumers misunderstand what they [**16] are getting for their money. Plaintiffs, who accuse the defendants of deceiving smokers, can't argue that their proposed system is "good deceit" and therefore a social improvement. Anyway, the wisdom of a radical change in the payment system for medical services is for legislatures or markets to consider; it is no part of the judicial function (and not a reasonable interpretation of the Sherman Antitrust Act of 1890) to decree a sudden, *ex post* shift in the financial consequences of selling a consumer product by attaching what would amount to a regressive excise tax. See Stephen Williams, *The More Law, the Less Rule of Law*, 2 Green Bag 2d 403, 406-09 (1999); Jeremy Bulow & Paul Klemperer, *The Tobacco Deal*, Brookings Papers on Economic Activity (1999).

Lack of antitrust injury is a further problem with plaintiffs' position. See HN3↑ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990); [**17] *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238 (7th Cir. 1996). To recover under the antitrust laws, the plaintiff must show that its injury flows from that which makes the conduct an antitrust problem: higher prices and lower output. But the Funds and the Blues do not say that the output of cigarettes is too low as a result of a conspiracy; they say that it is too high! A lower output (or a higher price) might injure the smokers, who want to get their immediate pleasure for less, but it would benefit whoever pays for the smokers' medical care. The conspiracy that plaintiffs allege is not one to raise prices directly; it is a conspiracy to suppress evidence of risks and to keep safer products off the market. Cast either way, however, the claim is that the conspiracy raises the effective price. Disclosures that raise the smokers' estimates of cigarettes' danger would make them less willing to pay; the information would reveal that cigarettes are lower-quality products, which must sell for lower prices. Suppose the cigarette producers had brought safer products to market, selling them for the same price as their current products. The demand for [**18] these would have been higher (as consumers see them, the effective price is lower, because the deferred medical bill per pack is lower). Would total medical costs have gone up or down as a result, when each pack is safer but more packs are sold? That is a very complex question; some responsible students of the subject believe that the elasticity of demand is such that "safer" cigarettes are actually more dangerous in the aggregate (because nicotine per cigarette is down and the smoker needs more to get the same effect, because the medical cost per pack drops, or both). But no matter how this subject comes out, the debate is (a) at least as intractable as the elasticity questions in *Illinois Brick* and *Associated General Contractors*, and (b) unrelated to antitrust injury.

What we have said about antitrust carries over to RICO, because in *Holmes v. SIPC*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), the Supreme Court applied to RICO the same approach to remote injuries that *Associated General Contractors* developed for antitrust. See also, e.g., *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333 (7th Cir. 1989); *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985). [**19] The injury for which the plaintiffs seek compensation is remote indeed, the chain of causation long, the risk of double recovery palpable because smokers can file their own RICO suits, and the damages wickedly hard to calculate, so the claim therefore flunks *Holmes* just as [*826] it flunked *Associated General Contractors*. The "racketeering acts" of which the plaintiffs complain all concern alleged misstatements about the relation between smoking and health. These

statements were not made to the Funds and the Blues; they were made to society as a whole, and affected the Funds and the Blues (if at all) only because they may have influenced smokers.

Insurers responded not to the statements but to the medical results (and costs) of smoking; for insurers it is outcomes, not words, that matter. To the extent the manufacturers' statements were designed to influence Congress--to get favorable laws and ward off unfavorable ones--they cannot be a source of liability directly under the Noerr-Pennington doctrine. See *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 v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965); [**20] *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972); *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993). (Although the Noerr-Pennington doctrine originated in **antitrust law**, its rationale is equally applicable to RICO suits.) We doubt that the collateral effects of the statements on smokers and derivatively on insurers is a better source of liability. Even if it is sound in principle, however, it risks double recovery (smokers could bring their own RICO suits), and the translation from principle to damages has too many intermediate steps.

Whether or not the activities of which plaintiffs complain gulled unsophisticated customers, they could not have deceived the insurers, who have on their staffs physicians with ready access not only to the Surgeon General's conclusions and medical databases but also direct access to information about health costs. Of all entities in society, insurers have the *best* information about the relation between smoking and health problems. Plaintiffs hint at an argument that they [**21] were deceived by the tobacco companies and as a result did not conduct programs to educate their insureds about the dangers of smoking, which led to higher health expenses later on. The third circuit analyzes this variant of the argument in detail. [171 F.3d at 927-32](#). We agree with its conclusion that this contention is hopelessly speculative. Just what *would* the insurers have done, had they known more earlier? How effective would this campaign have been? Or: why should we think that insurers would succeed where the Surgeon General and warnings on the product failed? The insurers *now* have all the information they say they lacked years ago, but what reason have we to believe that this knowledge by insurers has affected cigarette consumption? How would any change have affected the receipt side of the insurers' ledger? Insurers have been offering lower rates to nonsmokers for a long time; what is the net effect of these rates on smoking, health, and profits?

According to the plaintiffs and the district judge in the Blues' suit, *Marshfield Clinic* establishes that in this circuit, at least, insurers that paid medical bills are entitled to recover for injuries to [**22] patients. Unless we overrule *Marshfield Clinic*, they insist, we must depart from the views of the other circuits. But *Marshfield Clinic* does not countenance recovery by insurers whose balance sheets are affected by substances that made their insureds ill. Blue Cross and Blue Shield of Wisconsin contended that the Marshfield Clinic and its physicians monopolized the market for certain kinds of medical services in northern Wisconsin. Many of the overpriced services were paid for directly by the Blues; our panel stressed that "the money went directly from Blue Cross to the Clinic, and although the two entities were not linked by any overarching contract, each payment and acceptance was a separate completed contract. We do not think [**23] more is required to establish Blue Cross's right to sue to collect these overcharges." [65 F.3d at 1414](#). Direct payment of an overcharge to a monopolist satisfied both *Illinois Brick and Associated General Contractors*, we held. Although the Blues dealt directly with the accused monopolist in Wisconsin, neither the Blues nor the Funds have any direct dealings with the cigarette manufacturers. That makes all the difference, as we remarked [**24] pointedly in *Marshfield Clinic*: "If the patients paid the entire fees to the Clinic and then were reimbursed in whole or part by Blue Cross, the Clinic would be right: only the patients could sue." [65 F.3d at 1414](#). Here, the smokers alone bought and used tobacco products; plaintiffs may pay the resulting bills directly to hospitals and physicians, but this does not produce a direct injury, for physicians and hospitals are not committing any wrong (or conspiring with anyone else who is) against either the smokers or their insurers. *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555 (7th Cir. 1991), and *In re EDC, Inc.*, 930 F.2d 1275 (7th Cir. 1991), the other cases on which the Blues principally rely, are similarly inapposite.

Because we have assumed throughout this opinion that both the Funds and the Blues pay hospitals directly, rather than reimbursing smokers, the Blues' arguments that they are entitled to special treatment as "direct payors" gets them nowhere. The problem for both the Funds and the Blues is not that they deal with smokers rather than with

providers of medical care (though per *Illinois Brick* that would **[**24]** be a stopper) but that they do not deal with tobacco producers, the supposed wrongdoers. The Blues contend that they have a special role in the health care system, and in many respects this is true. But the differences do not affect analysis under antitrust laws or ERISA. The injury (if any) that the Blues sustain from the sale of tobacco products is no greater, no more direct, and no more easily ascertainable, than the injury suffered by ERISA welfare benefit funds or other kinds of insurers. To the extent that *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560 (E.D. N.Y. 1999), as amended under the name *National Asbestos Workers Medical Fund v. Philip Morris, Inc.*, 74 F. Supp. 2d 221, 1999 U.S. Dist. LEXIS 14041 (1999), reaches a different conclusion, we disapprove it. (The district court's first decision in *Blue Cross & Blue Shield of New Jersey* fails to anticipate the second circuit's conclusion in *Laborers Local 17 Health & Benefit Fund*; the amended decision is a thinly disguised refusal to accept and follow the second circuit's holding.)

Finally, a brief mention of state law. Both the Funds and the Blues advance **[**25]** claims under state law. The Funds rely on Illinois law; we cannot tell whose law the Blues want us to apply. Their brief is a pastiche, turning from Texas's version of RICO to South Dakota's **antitrust law** to a decision of the Supreme Court of Minnesota, *State v. Philip Morris Inc.*, 551 N.W.2d 490 (Minn. 1996), but not informing us what law the choice-of-law principles of Illinois (the forum state) would select for this suit. Minnesota is an outlier with respect to suits by remotely affected persons, and we cannot imagine any argument for the application of Minnesota law to the disputes between these plaintiffs and the defendants. Florida is a second outlier, having enacted a statute authorizing direct actions without regard to defenses that would be available when payors are subrogated to smokers' rights. *Fla. Stat. § 409.910(1)*. No one contends that Florida law governs our disputes, however, and at all events the Florida statute is limited to suits seeking to recover Medicaid outlays. Maryland has a weaker version of this law. 1998 Md. Laws 122. As far as we can see, the remaining 47 states enforce the normal rule that a third-party payor may recover as subrogee **[**26]** or not at all. Illinois, in particular, follows this rule. *Adler v. William Blair & Co.*, 271 Ill. App. 3d 117, 648 N.E.2d 226, 207 Ill. Dec. 770 (1st Dist. 1995); *Kraft Chemical Co. v. Illinois Bell Telephone Co.*, 240 Ill. App. 3d 192, 608 N.E.2d 243, 181 Ill. Dec. 170 (1st **[*828]** Dist. 1992). Illinois does not follow the *Illinois Brick* doctrine. *740 ILCS 10/7(2)*. But in other respects Illinois **antitrust law** uses the federal approach, see *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 (7th Cir. 1997) (holding that Illinois would apply the federal remoteness approach to a claim under state antitrust laws), and, as we have observed, the *Illinois Brick* doctrine is only one of several obstacles to insurers' recovery on an antitrust claim. The direct-purchaser doctrine of *Illinois Brick* and the direct-injury doctrine of Associated General Contractors are analytically distinct. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982); *Mid-State Fertilizer*, 877 F.2d at 1336. Because Illinois' statutory alteration of the *Illinois Brick* doctrine appears **[**27]** to be the only potentially important difference between Illinois law and the law of the other states that has been thoroughly canvassed by our colleagues in other circuits, it is unnecessary to offer an extended treatment of Illinois law here.

In the Funds' case the judgment is affirmed. In the Blues' case the order is reversed, and the case is remanded with instructions to dismiss the complaint.



Randall v. Buena Vista County Hosp.

United States District Court for the Northern District of Iowa, Central Division

November 19, 1999, Decided ; November 19, 1999, Filed

No. C 98-3018-MWB

Reporter

75 F. Supp. 2d 946 *; 1999 U.S. Dist. LEXIS 18439 **

DAN RANDALL, Plaintiff, vs. BUENA VISTA COUNTY HOSPITAL, JAMES O. NELSON, Individually and as Administrator of the Buena Vista County Hospital, BUENA VISTA CLINIC FOUNDATION, and DARRELL PRITCHARD, Individually and as Administrator of the Buena Vista Clinic Foundation, Defendants.

Disposition: [**1] Defendants' motion for summary judgment granted in part and denied in part.

Core Terms

Clinic, termination, anesthesia, handbook, defendants', privileges, provider, asserts, summary judgment motion, Sherman Act, patients, boycott, liberty interest, summary judgment, rule of reason, group boycott, conspiracy, genuine issue of material fact, public policy, provisions, market power, effective, terms, restraint of trade, property interest, anticompetitive, notice, staff, anesthesiologists, exclusive contract

LexisNexis® Headnotes

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

HN1 [down arrow] Summary Judgment, Entitlement as Matter of Law

On a defendants' motion for summary judgment, the undisputed facts as well as the parties' factual disputes must be viewed through the lens of Fed. R. Civ. P. 56.

Civil Procedure > ... > Discovery > Methods of Discovery > 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

HN2 [down arrow] Discovery, Methods of Discovery

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A party against whom a claim is asserted may, at any time, move for summary judgment in the party's favor as to all or any part thereof. [Fed. R. Civ. P. 56\(b\)](#). Thereon the judgment sought 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. [Fed. R. Civ. P. 56\(c\)](#).

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

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

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

The trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. An issue of material fact is genuine if it has a real basis in the record. As to whether a factual dispute is material, the United States Supreme Court has explained, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

Administrative Law > ... > Hearings > Right to Hearing > Due Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

[HN4](#) **Right to Hearing, Due Process**

To set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake. A state employee is entitled to a hearing or some related form of due process before being deprived of a constitutionally protected property or liberty interest. The Due Process Clause requires the government to provide an employee with procedural due process if the employee stands to lose a constitutionally protected property or liberty interest.

Constitutional Law > Substantive Due Process > Scope

Labor & Employment Law > Employment Relationships > At Will Employment > Duration of Employment

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

[HN5](#) **Constitutional Law, Substantive Due Process**

When a public employee asserts a protected property interest in his or her employment, the public employee must show that the protected property interest is derived from a source such as state law, which requires a showing that the employee could have been fired only for good cause. For a property interest to exist, the public employee must have a legitimate claim of entitlement to continued employment. While a public employee with a protected property interest in continued employment is entitled to due process before termination, where the claimant can show only that he or she was an at-will employee, the claimant lacks the necessary property interest in his or her employment.

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Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN6 Constitutional Law, Substantive Due Process

A public employee with a protected property interest in continued employment receives due process if there is notice and an opportunity to respond to charges of misconduct before her termination and if post-termination administrative review procedures are available.

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > Discharges

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > Duration of Employment

Labor & Employment Law > Wrongful Termination > Breach of Contract > For Cause Standard

HN7 Conditions & Terms, Discharges

A property interest in employment requires a showing that the employee could only be terminated for cause.

Labor & Employment Law > Wrongful Termination > Breach of Contract > For Cause Standard

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN8 Breach of Contract, For Cause Standard

A protected property interest in employment requires a showing that the employee could have been fired only for good cause. For a property interest to exist, the public employee must have a legitimate claim of entitlement to continued employment.

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

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

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

HN9 Entitlement as Matter of Law, Genuine Disputes

To set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Labor & Employment Law > Employee Privacy > Disclosure of Employee Information > Public Employees

HN10 Procedural Due Process, Scope of Protection

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An employee's liberty interests are implicated when, in connection with the employee's discharge, a government official makes accusations that seriously damage the employee's standing in the community or foreclose other employment opportunities. A public employee is therefore entitled to notice and a name-clearing hearing when fired under circumstances imposing a stigma on her professional reputation. However, no liberty interest is implicated if there are no public accusations that would stigmatize the employee.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Labor & Employment Law > Employee Privacy > Disclosure of Employee Information > Public Employees

HN11[] **Procedural Due Process, Scope of Protection**

There is a line of public employee cases holding that a public body may not discharge anyone, even an employee without a contractual or property right in his job, and make public reasons for the discharge involving stigma or obloquy, without giving the employee a right to clear his or her name at some kind of a due-process hearing. However, such a liberty theory fails if the defendant never made public any stigmatizing reasons for its action.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Labor & Employment Law > Employee Privacy > Disclosure of Employee Information > Public Employees

HN12[] **Procedural Due Process, Scope of Protection**

An employee's liberty interests are implicated when, in connection with the employee's discharge, a government official makes accusations that seriously damage the employee's standing in the community or foreclose other employment opportunities. Absent such a liberty interest, his due process claim must fail.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN13[] **Regulated Practices, Price Fixing & Restraints of Trade**

Section 1 of the Sherman Antitrust act makes it unlawful to form a conspiracy in restraint of trade. 15 U.S.C.S. §1. Thus, to demonstrate a violation of 15 U.S.C.S. §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.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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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

HN14 [blue icon] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

A conspiracy in restraint of trade may be either per se illegal or subject to a rule of reason. Restraints which have a pernicious effect on competition and lack of any redeeming virtue are illegal per se under [15 U.S.C.S. §1](#) without inquiry into the reasonableness of the restraint or the harm caused. Analysis of whether a restriction's harm to competition outweighs any pro-competitive 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.

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 > Per Se Violations

HN15 [blue icon] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

While 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, the 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. It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act. Therefore, 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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN16 [blue icon] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The elements of a claim of conspiracy in restraint of trade are the following: (1) there was an agreement among the defendants in restraint of trade; (2) the plaintiff was injured as a direct and proximate result; and (3) the plaintiff's 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. Furthermore, 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.

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN17**](#) [] Antitrust & Trade Law, Sherman Act

In order to satisfy the causation element of a [15 U.S.C.S. §1](#) case, the plaintiff must show that the defendants' anticompetitive acts were an actual, material cause of the alleged harm to competition. A material cause is a substantially contributing factor. Furthermore, 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 > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN18**](#) [] Price Fixing & Restraints of Trade, Tying Arrangements

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere 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

[**HN19**](#) [] Price Fixing & Restraints of Trade, Tying Arrangements

Courts condemn tying arrangements only 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.

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

[**HN20**](#) [] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se condemnation, condemnation without inquiry into actual market conditions, is only appropriate if the existence of forcing is probable. Thus, application of the per se rule focuses on the probability of anticompetitive consequences. Courts refuse to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby. Once this threshold is surmounted, per se prohibition is appropriate if anticompetitive forcing is likely. The strict rule is appropriate in situations in which the existence of market power is probable.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

[**HN21**](#) [] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The "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.

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Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

HN22 [] **Regulated Practices, Price Fixing & Restraints of Trade**

There is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all. A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. Malpractice concerns, quality of care, market perceptions, cost, and administrative considerations may all impact those decisions.

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 > Price Fixing & Restraints of Trade > General Overview

HN23 [] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Those cases involving staffing at a single hospital invariably analyze those circumstances under the "rule of reason". Conspiracies in restraint of trade may be per se illegal, but 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.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

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

HN24 [] **Horizontal Refusals to Deal, Boycotts**

The United States Supreme Court has held that the means used to restrain competition are irrelevant. What is important is that an anticompetitive motive propel the actions. It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN25 [] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A group boycott results in impermissible harm even if it results in lower prices or temporarily stimulates competition because such boycotts have, by their nature and character, a monopolistic tendency to restrain free trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

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Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

[**HN26**](#) [] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Classic boycotts include those in which a group of business competitors seeks to benefit economically by excluding other competitors from the market place.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

[**HN27**](#) [] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

"Group boycotts" are generally per se illegal.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[**HN28**](#) [] Regulated Practices, Price Fixing & Restraints of Trade

The market definition and market power analysis is not necessarily required where there is evidence of actual detrimental effects. If either market power or actual detrimental effects are shown, the burden shifts to the defendant to demonstrate pro-competitive effects. If that demonstration is made, the plaintiff must then try to show that any legitimate objectives can be achieved in a substantially less restrictive manner.

Contracts Law > Types of Contracts > Unilateral Contracts > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > Duration of Employment

Labor & Employment Law > Employment Relationships > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > ... > At Will Employment > Exceptions > General Overview

Labor & Employment Law > ... > Exceptions > Tort Exceptions > Public Policy Violations

Labor & Employment Law > Wrongful Termination > Breach of Contract > General Overview

Labor & Employment Law > Wrongful Termination > Breach of Contract > Employer Handbooks

Labor & Employment Law > Wrongful Termination > Public Policy

[**HN29**](#) [] Types of Contracts, Unilateral Contracts

Under Iowa law, employment relationships in Iowa are presumed to be at-will. In the absence of a valid employment contract, an employer may discharge an employee at any time, for any reason, or no reason at all. Courts recognize only two narrow exceptions to this general rule: (1) where the discharge clearly violates a well-recognized and defined public policy of the state; and (2) where a unilateral contract is created by an employer's handbook or policy manual.

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Labor & Employment Law > Wrongful Termination > Breach of Contract > Employer Handbooks

Healthcare Law > ... > Employment Issues > Wrongful Termination > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > ... > At Will Employment > Exceptions > General Overview

Labor & Employment Law > ... > Exceptions > Tort Exceptions > Public Policy Violations

Labor & Employment Law > Wrongful Termination > Public Policy

HN30[] **Breach of Contract, Employer Handbooks**

The public policy and handbook exceptions to Iowa's at-will employment policy apply in the absence of a valid employment contract.

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN31[] **Employment Relationships, At Will Employment**

See [Iowa Code § 20.7\(3\)](#).

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN32[] **At Will Employment, Public Employees**

[Iowa Code § 20.7\(3\)](#) does not negate the presumption of at-will employment for all public employees covered under this provision of the Iowa Public Employment Relations Act.

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > ... > Exceptions > Tort Exceptions > Public Policy Violations

HN33[] **At Will Employment, Public Employees**

[Iowa Code § 20.7\(3\)](#) does not itself establish any public policy against at-will termination of a public employee.

Antitrust & Trade Law > Sherman Act > Claims

Labor & Employment Law > Wrongful Termination > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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Antitrust & Trade Law > Sherman Act > Remedies > Damages

Labor & Employment Law > Wrongful Termination

HN34 [] Sherman Act, Claims

Where claims depend upon proof of the same elements, they are duplicative, and only one may be submitted to the jury. Alternative theories may be submitted to the jury, but duplicative damages awards compensating for the same loss are not permitted. Therefore, a wrongful discharge claim premised on the same violation of the Sherman Act asserted in a separate Sherman Act conspiracy claim is merely duplicative of the Sherman Act claim.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Contract Formation > General Overview

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN35 [] Types of Contracts, Quasi Contracts

Under Iowa law, an implied contract of employment can arise from an employee handbook if the following conditions are met: (1) the handbook is sufficiently definite in its terms to create an offer; (2) the handbook is communicated to and accepted by the employee so as to create an acceptance; and (3) the employee provides consideration.

Labor & Employment Law > ... > At Will Employment > Exceptions > Implied Contracts

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN36 [] Exceptions, Implied Contracts

To determine whether the first requirement of an implied contract of employment has been met, that is, to determine whether the language of the employee handbook creates a contract, the Iowa Supreme Court looks at the following factors: (1) Is the handbook in general and the progressive disciplinary procedures in particular mere guidelines or statement of policy, or are they directives?; (2) Is the language of the disciplinary procedures detailed and definite or general and vague?; (3) Does the employer have the power to alter the procedures at will or are they invariable?

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN37 [] Employment Relationships, At Will Employment

The key to determining whether a contract has been created is whether a reasonable employee upon reading the handbook would believe they had been guaranteed certain protections by their employer. An appropriate disclaimer, rather than mere reservation of the right to alter provisions, will more likely ensure that no implied contract is created by the terms of the handbook. Whether a handbook binds the parties in a contract is a question of law for the court.

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Labor & Employment Law > Wrongful Termination > Breach of Contract > Employer Handbooks

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN38 [] **Breach of Contract, Employer Handbooks**

Whether an employee handbook binds the parties in a contract is a question of law for the court.

Labor & Employment Law > Wrongful Termination > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN39 [] **Labor & Employment Law, Wrongful Termination**

An effective disclaimer may prevent creation of employment rights by a handbook.

Counsel: For Dan Randall, Plaintiff: Blake Parker, Blaker Parker Law Office, Fort Dodge, Iowa.

For defendants: Michael W. Ellwanger, Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, L.L.P.

Judges: MARK W. BENNETT, U. S. DISTRICT COURT JUDGE.

Opinion by: MARK W. BENNETT

Opinion

[*948] MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Was the plaintiff discharged from his contracts with a public hospital and a medical clinic in violation of his constitutional and common-law rights and the prohibitions of federal antitrust law? The plaintiff's wide-ranging assertions that he was wrongfully discharged are challenged in the defendants' motion for summary judgment presently before the court.

I. INTRODUCTION**A. Procedural Background**

Plaintiff Dan Randall, a Certified Registered Nurse Anesthetist (CRNA), filed this lawsuit on February 19, 1998, against defendants Buena Vista County Hospital (the Hospital) and Buena Vista Clinic Foundation (the Clinic Foundation), alleging that his contract with each institution had been wrongfully terminated in mid-1996. Randall named as additional defendants James O. Nelson, the Administrator of the Hospital, and Darrell Pritchard, the Administrator of the Clinic Foundation.

In his Complaint, Randall asserts three claims arising from the termination of his contracts with the two institutions. In his first cause of action, Randall asserts a claim pursuant to [**3] 42 U.S.C. § 1983 that the Hospital, "by and through James O. Nelson," discharged Randall as a CRNA "without cause" in violation of his rights to equal protection and due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, Randall alleges that the Hospital deprived him of his property interest in his public employment position without due process. In his second cause of action, Randall alleges that "all defendants" conspired to create an agreement or contract in restraint of trade that would preclude Randall from practicing as a CRNA at the Buena Vista County Hospital in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. For his third cause of action, Randall asserts a common-law claim that the "defendants" wrongfully discharged him contrary to the stated public policy of IOWA CODE § 20.7(3) and/or the rights guaranteed him by the personnel policies of the Hospital and Clinic Foundation. Randall seeks compensatory and punitive damages, costs, and attorneys fees.

The defendants answered the Complaint on May 19, 1998, asserting, *inter alia*, an affirmative defense that Randall **[**4]** was improperly splitting his cause of action between the present lawsuit and an action filed in Iowa District Court for Buena Vista County. On September 14, 1998, however, this court granted Randall's motion to strike the defendants' affirmative defense. The court concluded that the acts complained of, and the recovery demanded, **[*950]** in Randall's federal lawsuit were not the same as those found in Randall's state-court action.

On August 23, 1999, the defendants mounted another challenge to Randall's claims by filing the motion for summary judgment that is presently before the court. In that motion, the defendants seek summary judgment on all three of Randall's claims on various grounds. Randall resisted the motion on October 8, 1999. Neither party requested oral arguments on the motion for summary judgment and the court has therefore considered the motion on the record and written arguments presented.

B. Factual Background

The court will discuss here only the nucleus of undisputed facts pertinent to the present motion for summary judgment. In its legal analysis, the court will address where necessary Randall's assertion of genuine issues of material fact that may preclude summary **[**5]** judgment on his claims.

Mr. Randall, a Certified Registered Nurse Anesthetist (CRNA), originally provided anesthesia services at the Hospital pursuant to an Anesthesia Services Agreement, which became effective July 15, 1991. The contract provided that Randall was an "independent provider of professional anesthesia services, and nothing in this Agreement shall constitute or be construed in any manner so as to create an employment relationship or an agency, partnership or joint venture relationship between Hospital and Anesthetist." Appendix To Defendants' Motion For Summary Judgment, Deposition Exhibit No. 3, Anesthesia Services Agreement of July 15, 1991 (Randall's Anesthesia Services Agreement), Art. VI. Randall was also admitted as an Allied Health Professional (AHP) with clinical privileges at the Hospital.

Randall originally practiced with another CRNA, Jerry McMichael, in a business named Anesthesia Associates. McMichael and Randall shared the work at the Hospital and split the fees evenly between them. An entity called the Buena Vista Clinic provided billing services for McMichael and Randall and was paid 15% of fees billed for doing so. The Buena Vista Clinic, which operated **[**6]** a family practice office in Storm Lake, Iowa, was a separate entity from the Hospital. The Buena Vista Clinic later incorporated as the defendant Buena Vista Clinic Foundation (the Clinic Foundation).

In August of 1995, Randall and McMichael became employees of the Clinic Foundation. Randall entered into a Professional Employment Contract with the Clinic Foundation, effective August 21, 1995. This Professional Employment Contract required, *inter alia*, that Randall obtain and maintain good standing membership on the AHP staff at the Hospital with appropriate clinical privileges. Mr. Randall understood that the change in employment status would mean that the CRNAs would be better able to set up retirement plans and to obtain access to other employment benefits. However, Randall did not terminate his independent contract with the Hospital at the time he became an employee of the Clinic Foundation.

Randall's professional and personal relationship with McMichael became strained during 1995 and 1996. Each apparently made complaints about the professional competence of the other to the Clinic Foundation and the Hospital. Various meetings were held involving Mr. Nelson, Mr. Pritchard, **[**7]** McMichael, and Randall during the summer of 1995. Randall was apparently informed at about this time that he would not have a leadership role in the anesthesia department of the Hospital. In August of 1995, another CRNA, John Peters, also began providing anesthesia services at the Hospital, also as an independent service provider. Mr. Peters also expressed personal and professional concerns about working with Randall.

At some time in 1995 or 1996, the Hospital and Clinic Foundation began negotiating, and possibly operating under, an agreement pursuant to which the Clinic **[*951]** Foundation would provide services of CRNAs to the Hospital. A formal, written Anesthesia Services Agreement to that effect was eventually executed on July 1, 1996. Pursuant to

the July 1, 1996, agreement, the Clinic Foundation was to provide professional anesthesia services "on an exclusive basis." On April 30, 1996, prior to execution of the exclusive provider agreement between the Clinic Foundation and the Hospital, the Hospital sent all three CRNAs--Randall, McMichael, and Peters--official 60-day notices of the termination of their individual Anesthesia Services Agreements. On April 28, 1996, two days prior to [**8] the date on which the Hospital sent the three CRNAs notice of the termination of their individual Anesthesia Services Agreements, Mr. McMichael, who was suffering from cancer, advised Mr. Nelson by letter that he was terminating his contract to provide anesthesia services to the Hospital effective that day, stating that his "reasons for termination are health related - and in my best interest."

On May 28, 1996, at a meeting in Mr. Nelson's office, at which Nelson, Pritchard, Peters, and Randall were present, Nelson reiterated that Randall's contract would not be renewed and informed Randall that his AHP privileges would also be withdrawn. Nelson confirmed these decisions in a letter dated May 30, 1996, which again stated that Randall's anesthesia contract with the Hospital would not be renewed, effective July 1, 1996, "without cause," that "a business decision had been made to make a change," and that Randall's AHP privileges "would be null and void by contract terms." At the same meeting on May 28, 1996, Pritchard also informed Randall that his employment contract with the Clinic Foundation would be terminated effective August 21, 1996. Randall later received a written Notice of [**9] Nonrenewal of Professional Employment Agreement from Pritchard, dated May 29, 1996, which officially notified Randall that his contract with the Clinic Foundation would not be renewed and would accordingly expire on August 21, 1996.

On June 23, 1996, Randall filed an application with the Hospital for "Allied Health Credentialing Temporary Privileges." On July 16, 1996, Nelson notified Randall in writing that his application for temporary privileges would not be submitted for credentialing, because his Anesthesia Services Agreement indicated that AHP privileges would not survive termination of the Agreement. In his letter of July 16, 1996, Nelson also cited the agreement the Hospital had entered into with the Clinic Foundation for exclusive provision of professional anesthesia services at the Hospital as the basis for no longer granting CRNAs privileges on an independent-contractor basis.

Randall subsequently obtained employment as a CRNA in Fort Dodge, Iowa, although he was terminated from that position in 1998 after approximately two-and-one-half years.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

HN1[] On the defendants' motion for summary judgment, the [**10] undisputed facts recounted above as well as the parties' factual disputes must be viewed through the lens of Rule 56 of the Federal Rules of Civil Procedure. This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Rule 56 in a number of prior decisions. See, e.g., Swanson v. Van Otterloo, 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); Dirks v. J.C. Robinson Seed Co., 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); Laird v. Stilwill, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); Rural Water Sys. # 1 v. City of Sioux Ctr., 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997); Tralon Corp. v. Cedar Rapids, Inc., 966 F. Supp. 812, 817-18 (N.D. Iowa 1997); Security State Bank v. Firststar Bank Milwaukee, N.A., 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); Lockhart v. Cedar Rapids Community Sch. Dist., 963 F. Supp. 805 (N.D. Iowa 1997). Thus, the court will not consider those standards in detail here. Suffice it [***952**] to say that Rule 56 itself provides, in pertinent part, as follows:

HN2[] Rule 56. Summary Judgment

(b) For Defending Party. [**11] A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. . . . *The judgment sought 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.

FED. R. CIV. P. 56(b) & (c) (emphasis added). Applying these standards, HN3[¹²] the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. Quick v. Donaldson Co., 90 F.3d 1372, 1376-77 (8th Cir. 1996); Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394 (8th Cir. 1992) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)). [^{**12}] As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Beyerbach v. Sears, 49 F.3d 1324, 1326 (8th Cir. 1995); Hartnagel, 953 F.2d at 394.

With these standards in mind, the court turns to consideration of the parties' arguments for and against summary judgment in this case.

B. The Constitutional Claim

1. The parties' arguments

In the defendants' motion, the Hospital asserts that it is entitled to summary judgment on Randall's first cause of action on several grounds.¹ First, the Hospital argues that the undisputed record shows that Randall was never an employee of the Hospital, but was instead an independent contractor. Consequently, the Hospital argues that Hospital personnel policies have no relation to the termination of Randall's contract with the Hospital, because [*953] the only rules governing termination of the contract are in the contract itself. [^{**13}] The contract, the Hospital argues further, could be terminated without cause, either before automatic renewal, or at will during its term, upon sixty days' written notice. The Hospital asserts that it gave Randall timely notice of the termination of the contract more than sixty days before the end of its term. Consequently, the Hospital asserts that Randall had no property or liberty interest in his contract with the Hospital to which due process protections could apply.

[^{**14}] Randall counters that his AHP privileges were terminated in violation of the Hospital's Bylaws of the Medical Staff and that his contract was terminated without any notice or meaningful opportunity to be heard prior to the adverse action. He asserts that, in the circumstances, he was "clearly" entitled to a pre-termination "name-clearing"

¹ To the extent Randall has attempted to name Nelson as a defendant on this cause of action--because he alleged that the Hospital, "by and through James O. Nelson," discharged Randall as a CRNA "without cause" in violation of his rights to equal protection and due process, see Complaint, P 20--the court finds that the grounds for summary judgment asserted by the Hospital apply equally to Nelson. However, the court cannot find that Randall has asserted any constitutional claim against the other defendants, the Clinic Foundation and Pritchard. The allegations of elements of the claim in Randall's first cause of action all identify "Defendant Buena Vista County Hospital" or "the hospital" as the actor. See Complaint, PP 20 (discharge of Randall by the Hospital "by and through" Nelson), 21 (the Hospital acted under color of state law), 22 (the Hospital had no proper reason for discharge and acted "contrary to the notion of due process"), 23 (the Hospital failed to provide Randall with equal protection and due process), 24 (the Hospital discharged Randall without due process thus depriving him of his property interest in public employment), and 25 (the Hospital acted with malice and reckless disregard to Randall's civil rights). There is no specific reference in this count to conduct of the Clinic Foundation or Pritchard. The reallegation in this cause of action of facts stated in paragraphs one through eighteen of the Complaint, see *id.* at P 19, also does not indicate that Randall is attempting to assert a constitutional claim against either Pritchard or the Clinic Foundation, when the only defendant specifically asserted to have violated Randall's constitutional rights is the Hospital. Instead, paragraph 19 simply reiterates the factual context for the constitutional claim against the Hospital and/or Nelson. Therefore, the court will not address the defendants' arguments for summary judgment on the constitutional claim against Pritchard and the Clinic Foundation, because there is no such claim against those defendants.

hearing. He points out that, although he was told at the time that the termination of his contract and his AHP privileges was a "business decision," the first "whisper" he had that the decision was based on his professional competence was in the course of this litigation. He also contends that he was entitled to a post-termination grievance procedure as outlined in the Bylaws, but that he was never given forms or a forum for any grievance. Furthermore, he points out that his application for temporary AHP privileges was summarily denied. Finally, he contends that, as a public employee, he had a liberty interest in his good name, reputation, and integrity, which has now been impinged upon by the Hospital's assertions that his termination was on the basis of professional competence.²

[15] 2. A protected interest**

As the Eighth Circuit Court of Appeals recently explained, "To [HN4](#) set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake." [*Spitzmiller v. Hawkins*, 183 F.3d 912, 915 \(8th Cir. 1999\)](#) (quoting [*Gordon v. Hansen*, 168 F.3d 1109, 1114 \(8th Cir. 1999\)](#) (*per curiam*)); accord [*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 92 S. Ct. 2701 \(1972\)](#); [*Graning v. Sherburne County*, 172 F.3d 611, 616 \(8th Cir. 1999\)](#) ("A state employee is entitled to a hearing or some related form of due process before being deprived of a constitutionally protected property or liberty interest.") (citing [*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 \(1985\)](#)); [*Johnson v. City of West Memphis*, 113 F.3d 842, 843 \(8th Cir. 1997\)](#) ("The Due Process Clause requires the government to provide an employee with procedural due process if the employee stands to lose a constitutionally protected property or liberty interest.") (also citing [\[**16\] *Roth*, 408 U.S. at 569-70](#)). In his resistance to the defendants' motion for summary judgment, Randall asserts that he has both a protected property interest in his employment and a protected liberty interest in his professional reputation upon which his due process claim is based.

a. Property interest

[HN5](#) When a public employee asserts a protected property interest in his or her employment, the public employee must show that the protected property interest is derived from a source such as state law, which requires a showing that the employee [\[*954\]](#) could have been fired only for good cause. [*Spitzmiller*, 183 F.3d at 915-16](#); [*Johnson*, 113 F.3d at 843](#) ("For a property interest to exist, the public employee must have a legitimate claim of entitlement to continued employment."). While a public employee with a protected property interest in continued employment is entitled to due process before termination, see [*Graning*, 172 F.3d at 616](#); [*Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 690 \(8th Cir. 1998\)](#), cert. denied, 526 U.S. 1004, 143 L. Ed. 2d 209, 119 S. Ct. 1141 (1999), [\[**17\]](#)³ where the claimant can show only that he or she was an at-will employee, the claimant lacks the

² Randall does not argue in his resistance to the summary judgment motion that he was deprived of equal protection of the law, i.e., that he was treated differently from similarly situated individuals owing to a racial or other class-based animus, although he makes a passing reference to deprivation of equal protection in his Complaint. See Complaint, P 23 ("Defendant Buena Vista County Hospital failed to provide plaintiff the equal protection and due process as guaranteed by the [Fifth](#) and [Fourteenth Amendments to the United States Constitution](#); and [42 U.S.C. § 1983](#)."). Because Randall has ignored any "equal protection" claim, while arguing strenuously for the sufficiency of his "due process" claim, the court understands Randall to be asserting only a "due process" constitutional claim in his first cause of action in this litigation.

³ In [*Graning*](#), the court explained that [HN6](#) "[a] public employee with a protected property interest in continued employment receives due process if there is notice and an opportunity to respond to charges of misconduct before her termination and if posttermination administrative review procedures are available." [*Graning*, 172 F.3d at 616](#). The purpose of the pretermination hearing is to provide "an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." [*Wallin*, 153 F.3d at 690](#) (quoting [*Loudermill*, 470 U.S. at 545-46](#)). However, "the pretermination process need not be elaborate, especially if there are meaningful postdeprivation procedures." [*Graning*, 172 F.3d at 616](#) (citing [*Loudermill*, 470 U.S. at 542-47](#)). Furthermore, the hearing need not precede the decision to terminate the employee; rather, it must only precede the termination of the employee's

necessary property interest in his or her employment. [Spitzmiller, 183 F.3d at 916](#); [Johnson, 113 F.3d at 843](#) (the plaintiff "lacked a property interest because he was not entitled to continued employment as the utility commission's general manager," but instead "was an at-will employee who could be terminated at any time without cause").

[**18] It cannot be disputed that Randall's Anesthesia Services Agreement, which became effective July 15, 1991, clearly provided that he was an independent contractor, not an employee of the Hospital. The contract provided that Randall was an "independent provider of professional anesthesia services, and nothing in this Agreement shall constitute or be construed in any manner so as to create an employment relationship or an agency, partnership or joint venture relationship between Hospital and Anesthetist." Randall's Anesthesia Services Agreement, Art. VI. However, leaving aside the question of whether or not Randall can establish that he was an employee of the Hospital notwithstanding this term of his contract, and the alternative question of whether an independent contractor can have a property interest in continuing employment, it is clear that Randall's Anesthesia Services Agreement was terminable *at-will*, and thus could provide him with no property interest in continued employment. See [Spitzmiller, 183 F.3d at 915-16](#) (a HN7[↑] property interest in employment requires a showing that the employee could only be terminated for cause); [Johnson, 113 F.3d at 843](#) [**19] (same). Although his agreement with the Hospital provided that it renewed automatically for successive one year terms, in the absence of notice to terminate at least sixty days prior to the end of the term, see Anesthesia Services Agreement, Art. VII(1), Randall's Anesthesia Services Agreement also expressly provided for termination at will during its term as follows:

VII. TERM AND TERMINATION

* * *

2. This Agreement may be terminated *without cause by either party at any time during* the term of this Agreement by providing written notice to the other party at least sixty (60) days prior to the effective date of the intended termination. The notice of termination provision in the preceding sentence shall not apply, however, in the event of termination "for cause."

Id. at Art. VII(2) (emphasis added). Because it is undisputed that the contract [*955] was terminable *without cause* upon sixty days notice at any time during its term, Randall's contract with the Hospital does not provide the basis for any protected property interest in continued employment to which due process rights could attach. Compare [Spitzmiller, 183 F.3d at 915-16](#) (a HN8[↑] protected [**20] property interest in employment requires a showing that the employee could have been fired only for good cause); [Johnson, 113 F.3d at 843](#) ("For a property interest to exist, the public employee must have a legitimate claim of entitlement to continued employment.").

Nor can the court find that Randall has generated a genuine issue of material fact that he had a property interest in continued employment arising from the terms of his AHP Agreement with the Hospital. Randall argues that his AHP privileges were terminated in violation of the Hospital's Bylaws of the Medical Staff, because those Bylaws provide, in Article 5.7, for a written grievance procedure for review of actions taken against a member of the AHP staff, see Plaintiff's Statement Of Contested Facts In Response To Defendants' Motion For Summary Judgment, Exhibit A, Bylaws Of The Medical Staff Of Buena Vista County Hospital (Bylaws), p. 22, yet he was denied access to such a grievance procedure.

However, as a matter of law, Randall cannot rely on the grievance provisions for AHPs in the Bylaws as establishing a property right in continued employment. Randall's Anesthesia Services Agreement specifically [**21] states the following in the article concerning termination:

4. In no case shall clinical privileges or staff appointment survive the termination of this Agreement, *nor shall termination of privileges pursuant to termination of the contract entitle Anesthetist to any hearing and appeal procedure not specifically provided for herein*. Specific contractual terms shall in all cases be controlling in the event that they conflict with provisions in the hospital bylaws or medical staff bylaws.

Randall's Anesthesia Services Agreement, Art. VII(4) (emphasis added). Thus, under this term of his Agreement, the provisions of the Bylaws on which Randall relies are inapplicable to him and his AHP privileges could not "survive" the termination of his Anesthesia Services Agreement. *Id.* Furthermore, the "appeal" provisions of the Agreement are controlling over the grievance provisions of the Bylaws upon which Randall relies. *Id.* The Agreement provides no appeal provisions for a "without cause" termination.

Thus, Randall has failed to generate any genuine issue of material fact that he has a protected property interest in his "employment" with the Hospital. See [**22] [FED. R. CIV. P. 56\(c\)](#) (summary judgment is appropriate if there is no genuine issue of material fact). Lacking such a protected property interest, his due process claim based on a protected property interest must fail. See [Spitzmiller, 183 F.3d at 915](#) ("To [HN9](#) set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake.") (quoting [Gordon, 168 F.3d at 1114](#)); accord [Roth, 408 U.S. at 569](#); [Graning, 172 F.3d at 616](#); [Johnson, 113 F.3d at 843](#). The Hospital is therefore entitled to summary judgment on that part of Randall's due process claim founded on a protected property interest.

b. Liberty interest

Randall also contends that he had a protected liberty interest that was violated by the Hospital. [HN10](#) "An employee's liberty interests are implicated when, in connection with the employee's discharge, a government official makes accusations that seriously damage the employee's standing in the community or foreclose other employment opportunities." [Johnson, 113 F.3d at 843](#). "A public employee is [therefore] [**23] entitled to notice and a name-clearing hearing when fired under circumstances imposing a stigma on her professional reputation." [Graning, 172 F.3d at 616](#). However, no liberty interest is implicated [*956] if there are no public accusations that would "stigmatize" the employee. See [Johnson, 113 F.3d at 844](#) (there had been no public accusations stigmatizing the employee, and hence no liberty interest was implicated, when the public comment of a councilwoman simply expressed her view that it was inappropriate for the utility commission to do construction work on private property).

The Eighth Circuit Court of Appeals acknowledged some time ago that [HN11](#) there is "a line of public employee cases holding that a public body may not discharge anyone--even an employee without a contractual or property right in his job--and make public reasons for the discharge involving stigma or obloquy, without giving the employee a right to clear his or her name at some kind of a due-process hearing." [Bell v. Sellevold, 713 F.2d 1396, 1401 \(8th Cir. 1983\)](#), cert. denied, 464 U.S. 1070, 79 L. Ed. 2d 215, 104 S. Ct. 978 (1984). However, such a "liberty [**24] theory" fails if the "defendant never made public any stigmatizing reasons for [its] action." See *id.*; accord [Johnson, 113 F.3d at 844](#) (no public accusations concerning the plaintiff's competence were made by the defendants). In *Bell*, which actually applied these principles to the due process claims of a physician arising from the actions of county commissioners to remove him from space he had been using in a medical clinic owned by the county, [713 F.2d at 1398](#), the court found that no reasons for termination of the physician's lease on the clinic space had been given to the public; rather, "accusations that Dr. Bell was responsible for 'turmoil' came in a letter written to him at his own lawyer's request," which letter became public only because the plaintiff introduced it as an exhibit at the hearing on his motion for a preliminary injunction. [Id. at 1401](#). The Eighth Circuit Court of Appeals found that "[Bishop v. Wood, 426 U.S. 341, 347-50, 96 S. Ct. 2074, 2078-80, 48 L. Ed. 2d 684 \(1976\)](#), holds that there is no deprivation of constitutionally protected liberty in such a situation." *Id.*

Similarly, here, none of the official notices [**25] of termination of Randall's contract or AHP status with the Hospital indicates that the termination was other than "without cause." See Appendix To Defendants' Motion For Summary Judgment, Deposition Exhibit No. 10 (notice of termination of Anesthesia Services Agreement, dated April 30, 1996); Appendix To Defendants' Motion For Summary Judgment, Deposition Exhibit No. 11 (reiterated notice of termination of contract with Hospital and notice of termination of AHP privileges, dated May 30, 1996). Furthermore, there are no indications that any of these termination notices was ever disseminated to the public in any way. Indeed, Randall asserts the following in his brief in resistance to the defendants' motion for summary judgment:

What is interesting and important to this case is that the only information ever given to Dan Randall concerning the termination is that it was a "business decision." Ex. 11. This was given to him after a meeting which took

place the day before, where his AHP privileges were removed. The first time that any whisper has been made that the decision was based on his professional competence is in this forum, and when affidavits were prepared for the Defendants [**26] [sic] Motion for Summary Judgment. Clearly, no notice was ever given of the now asserted reason (or any other reason) and thus there was never an opportunity for Randall to address the allegations. The Defendant does not assert that they [sic] gave notice to the Plaintiff at the time of the meeting, and the Plaintiff asserts that they gave no notice. In fact, they simple [sic] told him of the termination.

Plaintiff's Brief In Support Of Resistance To Motion For Summary Judgment (Plaintiff's Brief), pp. 4-5. Thus, as in *Bell*, Randall concedes that the issue' of professional competence was first raised as an issue in response to Randall's lawsuit; professional competence was not asserted as the reason for Randall's dismissal at the [*957] time he was dismissed and no publication of any accusation concerning his professional competence was ever made by the defendants except "in this forum." *Id.* at 4; and compare *Bell, 713 F.2d at 1401* ("accusations that Dr. Bell was responsible for 'turmoil' came in a letter written to him at his own lawyer's request," which letter became public only because the plaintiff introduced it as an exhibit at the hearing on his [**27] motion for a preliminary injunction).

The court concludes that this record is insufficient to generate a genuine issue of material fact that Randall has a liberty interest that was implicated by his dismissal, such that a due process right could attach. See *HN12*[¹²] *Johnson, 113 F.3d at 843* ("An employee's liberty interests are implicated when, in connection with the employee's discharge, a government official makes accusations that seriously damage the employee's standing in the community or foreclose other employment opportunities."); *Bell, 713 F.2d at 1401* (no liberty interest is implicated when accusations impugning the plaintiff's reputation are not published at the time of dismissal but only in response to plaintiff's post-termination actions). Absent such a liberty interest, his due process claim must fail. See generally *Spitzmiller, 183 F.3d at 915* ("To set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake.") (quoting *Gordon, 168 F.3d at 1114*); accord *Roth, 408 U.S. at 569*; *Graning, 172 F.3d at 616*; [**28] *Johnson, 113 F.3d at 843*. The Hospital is therefore entitled to summary judgment on that part of Randall's due process claim founded on a protected liberty interest, and consequently, on the entirety of Randall's first cause of action.

C. The Sherman Act Claim

1. The parties' arguments

Randall's second cause of action alleges that "all defendants" conspired to create an agreement or contract in restraint of trade that would preclude Randall from practicing as a CRNA at the Buena Vista County Hospital in violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*. The defendants argue that they are entitled to summary judgment on this claim on various grounds. They note that, in the only case in which the Supreme Court has considered an exclusive contract between a hospital and a provider of medical services, *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*, the Court likened the exclusive contract to a "tying" arrangement, in which a patient who purchased hospital services was required also to purchase the services of a specific anesthesia group. The defendants [**29] argue that the Court did not find such a tying arrangement *per se* illegal, because the hospital did not exercise the degree or kind of market power that enabled it to force customers to purchase a second product. They argue that, in this case, if a patient preferred a different CRNA, that patient could go to one of eight nearby county hospitals. They argue that the Court in *Jefferson Parish Hospital* also rejected a violation based on the "rule of reason," because in that case, as here, there was no "separate market" for anesthesia services. The defendants contend that courts have consistently upheld the types of contractual arrangements between hospitals and "hospital based" medical professionals at issue here, and that there is no evidence here of the Hospital conspiring with another group of providers to force Randall out of the Hospital by means of an exclusive contract with the other providers.

Randall, however, argues that there is evidence of a conspiracy between the Hospital and the Clinic Foundation, in the persons of their administrators, Nelson and Pritchard, to prevent him from practicing at the Hospital. Randall argues that only by terminating his contract with [**30] the Clinic Foundation, as well as his contract with the Hospital, could he be precluded from practicing at the Hospital; otherwise, he would have been able to practice at the Hospital, notwithstanding the termination of his independent contract, as a Clinic Foundation employee under [**31] the Clinic Foundation's exclusive provider contract with the Hospital. Randall also points out that, unlike the situation in the *Jefferson Parish Hospital* case, the Hospital is the exclusive provider of hospital services in the Storm Lake area, so that patients have no practical choice but to accept the services of anesthetists "tied" to the services of the hospital. Randall relies on the holding in *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988), in which the Ninth Circuit Court of Appeals recognized an antitrust claim could be based on exclusive provider contracts where the hospital was the "only game in town." He therefore asserts that genuine issues of material fact should preclude summary judgment on this claim.

2. Prohibitions of the Sherman Act

HN13 [↑] "Section 1" of the Sherman Antitrust act makes it unlawful to form a conspiracy in restraint of trade. [**31] "St. Louis Convention & Visitors Comm'n v. N.F.L., 154 F.3d 851, 861 (8th Cir. 1998); Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 558 (8th Cir. 1998) (section 1 of the Sherman Antitrust Act "declares it unlawful to contract or form a conspiracy 'in restraint of trade or commerce among the several States'"). Thus, "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." **HN14** [↑] Double D Spotting Serv., Inc., 136 F.3d at 558.

A conspiracy in restraint of trade may be either *per se* illegal or subject to a rule of reason:

Restraints which have [a] "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. Ry v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958); see also Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 [(1984)]; United States v. Topco Associates, Inc., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972). [**32] 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 v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 [(1918)]; Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 9-10, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979).

St. Louis Convention & Visitors Comm'n, 154 F.3d at 861; accord Double D Spotting Serv., Inc., 136 F.3d at 558 (noting that conspiracies in restraint of trade may be *per se* illegal, but "'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'" (quoting State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 279, 139 L. Ed. 2d 199 (1997)). To put it another way, **HN15** [↑] while "certain types of restraint are so inherently anticompetitive that they are illegal *per se*, without inquiry into the reasonableness of the restraint or [**33] the harm caused," the "'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." Double D Spotting Serv., Inc., 136 F.3d at 558. "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *Id.* (quoting United States v. Topco Assocs., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)). Therefore, "'*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." *Id.* (quoting *Khan*, 522 U.S. at __, 118 S. Ct. at 279).

3. Elements of the claim

HN16[¹] The elements of a claim of conspiracy in restraint of trade are the following: [*959] (1) there was an agreement among the defendants in restraint of trade; (2) the plaintiff was injured as a direct and proximate result; and (3) the plaintiff's damages are capable of ascertainment and not speculative. *St. Louis Convention & Visitors Comm'n*, 154 F.3d at 861; see also *Read v. Medical X-Ray Ctr., P.C.*, 110 F.3d 543, 545 (8th Cir. 1997) [**34] (stating one element of the claim to be that the defendant's "allegedly anticompetitive conduct was 'a material cause' of [the plaintiff's] injury") (citations omitted), cert. denied, 522 U.S. 914, 118 S. Ct. 299, 139 L. Ed. 2d 230 (1997). "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.'" *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 767, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)). Furthermore, "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, because conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* (internal citations and quotation marks omitted). As to element two, **HN17**[¹] "in order to satisfy the causation element of a Section 1 case, [the plaintiff must] show that the [defendants'] anticompetitive acts were an actual, material cause [**35] of the alleged harm to competition." 154 F.3d at 862; *Read*, 110 F.3d at 545 (requiring that the plaintiff show the defendant's anticompetitive conduct was "a material cause" of his injury). "A material cause is a 'substantially contributing factor.'" *Read*, 110 F.3d at 545 (quoting *National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. The Appraisal Found.*, 64 F.3d 1130, 1135 (8th Cir. 1995), cert. denied, 517 U.S. 1189, 134 L. Ed. 2d 779, 116 S. Ct. 1676 (1996)). Furthermore, "antitrust injury is 'injury of the type the antitrust laws were intended to prevent and flows from that which makes defendants' acts unlawful.'" 154 F.3d at 864 (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 defendants' challenge to the adequacy of Randall's antitrust claim focuses only on the first of these elements, proof of an agreement in restraint of trade. See *St. Louis Convention & Visitors Comm'n*, 154 F.3d at 861. Although the defendants acknowledge that there was an "agreement," the exclusive provider contract for anesthesia [**36] services between the Hospital and the Clinic Foundation, they argue, in essence, that the agreement was not one "in restraint of trade."

4. Exclusive contracts and "tying"

The defendants contend that, as the Supreme Court concluded in *Jefferson Parish Hospital*, an exclusive provider contract between a hospital and certain providers of anesthesia services is not an illegal "tying" arrangement. In *Jefferson Parish Hospital*, the Supreme Court framed the issue before it as follows:

At issue in this case is the validity of an exclusive contract between a hospital and a firm of anesthesiologists. We must decide whether the contract gives rise to a per se violation of § 1 of the Sherman Act because every patient undergoing surgery at the hospital must use the services of one firm of anesthesiologists, and, if not, whether the contract is nevertheless illegal because it unreasonably restrains competition among anesthesiologists.

Jefferson Parish Hospital, 466 U.S. at 45. The Court likened the exclusive provider contract to a "tying" arrangement, noting,

HN18[¹] The essential characteristic of an invalid tying arrangement lies in the seller's [**37] exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the [*960] market for the tied item is restrained and the Sherman Act is violated.

Id. at 12. In other words, the Court in *Jefferson Parish Hospital* considered whether exploitation of the defendants' control over hospital services, the tying product, forced the buyer into the purchase of a tied product, anesthesiological services from a particular group of anesthesiologists, that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. The Court reiterated that it had **HN19**[¹]

"condemned tying arrangements [only] 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." *Id. at 13-14.*

The Court then considered when a tying arrangement constitutes a per se violation of the Sherman Act:

HN20[] Per se condemnation--condemnation without inquiry [**38] into actual market conditions--is only appropriate if the existence of forcing is probable. Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences. . . . We have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby. . . .

Once this threshold is surmounted, *per se* prohibition is appropriate if anticompetitive forcing is likely. . . . The . . . strict rule is appropriate in . . . situations in which the existence of market power is probable.

Id. at 16-18 (footnotes and citations omitted).

In the case before it in *Jefferson Parish Hospital*, the Court found that the hospital "had provided its patients with a package that included the range of facilities and services required for a variety of surgical operations," and that the package included "the services of the anesthesiologist." *Id. at 18.* The hospital argued that it was simply providing "an integrated package of services," not a tying arrangement. *Id. at 18-19.* The Court found that "a tying arrangement cannot exist unless two separate product markets have been linked." *Id. at 21.* [**39] Consequently, the Court concluded that "in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services." *Id. at 21-22.*

Examining the record before it in *Jefferson Parish Hospital* in light of these requirements, the Court concluded that "the record amply supports the conclusion that consumers differentiate between anesthesiological services and the other hospital services provided by [the hospital]." *Id. at 23.* Therefore, "the hospital's requirement that its patients obtain necessary anesthesiological services from [one provider] combined the purchase of two distinguishable services in a single transaction." *Id. at 24.* However, this fact did not make the arrangement *per se* illegal, if the hospital had no market power to "force" the purchase of the two separate items together. *Id.* The Court found the hospital's "dominance" over persons residing in the parish was "far from overwhelming" where [**40] seventy percent of the patients residing in the parish actually entered other hospitals. *Id. at 26.* The Court found no evidence that patients were "forced" to obtain anesthesiological services they would not otherwise have purchased, because presumably every patient undergoing surgery required such services. *Id. at 28.* On the record before it, the Court found no basis for applying the *per se* rule against tying to the arrangement in question. *Id. at 29.*

The Court also found that the evidence did not support a finding that the arrangement violated the Sherman Act under a "rule of reason" analysis, which "involves an inquiry into the actual effect of the [*961] exclusive contract on competition among anesthesiologists." *Id.* The Court's "rule of reason" analysis consisted of the following:

This competition takes place in a market that has not been defined. The market is not necessarily the same as the market in which hospitals compete in offering services to patients; it may encompass competition among anesthesiologists for exclusive contracts such as the Roux contract and might be statewide or merely local. There is, however, insufficient [**41] evidence in this record to provide a basis for finding that the Roux contract, as it actually operates in the market, has unreasonably restrained competition. The record sheds little light on how this arrangement affected consumer demand for separate arrangements with a specific anesthesiologist. The evidence indicates that some surgeons and patients preferred respondent's services to those of Roux, but there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.

In sum, all that the record establishes is that the choice of anesthesiologists at East Jefferson has been limited to one of the four doctors who are associated with Roux and therefore have staff privileges. Even if Roux did not have an exclusive contract, the range of alternatives open to the patient would be severely limited by the

nature of the transaction and the hospital's unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges. If respondent is admitted to the staff of East Jefferson, the range [**42] of choice will be enlarged from four to five doctors, but the most significant restraints on the patient's freedom to select a specific anesthesiologist will nevertheless remain. Without a showing of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws, and no such showing has been made.

Jefferson Parish Hosp., 466 U.S. at 29-31 (footnotes omitted); accord *Double D Spinning Serv., Inc., 136 F.3d at 558* (the [HN21](#)[[↑]] "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").

A number of courts have more recently considered whether exclusive provider contracts between hospitals and medical professionals pose antitrust violations. The Seventh Circuit Court of Appeals summarized the conclusions of many of these courts:

This case involves one hospital's decisions about staff privileges and staffing patterns. The cases involving staffing at a single hospital are legion. Hundreds, perhaps thousands of pages in West publications are devoted to the issues those circumstances present. Those cases invariably analyze [**43] those circumstances under the rule of [HN22](#)[[↑]] reason--there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all. *Bhan v. NME Hospitals, 929 F.2d 1404, 1412 (9th Cir. 1991)*. A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. *Jefferson Parish Hospital, 466 U.S. at 30, 104 S. Ct. at 1567-68*. Malpractice concerns, quality of care, market perceptions, cost, and administrative considerations may all impact those decisions.

Those hundreds or thousands of pages 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.

BCB Anesthesia Care v. Passavant Mem. Area Hosp. Ass'n, 36 F.3d 664, 667 (7th Cir. 1994) (citing cases).

Randall nonetheless asserts that his case is distinguishable from *Jefferson Parish* [*962] *Hospital* and other such cases, because in this case the exclusive contract was not already in existence, but was instead introduced and "orchestrated" for the purpose of excluding [**44] him from practice at the Hospital and to ensure that CRNAs for whom the defendants were billing (and from whom they were earning a fee) would not have to compete with an independent anesthetist. He also argues that, unlike the hospital in *Jefferson Parish Hospital*, which was one of twenty hospitals in the New Orleans area, the Hospital here is the only hospital in the market area, which Randall asserts is the Storm Lake area. He likens his case to that before the Ninth Circuit Court of Appeals in *Oltz v. St. Peter's Community Hosp., 861 F.2d 1440 (9th Cir. 1988)*, in which the defendant hospital enjoyed an eighty-four percent share of the patient market in Helena, Montana.

Here, the court finds, first, that there is no dispute that "tied" products were created by the Hospital's exclusive contract for anesthesia services with the Clinic Foundation, because, under that agreement, the Clinic Foundation had the exclusive right to provide anesthesia services at the Hospital. What remains to be seen, *inter alia*, is whether there are genuine issues of material fact concerning exploitation of the Hospital's control over its services to force patients to purchase the [**45] "tied" anesthesia services. Cf. *Jefferson Parish Hosp., 466 U.S. at 12*. On that question, the court finds the barest suggestion from the record that consumers actually differentiated between the anesthesia services provided by the Clinic Foundation and other providers, and thus, by the barest of margins, there is a genuine issue of material fact as to whether the exclusive provider contract "ties" two distinguishable services in a single transaction, as required by *Jefferson Parish Hospital*. See *id. at 23-24*. Although the Hospital contends that there was no separate market for anesthesia services outside of the Hospital, the record suggests that both doctors and patients might from time to time request the services of a specific anesthetist, indicating, as in *Jefferson Parish Hospital*, that such consumers differentiated between Hospital and anesthesia services. Cf. *id. at 23*.

As in *Jefferson Parish Hospital*, this court finds that the circumstances here are not sufficient to establish that the exclusive provider contract is so clearly anticompetitive as to be *per se* illegal. See *id. at 16-18*. There is no [**46] evidence that patients of the Hospital were "forced" to obtain anesthesia services they would not otherwise have purchased, because presumably every patient undergoing surgery at the Hospital required such services. *Id. at 28*. Furthermore, because a hospital has an "unquestioned right" to exercise some control over the identity and number of staff with practice privileges, a "rule of reason" analysis is appropriate. See *id. at 29-30*; *BCB Anesthesia Care, 36 F.3d at 667* ("Those [HN23](#)[↑] cases [involving staffing at a single hospital] invariably analyze those circumstances under the rule of reason"); accord *Double D Spotting Serv., Inc., 136 F.3d at 558* (noting that conspiracies in restraint of trade may be *per se* illegal, but "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") (quoting *Khan*, 522 U.S. at __, 118 S. Ct. at 279).

There is a significant difference in the record between this case and *Jefferson Parish Hospital* concerning the "market power" of the Hospital-- [**47] i. e., there are genuine issues of material fact on the present record lacking in *Jefferson Parish Hospital*. Although Randall has not articulated what share of the consumer market the Hospital holds, compare *Jefferson Parish Hospital, 466 U.S. at 24* (evidence that seventy percent of parish residents actually entered other hospitals was "far from overwhelming" evidence of market power), Randall has pointed out that the Hospital is the only such entity in the relevant geographic market for consumers, [*963] which he contends is the Storm Lake, Iowa, area. Compare *id. at 29* (finding insufficient evidence in the record for determining geographic market). The Hospital has argued that it is not "the only game in town," because there are eight surrounding counties with hospitals approximately fifty miles or less from Storm Lake. See Affidavit of James O. Nelson, p. 1. However, this evidence serves only to establish the opposite pole of the dispute of fact, because neither party has pointed to undisputed evidence demonstrating what percentage of consumers in Storm Lake, or some other appropriately defined market area, actually enter the Buena Vista County [**48] Hospital or other hospitals, or even what percentage of doctors with practice privileges at the Hospital also enjoy such privileges at other nearby county hospitals, which would suggest a larger market area beyond Storm Lake itself. See *Jefferson Parish Hospital, 466 U.S. at 26* (no evidence of share of consumers actually using the defendant hospital's services); and compare *Oltz, 861 F.2d at 1446-47* (the defendant hospital "enjoyed the overwhelming majority of the market for general surgery").

These genuine issues of material fact preclude summary judgment in the defendants' favor on Randall's conspiracy claim pursuant to [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), founded on a "tying" arrangement resulting from the exclusive anesthesia services provider contract between the Hospital and the Clinic Foundation. See *FED. R. CIV. P. 56(c)* (summary judgment is only appropriate if the record shows 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").

5. "Group boycott"

Although the defendants challenged the adequacy of Randall's conspiracy claim [**49] only on the basis that the exclusive provider contract is the agreement that is allegedly in restraint of trade, it is apparent from Randall's complaint and his resistance to the motion for summary judgment that he asserts, either instead or in the alternative, that the "agreement" in question is an agreement between the Hospital and the Clinic Foundation, in the persons of their administrators, defendants Nelson and Pritchard, to preclude Randall from practicing at the Hospital. Randall specifically argues that only by terminating his contract with the Clinic Foundation, as well as his contract and AHP privileges with the Hospital, could he be precluded from practicing at the Hospital; otherwise, he would have been able to practice at the Hospital, notwithstanding the termination of his independent contract, as a Clinic Foundation employee under the Clinic Foundation's exclusive provider contract with the Hospital. Thus, although he never used the appropriate "catch phrase," it is apparent that in addition to an anticompetitive "tying" arrangement, Randall is asserting that he was subjected to a "group boycott" by the defendants.

The Eighth Circuit Court of Appeals has explained [**50] the fundamental aspects of a "group boycott" as follows:

The term boycott has a long tradition of usage. As stated in an early case: "Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the

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business or property of the complainant." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 437, 31 S. Ct. 492, 496, 55 L. Ed. 797 (1911). The First Circuit has said: "The classic anticompetitive 'group boycott' is a concerted action by competitors at one level to protect themselves from competition by non-group members who seek to compete at that level." *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 (1st Cir. 1981), aff'd, 456 U.S. 212, 102 S. Ct. 1656, 72 L. Ed. 2d 21 (1982) (citation omitted). The Third Circuit has provided another description: "'Classic' boycotts [include those] in which a group of business competitors seek[s] to benefit [*964] economically by excluding other competitors from the market place. 'The crucial element' in such boycotts, according to Professor Sullivan, 'is an effort to exclude or cause disadvantage [**51] to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete.'" *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421, 429-30 (3d Cir.), cert. denied, HN24[¹] 459 U.S. 916, 103 S. Ct. 229, 74 L. Ed. 2d 182 (1982).

The Supreme Court has held that the means used to restrain competition were irrelevant. See *Gompers*, 221 U.S. at 438, 31 S. Ct. at 496. See also *American Tobacco Co. v. United States*, 328 U.S. 781, 809, 66 S. Ct. 1125, 1138, 90 L. Ed. 1575 (1946). What is important is that an anticompetitive motive propel the actions. "In each of [the] cases [finding an illegal boycott] the aim and purpose of the group boycott or refusal to deal was either to compel the object of the boycott to adopt a certain standard of trade practice, or to exclude him from competition." *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 979 (1st Cir. 1984) (citation omitted). See also *American Tobacco*, 328 U.S. at 809, 66 S. Ct. at 1138 ("It is not the form of the combination or the particular means used [**52] but the result to be achieved that the statute condemns.").

In re Workers' Compensation Ins. Antitrust Litig., 867 F.2d 1552, 1561 n.14 (8th Cir. 1989), cert. denied, 492 U.S. 920, and cert. denied, 493 U.S. 818 (1989). "A HN25[¹] group boycott results in impermissible harm even if it results in lower prices or temporarily stimulates competition because such boycotts have, by their 'nature and character, a monopolistic tendency' to restrain free trade." *National Ass'n of Review Appraisers and Mortgage Underwriters, Inc.*, 64 F.3d at 1134 (quoting *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)).

The "group boycott" Randall alleges here is a boycott by the Hospital and the Clinic Foundation, acting through their respective administrators, to keep him from practicing in the Storm Lake area. The Hospital and Clinic Foundation are not necessarily competitors joining to keep out another competitor, Randall, the "classic" boycott scenario. See *In re Workers' Compensation Ins. Antitrust Litig.*, 867 F.2d at 1561 n.14 ("Classic' HN26[¹] boycotts [**53] [include those] in which a group of business competitors seek[s] to benefit economically by excluding other competitors from the market place.") (quoting *Larry V. Muko, Inc.*, 670 F.2d at 429-30). They are, however, potential competitors, as the Hospital could supply its own need for CRNAs by hiring in-house staff, instead of contracting with the Clinic Foundation for CRNA services. More importantly, "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns." *American Tobacco*, 328 U.S. at 809; accord *In re Workers' Compensation Ins. Antitrust Litig.*, 867 F.2d at 1561 n.14 (quoting *American Tobacco*). In one "group boycott" case considered by the Eighth Circuit Court of Appeals involving staff privileges at a hospital, all of the members of the alleged boycott were members of the staff of one hospital and that hospital itself, which is comparable to the scenario here, which is a boycott allegedly involving the Hospital and the entity providing is anesthesia staff. *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682, 684 (8th Cir. 1993). The [**54] result of the alleged boycott here is certainly the "classic" exclusion of the boycotted party from competing in the relevant market, here allegedly the Hospital or Storm Lake area anesthesia services market. *In re Workers' Compensation Ins. Antitrust Litig.*, 867 F.2d at 1561 n.14 ("Classic' boycotts [include those] in which a group of business competitors seek[s] to benefit economically by excluding other competitors from the market [*965] place.") (quoting *Larry V. Muko, Inc.*, 670 F.2d at 429-30); accord *American Tobacco*, 328 U.S. at 809 (the result allegedly achieved is the identifying feature of an illegal boycott).

HN27[¹] "Group boycotts" are generally *per se* illegal. See *id.* However, in *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682 (8th Cir. 1993), the Eighth Circuit Court of Appeals held that a group boycott similar to the one asserted here is subject to the rule of reason. See *Flegel*, 4 F.3d at 685-87; accord *Angelico v. Lehigh Valley*

Hosp., Inc., 184 F.3d 268, 275 n.3 (3d Cir. 1999) (rejecting *per se* analysis of a group boycott against a doctor by a hospital [**55] and groups of surgeons); All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 748-49 (11th Cir. 1998) (also rejecting *per se* analysis of a similar group boycott claim), cert. denied sub nom. Quality Prof'l Nursing, Inc. v. Bethesda Mem. Hosp., Inc., 526 U.S. 1016, 143 L. Ed. 2d 347, 119 S. Ct. 1250 (1999). In *Flegel*, the plaintiff doctors of osteopathy asserted that the defendant hospital and its staff conspired in a group boycott to exclude them from practice privileges at the hospital. 4 F.3d at 684-85. The Eighth Circuit Court of Appeals noted that "the courts of appeals have generally examined the denial or revocation of hospital privileges under the rule of reason." Id. at 686 (citing cases). The court also relied on the decision of the Ninth Circuit Court of Appeals in Bhan v. NME Hosp., Inc., 929 F.2d 1404 (9th Cir.), cert. denied, 502 U.S. 994, 116 L. Ed. 2d 639, 112 S. Ct. 617 (1991), for the proposition that "only certain boycotts are unlawful *per se*," although "the distinction between those that are and those that must be tested under the rule of reason [**56] is less than crystal clear." Flegel, 4 F.3d at 687 (quoting Bhan, 929 F.2d at 1412). The court relied on "rule of reason" treatment of the matter as the boycott was purportedly an example of "industry self-regulation." Id. (citing Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984), cert. denied, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985)).

Turning to the legality of the boycott in *Flegel* under the rule of reason, the Eighth Circuit Court of Appeals looked for evidence of "detrimental effects to competition, often [determined] by defining the relevant market and considering the evidence of the defendant's power within that market." 4 F.3d at 688. However, the court observed that HN28[¹] the market definition and market power analysis was not necessarily required where there was evidence of "actual detrimental effects." Id. (quoting FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)). If either market power or actual detrimental effects are shown, the court noted that the burden shifts to the defendant to "demonstrate pro-competitive [**57] effects." Id. If that demonstration is made, the plaintiff must "then try to show that any legitimate objectives can be achieved in a substantially less restrictive manner." Id. (quoting Bhan, 929 F.2d at 1413).

Randall has not, at this point, asserted actual anticompetitive effects, apart from his own exclusion from practice in the Storm Lake area, and the defendants' principal challenge to Randall's antitrust claims has been the lack of market power of the Hospital owing to the availability of other county hospitals within a reasonable distance. Therefore, the court returns to the question of market power of the defendants, which the court considered above in reference to Randall's "tying" claim. Although evidence of market power was lacking in *Flegel*, see Flegel, 4 F.3d at 689-91, as it had been in the "tying" case of *Jefferson Parish Hospital*, see Jefferson Parish Hosp., 466 U.S. at 26, there is a genuine issue of material fact as to the Hospital's market power here, arising from Randall's assertion that the Hospital is the "only game in town."

These genuine issues of material fact preclude summary judgment in the defendants' [**58] favor on Randall's conspiracy claim pursuant to section 1 of the Sherman Act, 15 U.S.C. § 1, founded on a "group boycott" [*966] of Randall by the Hospital and the Clinic Foundation. See FED. R. CIV. P. 56(c) (summary judgment is only appropriate if the record shows 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"). Therefore, the defendants are not entitled to summary judgment on Randall's antitrust claim.

D. Wrongful Discharge

1. The parties' arguments

Finally, the court turns to the defendants' arguments for summary judgment on Randall's "wrongful discharge" claim. HN29[¹] Under Iowa law,

Employment relationships in Iowa are presumed to be at-will. Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 281 (Iowa 1995). In the absence of a valid employment contract, an employer may discharge an employee at any time, for any reason, or no reason at all. Huegerich v. IBP, Inc., 547 N.W.2d 216, 219 (Iowa

1996); Anderson, 540 N.W.2d at 281. We have recognized only two narrow exceptions to this general rule: (1) where the [**59] discharge clearly violates a "well-recognized and defined public policy of the state"; and (2) where a unilateral contract is created by an employer's handbook or policy manual. Huegerich, 547 N.W.2d at 220 (quoting Springer v. Weeks & Leo Co., 429 N.W.2d 558, 560 (Iowa 1988)).

Phipps v. IASD Health Servs. Corp., 558 N.W.2d 198, 202-03 (Iowa 1997); accord Below v. Skarr, 569 N.W.2d 510, 511 (Iowa 1997) (quoting Phipps). In his wrongful discharge claim, Randall asserts both violation of public policy and violation of an employer's handbook or policy manual. He alleges that the "defendants" wrongfully discharged him contrary to the stated public policy of IOWA CODE § 20.7(3) and/or the rights guaranteed him by the personnel policies of the Hospital and Clinic Foundation.

The Hospital contends that its employee manual has no application to AHPs who, like Randall, were independent contractors. The Clinic Foundation contends that its "Benefits and Policies Handbook" has nothing to do with the termination of CRNAs, because the provisions regarding termination of CRNAs are set forth in the employment contract [**60] between the Clinic Foundation and the individual CRNA. The Clinic Foundation argues further that, if its policies handbook applies, it provides no support for Randall's claim, because it only requires less notice than Randall actually got of his termination without cause.

Randall claims that the problem-solving procedure called for in the Clinic Foundation's Handbook was never used, and thus his termination by the Clinic Foundation was wrongful. However, he also contends that the "real issue" is that his contract with the Clinic Foundation was breached in violation of the Sherman Act, and that the Hospital had no reason for termination of his Anesthesia Services Agreement except that Nelson and Pritchard were conspiring to end his CRNA career at the Hospital. Randall does not reiterate any "public policy" argument.

2. Contract employee

Both the Hospital and the Clinic Foundation argue, in the first instance, that Randall's contracts are controlling on the question of whether his termination was "wrongful." As noted above, HN30 [↑] the public policy and handbook exceptions to Iowa's at-will employment policy apply "in the absence of a valid employment contract." Phipps, 558 N.W.2d at 202-03; **61 accord Below, 569 N.W.2d at 511 (quoting Phipps); Huegerich, 547 N.W.2d at 219. Randall had a contract with each institution; thus, his wrongful discharge claim would appear to be governed by the terms of those contracts, not by the "public policy" or "handbook" exceptions to at-will employment.

The court held above, in Section II.B.2.a., beginning on page 11, in reference to Randall's due process claim, that the provisions of Randall's Anesthesia Services Contract with the Hospital governed the [*967] termination of that contract and the termination of Randall's AHP privileges, and that neither termination violated the terms of the contract. Randall also cannot generate a genuine issue of material fact that his termination by the Clinic Foundation was in violation of the terms of his contract with that institution, because he was given sufficient notice of a "without cause" termination pursuant to Section 6 of the contract. See Appendix To Defendants' Motion For Summary Judgment, Deposition Exhibit No. 4, Buena Vista Clinic Foundation Professional Employment Agreement (Clinic Employment Agreement), § 6. The provision of the Clinic Employment Agreement [**62] provides, in pertinent part, that the agreement would renew automatically "if neither party gives written notice to the other party of intent not to renew at least sixty (60) days prior to the scheduled expiration of the then current term." *Id.* Randall was notified by a written Notice of Nonrenewal of Professional Employment Agreement from Pritchard, dated May 29, 1996, more than sixty days prior to the end of the first term of his contract, that his contract with the Clinic Foundation would not be renewed and would accordingly expire on August 21, 1996.

Thus, Randall cannot assert a wrongful discharge claim based on violation of his contracts with the two institutional defendants and the defendants are entitled to summary judgment on Randall's wrongful discharge claim to the extent it is based on violation of the terms of his employment contracts. The defendants are also entitled to summary judgment on this claim to the extent it is based on violation of public policy or an employment handbook, because Randall cannot invoke such exceptions to at-will employment in the face of the existence of a valid employment contract.

3. Public policy exception

In the alternative, [**63] assuming that Randall can assert a "public policy" discharge claim, despite controlling contracts, Randall cannot base such a claim on violation of [IOWA CODE § 20.7\(3\)](#), the "public policy" ground he pleaded in his Complaint. [HN31](#)[[↑]] The statutory provision in question states that "public employers shall have . . . the right to . . . suspend or discharge public employees for proper cause." [IOWA CODE § 20.7\(3\)](#). In [Lockhart v. Cedar Rapids Community Sch. Dist.](#), 577 N.W.2d 845 (Iowa 1998), the Iowa Supreme Court responded to the following question certified to it by this court: "Does [HN32](#)[[↑]] [Iowa Code § 20.7\(3\)](#) negate the presumption of at-will employment for all public employees covered under this provision of the Iowa Public Employment Relations Act?" See [Lockhart](#), 577 N.W.2d at 845; see also [Lockhart v. Cedar Rapids Community Sch. Dist.](#), 963 F. Supp. 805 (N.D. Iowa 1997) (certifying the question). The Iowa Supreme Court answered the certified question "no." [Lockhart](#), 577 N.W.2d at 849. More specifically, the Iowa Supreme Court held as follows:

In examining the context in which the "proper cause" language appears, we conclude [**64] the legislature did not intend to establish a just-cause limitation on the right of a public employer to discharge an employee. The legislature's intent in [section 20.7\(3\)](#) was merely to restate the public employer's common law right to terminate an employee at will for any lawful reason, in other words, one not violative of public policy.

Id. at 848. Thus, [HN33](#)[[↑]] [IOWA CODE § 20.7\(3\)](#) does not itself establish any public policy against at-will termination of a public employee.

Nor can Randall properly base a claim of discharge in violation of public policy upon a violation of the Sherman Act, the position he asserts in his resistance to the defendants' motion for summary judgment. Such a claim is fully comprehended within Randall's separate Sherman Act claim, as both claims rely on an *identical* theory of wrongful conduct, not *alternative* theories, and the Sherman Act contains its own enforcement provisions. See [Olson v. Prosoco, Inc.](#), 522 N.W.2d 284, 287 (Iowa [*968] 1994) (where [HN34](#)[[↑]] claims depend upon proof of the same elements, they are duplicative, and only one may be submitted to the jury); and compare [Revere Transducers, Inc. v. Deere & Co.](#), 595 N.W.2d 751, 770-71 (Iowa 1999) [**65] (alternative theories may be submitted to the jury, but duplicative damages awards compensating for the same loss are not permitted). Therefore, a wrongful discharge claim premised on the same violation of the Sherman Act asserted in a separate Sherman Act conspiracy claim is merely duplicative of the Sherman Act claim.

Consequently, the defendants are entitled to summary judgment on Randall's wrongful discharge claim, to the extent that claim is premised on discharge in violation of public policy.

4. Handbook exception

In the alternative, again assuming that Randall can assert a wrongful discharge claim based on violation of an employment handbook where his employment is subject to controlling contracts, Randall cannot base such a claim on the language of any handbook at issue here. Randall has not pointed to any "handbook" of the Hospital; rather, he points to a "handbook" of the Clinic Foundation as the basis for this part of his claim.

[HN35](#)[[↑]] Under Iowa law, an implied contract of employment can arise from an employee handbook if the following conditions are met: (1) the handbook is sufficiently definite in its terms to create an offer; (2) the handbook is communicated to [**66] and accepted by the employee so as to create an acceptance; and (3) the employee provides consideration. [HN36](#)[[↑]] [Jones v. Lake Park Care Ctr., Inc.](#), 569 N.W.2d 369, 375 (Iowa 1997); [Thompson v. City of Des Moines](#), 564 N.W.2d 839, 844 (Iowa 1997).

To determine whether the first requirement has been met, that is, to determine whether the language of the handbook creates a contract, the Iowa Supreme Court looks at the following factors:

- (1) Is the handbook in general and the progressive disciplinary procedures in particular mere guidelines or statement of policy, or are they directives?

- (2) Is the language of the disciplinary procedures detailed and definite or general and vague?
- (3) Does the employer have the power to alter the procedures at will or are they invariable?

[Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 286 \(Iowa 1995\)](#); accord [Jones, 569 N.W.2d at 375](#) (quoting [Anderson](#)). "The [HN37](#)[¹] key to determining whether a contract has been created is whether a reasonable employee upon reading the handbook would believe they had been guaranteed certain protections by their employer." [Jones, 569 N.W.2d at 375](#). [**67] An appropriate disclaimer, rather than mere reservation of the right to alter provisions, will more likely ensure that no implied contract is created by the terms of the handbook. [Id. at 376](#). Whether a handbook binds the parties in a contract is a question of law for the court. See [Thompson, 564 N.W.2d at 844](#); [Yockey v. Iowa, 540 N.W.2d 418, 422 \(Iowa 1995\)](#).

Randall relies on the following provisions of the Buena Vista Clinic Foundation Benefits & Policies Handbook:

PROBLEM SOLVING PROCEDURE: Misunderstandings or conflicts can arise in any organization. To ensure positive and effective working relations, it is important that concerns be resolved before serious problems develop. Although most incidents resolve themselves, in the event a situation persists that you believe is not fair, or has not been explained adequately, you should follow the procedure below:

Step One: Meet with Unit Leader: Discuss the problem with your immediate supervisor. If you believe a discussion with your supervisor would not be appropriate, you may go to Step Two.

Step Two: Meet with Department Supervisor: Should you and your unit [**68] leader be unable to settle the problem or if a discussion with your unit leader is inappropriate, you may arrange a discussion [*969] with your department manager. The manager shall thoroughly review the situation, including your supervisor's efforts to resolve the problem and will respond to you ordinarily within three working days.

Step Three: Meet with Clinic Manager: If you are not satisfied with previous measures, you may present your case in writing to the manager. The Manager shall observe proper methods to address your concern. The manager shall respond to you in writing ordinarily within three working days. The manager [sic] decision is final unless an appeal is accepted for review by the Grievance Board of the Clinic Affairs Committee.

* The proper forms for completing a written report may be obtained from the Clinic Manager.

Plaintiff's Statement of Contested Facts, Exhibit E, Buena Vista Clinic Foundation Benefits & Policies Handbook (Clinic Policies Handbook), p. 3. As a matter of law, these provisions of the Clinic Foundation's handbook do not create a contract of employment terminable only for cause.

First, the provision in question does not establish progressive [**69] disciplinary procedures at all. [Anderson, 540 N.W.2d at 286](#) (step one of analysis is to consider whether the handbook in general and the progressive disciplinary procedures in particular are mere guidelines or statement of policy, or are directives); accord [Jones, 569 N.W.2d at 375](#) (quoting [Anderson](#)). Rather, it suggests a procedure for employees to pursue when they encounter some "conflict" or "confusion." The court concludes that no reasonable employee, upon reading this provision of the handbook, would believe he or she had been guaranteed such procedures would be followed prior to termination by his or her employer. [Jones, 569 N.W.2d at 375](#).

Furthermore, the procedures, such as they are, are not directives, but are cast in terms of guidelines or a preferred approach as a matter of policy. See [Anderson, 540 N.W.2d at 286](#). These procedures place the onus upon the employee to pursue the procedure the employee deems appropriate to address his or her "concern." They do not require the employer to do anything, except respond to a complaint from an employee. Again, the court concludes that no reasonable employee, [**70] upon reading this provision of the handbook, would believe he or she had been guaranteed such procedures would be followed prior to termination by his or her employer. [Jones, 569 N.W.2d at 375](#).

Third, even if the procedures established progressive disciplinary procedures, they could not establish a contract for "for cause" employment in the face of a specific disclaimer in the policy manual or handbook. See [Jones, 569 N.W.2d at 376](#) (an appropriate disclaimer, rather than mere reservation of the right to alter provisions, will more

likely ensure that no implied contract is created by the terms of the handbook). Here, above the employee's acknowledgment of receipt of the handbook, headed by a caption that reads, "**AN IMPORTANT NOTE**," the Clinic Policies Handbook states that the Clinic Foundation "reserves the right to make any change in policies or benefit plans without notice"; that "this handbook is intended as a guide for your questions. It is not a guarantee of employment, benefits, or eligibility for benefits"; and specifically states that "no contract of employment exists between the employee and the Buena Vista Clinic Foundation for [**71] a specific or definite period. The Buena Vista Clinic Foundation may terminate an employee at any time for any reason." Clinic Policies Handbook, unnumbered preface. As a matter of law, see [Thompson, 564 N.W.2d at 844](#) (whether [HN38](#)[[↑]] a handbook binds the parties in a contract is a question of law for the court); [Yockey, 540 N.W.2d at 422](#) (same), Randall's assertions of violation of a right to continued employment based on the provisions of the Handbook cannot stand in the face of this disclaimer. [Jones, 569 N.W.2d at 376](#) (an [HN39](#)[[↑]] effective disclaimer may prevent creation of employment rights by a handbook). [*970]

Therefore, on these grounds, the defendants are entitled to summary judgment on that part of Randall's wrongful discharge claim founded on violation of the provisions of an employment handbook, and consequently on the entirety of Randall's wrongful discharge claim.

III. CONCLUSION

Defendants' motion for summary judgment must be granted in part and denied in part. Defendants' motion for summary judgment on Randall's "due process" claim is **granted**, because Randall has failed to generate a genuine issue of material fact that [**72] he has either a property or liberty interest on which such a claim can be founded. The defendants' motion for summary judgment is also **granted** on Randall's wrongful discharge claim, because his discharge was not in violation of the terms of the pertinent contracts, and he has pointed to no adequate basis in the public policy of this state or the terms of employment handbooks for a requirement that termination must be "for cause."

However, the defendants' motion for summary judgment must be **denied** as to Randall's Sherman Act claim. The court finds that there are genuine issues of material fact as to the "market power" of the Hospital precluding summary judgment on a Sherman Act claim founded on either an illegal "tying" arrangement or "group boycott."

IT IS SO ORDERED.

DATED this 19th day of November, 1999.

MARK W. BENNETT

U. S. DISTRICT COURT JUDGE



Ports Auth. v. Compania Panamena de Aviacion (Copa), S.A.

United States District Court for the District of Puerto Rico

November 22, 1999, Decided ; November 22, 1999, Filed

CIVIL NO. 99-1336 (JP)

Reporter

77 F. Supp. 2d 227 *; 1999 U.S. Dist. LEXIS 18988 **; 2000-1 Trade Cas. (CCH) P72,903

THE PORTS AUTHORITY OF PUERTO RICO, et al., Plaintiffs vs. COMPANIA PANAMENA DE AVIACION (COPA), S.A., Defendant

Disposition: **[**1]** American's Motion to Dismiss GRANTED, and JUDGMENT ENTERED, DISMISSING COPA's antitrust counterclaims against American.

Core Terms

Airport, passengers, facilities, supervision, tariffs, competitors, Terminal, airlines, immunity, transportation, antitrust, Authority Act, charges, prong, motion to dismiss, conferred, formula, annual, antitrust immunity, Sherman Act, inbound, air, state action, counterclaim, flights, invoice, rates, private party, alleges, prices

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

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

HN1 Motions to Dismiss, Failure to State Claim

Under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a party may, in response to an initial pleading, file a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. It is well-settled, however, that 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. The court must accept as true all well-pleaded factual averments and indulge all reasonable inferences in the plaintiff's favor.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN2 Defenses, Demurrsers & Objections, Motions to Dismiss

77 F. Supp. 2d 227, *227LÁ999 U.S. Dist. LEXIS 18988, **1

A complaint must set forth factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable theory. The court, however, need not accept a complaint's bald assertions or legal conclusions when assessing a motion to dismiss.

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

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > Immunity

HN3 Exemptions & Immunities, Parker State Action Doctrine

State action immunity is in the nature of an affirmative defense; the party claiming immunity has the burden of proof.

Antitrust & Trade Law > Sherman Act > General Overview

HN4 Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN5 Monopolies & Monopolization, Attempts to Monopolize

See [15 U.S.C.S. § 2](#).

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

Governments > Local Governments > Employees & Officials

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN6 Exemptions & Immunities, Parker State Action Doctrine

The "state action" doctrine, in the context of **antitrust law**, confers antitrust immunity on states, municipalities, and agents or instrumentalities of states or municipalities in certain circumstances. The United States Supreme Court has cautioned, however, that state-action immunity is disfavored.

Antitrust & Trade Law > Sherman Act > General Overview

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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

HN7 Antitrust & Trade Law, Sherman Act

The Sherman Act is not intended to reach activities directed by a state legislature. Municipalities also enjoy antitrust immunity.

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

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

HN8 Parker State Action Doctrine, Local Governments & Private Parties

A two-prong test governs antitrust immunity when the actions of private parties are challenged. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself. The first prong is satisfied where the legislative policy is forthrightly stated and clear in its purpose to permit activities that would otherwise run afoul of the Sherman Act.

Transportation Law > Air & Space Transportation > Airline Deregulation Act > General Overview

HN9 Air & Space Transportation, Airline Deregulation Act

See *P.R. Laws Ann. tit. 23, § 336(l)*.

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

HN10 Exemptions & Immunities, Parker State Action Doctrine

The active supervision prong of the two-prong test governing antitrust immunity mandates that the state exercise ultimate control over the challenged anticompetitive conduct. The active supervision prong 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. The mere presence of some state involvement or monitoring is insufficient. Rather, the touchstone is whether the anticompetitive scheme is the state's own, such that the details of the rates or prices have been established by deliberate state intervention, not simply by agreement among private parties.

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

HN11 Exemptions & Immunities, Parker State Action Doctrine

Where prices or rates are set as an initial matter by private parties, subject only to a veto if the state chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-setting or ratesetting scheme.

Counsel: For Plaintiffs: Francisco Fernandez Alvarez, Esq., Hato Rey, P.R.

For Plaintiffs: Diego A. Ramos Cayon, Esq., Fiddler, Gonzalez & Rodriguez, San Juan, P.R.

For Defendant: Francisco M. Troncoso Cortes, Esq., Troncoso & Becker, San Juan, P.R.

Judges: JAIME PIERAS, JR., U.S. SENIOR DISTRICT JUDGE.

Opinion by: JAIME PIERAS, JR.

Opinion

[*227] OPINION AND ORDER

Before the Court is co-Plaintiff American Airlines, Inc.'s ("American") Motion to [*228] Dismiss COPA's Counterclaim (**docket No. 16**), Defendant Compania Panamena de Aviacion, S.A.'s ("COPA") Opposition to American's Motion to Dismiss COPA's Antitrust Claims (docket No. 45), and American's Reply thereto (docket No. 56).

I. BACKGROUND

Plaintiffs American and The Ports Authority of Puerto Rico ("Ports Authority") have brought this action against COPA for unjust enrichment and declaratory relief arising from COPA's non-payment of a fee for the use of the Federal Inspection Service Facility ("FIS Facility") located at the Luis Munoz Marin International Airport ("LMM Airport") in San Juan, Puerto Rico. COPA [**2] filed a counterclaim alleging antitrust violations.

More specifically, COPA alleges in its counterclaim that (1) the Ports Authority had abdicated its regulatory duties and powers conferred by the Puerto Rico Ports Authority Act over the FIS Facility at the LMM Airport in favor of American, without retaining any regulatory oversight, thus constituting an unreasonable "hybrid" restraint of trade in violation of section 1 of the Sherman Act; (2) American's contractual demands, whereby it conditioned the building of a new FIS Facility at the LMM Airport on the Ports Authority's closing of the old FIS Facility and granting to American the exclusive right to set the fees for the use of the new FIS Facility, constitute illegal "tying," also in violation of the Sherman Act; and (3) the Ports Authority illegally granted American "monopoly power" to exclude its competitors from the LMM Airport in violation of section 2 of the Sherman Act.

In its Motion to Dismiss, American argues that (1) American and Ports Authority are entitled to immunity from antitrust liability under the state action doctrine; (2) the "Noerr-Pennington Doctrine" immunizes American's outsourcing arrangement with the Ports [**3] Authority; and (3) COPA has failed to state an antitrust claim because there is no antitrust injury.

In its counterclaim, COPA first requests that pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, the Court enter a declaratory judgment holding that the provisions of the agreement between the Ports Authority and American on June 12, 1996, and American's attempts to set, charge, and collect tariffs for the use of its FIS Facility as well as the tariffs enacted by the Ports Authority pursuant to its contractual obligations with American are illegal under the Sherman Antitrust Act, 15 U.S.C. §§ 1-7; 49 U.S.C. §§ 40116-40117, 47101, and the federal regulations enacted thereunder; and the Puerto Rico Ports Authority Act, *P.R. Laws Ann. tit. 23, §§ 331-354*. Second, COPA requests that the contract entered into by American and the Ports Authority be declared null and void under Articles 1227 and 1252 of the Puerto Rico Civil Code, *P.R. Laws Ann. tit. 31, §§ 3432 and 3511*. Third, COPA requests injunctive relief enjoining American from attempting to set, charge, and collect tariffs for the use of the FIS Facility, [**4] as well as from threatening COPA that it will bar the entry of its passengers. Finally, COPA seeks reimbursement for the costs incurred in filing its counterclaim.

II. LEGAL STANDARD AND FACTUAL ALLEGATIONS

A. Standard for Motion to Dismiss

HN1[¹] Under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#), a party may, in response to an initial pleading, file a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. It is well-settled, however, that "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." [Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#); see also [Miranda v. Ponce Fed. Bank, 948 F.2d 41 \(1st Cir. 1991\)](#). The Court must accept as true "all well-pleaded factual averments and indulge [²²⁹] all reasonable inferences in the plaintiff's favor." [Aulson v. Blanchard, 83 F.3d 1, 3 \(1st Cir. 1996\)](#) (citations omitted); see also [Berrios v. Bristol Myers Squibb Caribbean Corp., 51 F. Supp. 2d 61, 1999 WL 312159 \(**51\) \(D. Puerto Rico 1999\)](#) (Pieras, J.). **HN2**[²] A Complaint must set forth "factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable theory." [Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 28 n. 2 \(1st Cir. 1996\)](#) (quoting [Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 \(1st Cir. 1988\)](#)). The Court, however, need not accept a complaint's "bald assertions' or legal conclusions" when assessing a motion to dismiss. [Abbott, III v. United States, 144 F.3d 1, 2 \(1st Cir. 1998\)](#) (citing [Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1216 \(1st Cir. 1996\)](#)). It is with this framework in mind that the Court will assess the motion before it.

B. COPA's Allegations

Pursuant to the legal standard set forth above, the following facts are taken as true for purposes of this motion to dismiss. COPA is a corporation organized and existing under the laws of the Republic of Panama and is engaged in the transportation of passengers for hire to and from Puerto Rico and other foreign destinations, among other routes it operates throughout the world. American and COPA [^{**6}] are direct competitors in the air travel industry. At the LMM Airport, American's share of the air travel market is approximately 70%, while COPA's share is negligible.

Under the authority conferred by the Puerto Rico Ports Authority Act, *P.R. Laws Ann. tit. 23, § 331*, and the regulatory Tariffs issued pursuant to this authority, the Ports Authority leased certain premises to COPA at the LMM Airport for the operation of scheduled flights between Puerto Rico and various international destinations. The sums paid by COPA for the use of the facilities at LMM Airport were to be established by the Tariffs enacted by the Ports Authority under the regulatory duties conferred by the Ports Authority Act.

At the time of the agreement between the Ports Authority and COPA, there were two FIS Facilities at the LMM Airport. One was located at Terminal B and used by COPA and other airlines. The second FIS Facility was located at Terminal C and used by American. The Ports Authority charged COPA \$ 2.41 per inbound passenger for the use of the facilities at Terminal B, including the FIS Facility.

In May 1997, the Ports Authority notified COPA and the other international airlines that effective June 1, 1997, the [^{**7}] FIS Facilities at Terminal B would be closed, and that all international airlines would be required to use the FIS Facility at Terminal C. At the time, the Ports Authority did not advise COPA of any changes in its regulatory Tariffs that would entail an increase in the fees charged for the use of FIS Facilities at the LMM Airport.

By letter dated March 27, 1998, the Ports Authority informed COPA that in addition to the Tariffs that Port Authority had been charging for inbound passengers, American would charge a fee of \$ 5.66 inbound passenger. The letter indicated that the \$ 5.66 per passenger fee was retroactive to June 1, 1997. The Ports Authority acknowledged that the \$ 5.66 figure was different from that which American had demanded. Further, if the payment was not made, the letter indicated that American would bar COPA's passengers from access to the FIS Facility. This in turn would essentially bar COPA's passengers from entry into the United States. The \$ 5.66 fee demanded by American is in

addition to the fees already charged by the Ports Authority, U.S. Customs Service, U.S. Immigration and Naturalization Service, and U.S. Department of Agriculture.

COPA asserts that the Ports **[**8]** Authority has abdicated its regulatory duties and powers conferred by the Puerto Rico Ports Authority Act over the FIS facilities at the LMM International Airport in favor of **[*230]** American, without retaining any regulatory oversights. The Ports Authority does not have the authority to review the reasonableness of the fees set by American before they go into effect or the terms of the contract American insists its competitors sign. American has been exempted from the charges. Thus, the Ports Authority has granted American the ability to control and regulate the international air travel market at the LMM Airport.

C. Uncontested Facts

In addition to the facts alleged by COPA, the Court takes notice of the following facts, to which the parties previously stipulated:

1. The Authority is an instrumentality of the Commonwealth of Puerto Rico, created by virtue of the Puerto Rico Ports Authority Act, *P.R. Laws Ann. tit. 23, §§ 331-354*.
2. American is a corporation organized in Delaware, with its principal place of business in Fort Worth, Texas. American transports passengers to and from Puerto Rico by aircraft from and to airports in the United States and foreign countries.
3. **[**9]** COPA is a corporation organized in Panama. COPA transports passengers to and from Puerto Rico and other foreign countries.
4. To the extent American and COPA fly and serve the same markets for foreign passengers, or could expand their operations to serve those same markets, American and COPA are competitors or could be competitors in those markets.
5. COPA is a significant competitor of American in international air travel in the routes to and from San Juan and Santo Domingo, Dominican Republic, and San Juan and Central America.
6. According to public statistics kept by the Ports Authority and other federal regulatory agencies, airlines other than American and its affiliate, Executive Airlines, Inc., d/b/a American Eagle, transport about 30% of the passengers traveling in and out of LMM Airport. In other words, American transports approximately 70% of the passengers in and out of LMM Airport.
7. The Ports Authority owns, regulates and administers all the facilities and services related to the transportation of goods and passengers to and from Puerto Rico, including the LMM Airport, by operation of state law, *P.R. Laws Ann. tit. 23, §§ 331-354*.
8. Pursuant to **[**10]** its enabling Act, *P.R. Laws Ann. tit. 23, §§ 331-354*, the Ports Authority has adopted regulations, contracts and tariffs regulating the use of all the facilities at the LMM International Airport; who has to pay for the use of those facilities; who can build, operate and maintain those facilities; and how much has to be paid for the use of those facilities.
9. Under the authority conferred by the Puerto Rico Ports Authority Act, *P.R. Laws Ann. tit. 23, §§ 331-354*, and the regulatory tariffs issued pursuant thereto, on December 14, 1995, the Ports Authority leased counter space to COPA in order to sell tickets and service clients. The amounts to be paid by COPA for the use of the above-mentioned facilities at the LMM Airport, were those to be established by the tariffs enacted by the Ports Authority under the regulatory duties conferred by the Puerto Rico Ports Authority Act.
10. As an operator of scheduled flights to and from Puerto Rico and international destinations and Puerto Rico being the point of entry into the United States of COPA's flights, the Ports Authority facility used by COPA at the

LMM Airport as of 1995 for its passengers to [*231] enter the United States was the [**11] Federal Inspection Service facilities located at the International Terminal (formerly known as the Eastern Airlines terminal or Terminal B).

11. At the time of the agreement between the Ports Authority and COPA, there were two FIS facilities at the LMM Airport, one at the International Terminal (Terminal B) used by COPA and other airlines, and another at Terminal C used by American.

12. Until June 1997, the Ports Authority operated and allowed American Airlines to operate two FIS facilities at the LMM Airport.

13. One of those FIS facilities was built by the former Eastern Airlines and it was operated and maintained by the Authority. The other FIS facility was built, operated and maintained by American.

14. COPA passengers were processed by federal authorities through the old FIS facilities operated by the Authority until June 1997.

15. American has charged \$ 5.66 per arriving international passenger for the use of its FIS facilities during the second half of 1997 and throughout 1998.

16. On numerous occasions, American has threatened that it would bar the entry of COPA's passengers to the United States unless COPA agrees to pay American the sum of \$ 5.66 [**12] per inbound passenger.

17. Pursuant to the authority conferred on American by the Ports Authority under the June 12, 1996 agreement, American has demanded payment from its competitors that operate international flights and are required to use the FIS facilities of the LMM Airport to enter the United States, that they sign an agreement with American wherein they consent to the payment of the \$ 5.66 per inbound tariff to American.

18. American has demanded from COPA and its other competitors information on the actual number of passengers arriving on each flight, that COPA name American as an additional named insured in its liability insurance policy and that it hold harmless American from any liability for the use of the FIS facilities at the LMM Airport.

19. Beginning January 1, 1999, the fee for using its FIS facility at LMM Airport increased by 22 cents per person.

20. All information about the number of passengers deplaning from an international flight at any airport of the United States is public information kept by operation of law by several federal agencies.

21. The Ports Authority enacted public resolutions and tariffs for the fees for use of its facilities [**13] during 1997.

22. The Ports Authority enacted Tariff A-3-2, effective during 1997, prohibiting anyone at the LMM Airport to collect any different tariff "unless a specific contract has been signed with the Authority and/or prior written consent has been obtained from the Authority."

23. On February 19, 1997, the Ports Authority adopted Emergency Resolution No. 97-12.

24. The following list includes the number of COPA passengers processed through the American FIS facility from June 1997 through February 1999.

1997	
June	6,644
July	7,756
August	7,047
September	5,562
October	6,149
November	6,199

	December	5,596
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	1998
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	January	6,776
	February	5,682
	March	6,472
	April	5,810
	May	5,057
	June	7,969
	July	9,596
	August	8,092
	September	4,975
	October	4,694
	November	4,937
	December	4,704

	1999
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	January	6,880
	February	5,258

[*232] 25. During the months of March, April and May 1999, COPA processed more than 15,000 passengers through the FIS facility in LMM Airport.

26. On or about March 31, 1998, American delivered to COPA invoice number 1800009358 in the amount of \$ 279,145.54 for the use of the FIS facilities in LMM Airport.

[**14] 27. On or about July 28, 1998, American delivered to COPA invoice number 9900083543 in the amount of \$ 175,324.16 for the use of the FIS facilities in LMM Airport.

28. On or about November 16, 1998, American delivered to COPA invoice number 9900120906 in the amount of \$ 161,530.74 for the use of the FIS facilities in LMM Airport.

29. On or about January 15, 1999, American delivered to COPA invoice number 9900138702 in the amount of \$ 26,839.72 for the use of the FIS facilities in LMM Airport.

30. On or about March 16, 1999, American delivered to COPA invoice number 9900155008 in the amount of \$ 41,561.38 for the use of the FIS facilities in LMM Airport.

31. COPA has not paid any of the invoices delivered by American for the use by COPA's passengers of the new FIS facilities built and operated by American because it understands the fee is illegal.

32. From January 1, 1999 until May 31, 1999, more than 27,000 COPA passengers used the new FIS facilities built and operated by American.

33. On March 27, 1998, the Ports Authority sent a letter to COPA regarding the payment of FIS facility usage fees.

34. The FIS fee charged by American is to be paid [**15] by FIS users in addition to any unrelated Authority charges for the use of airport gates and premises as well as another unrelated charges by United States governmental authorities.

35. American entered into an agreement with the Ports Authority dated June 12, 1996, under which American agreed to build a new FIS facility.

36. The agreement that American has requested that its competitors sign for the use of the FIS facilities at the LMM Airport included the following provision:

FIS Fee. American and the User [the competitor] acknowledge that the initial estimated Cost Per Passenger (as defined on Exhibit "A") shall be \$ 5.66 through December 31, 1997 and will be adjusted by American on annual basis as of the first day of each year thereafter commencing on January 1, 1998 according to the formula presented in Exhibit "A."

III. "STATE ACTION" DOCTRINE

American contends that it enjoys antitrust immunity under the "state action" doctrine. [HN3](#)[↑] State action immunity is in the nature of an affirmative defense; the party claiming immunity has the burden of proof. See [Ticor II, 504 U.S. 621, 112 S. Ct. 2169 at 2172, 119 L. Ed. 2d 410](#); [Town of Hallie v. City of Eau Claire, 471 U.S. 34, 37-39, 105 S. Ct. 1713, 1716, 85 L. Ed. 2d 24 \(1985\)](#); [**16 Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 731-33, 93 S. Ct. 1773, 1778, 36 L. Ed. 2d 620 \(1973\)](#); [Yeager's Fuel v. Pennsylvania Power & Light, 22 F.3d 1260, 1267 \(3d Cir. 1994\)](#). American argues that it is entitled to state action immunity because the conduct challenged by COPA is undertaken pursuant to a clearly articulated state policy that is actively supervised by the state itself. See [California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 943, 63 L. Ed. 2d 233 \(1980\)](#).

[Section 1](#) of the Sherman Act provides that "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States" shall be unlawful. [HN4](#)[↑] [15 U.S.C. § 1 \(1997\)](#). [HN5](#)[↑] [Section 2](#) of the Sherman Act makes it unlawful 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." *Id.*, [§ 2](#).

[HN6](#)[↑] The "state action" doctrine, in the context of [antitrust law](#), confers antitrust immunity on states, municipalities, and agents or instrumentalities of states [**17](#) or municipalities in certain circumstances. The United States Supreme Court has cautioned, however, that "state-action immunity is disfavored . . ." [Federal Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 636, 112 S. Ct. 2169, 2178, 119 L. Ed. 2d 410 \(1992\)](#). The doctrine is rooted in the case of [Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 \(1943\)](#), which established that [HN7](#)[↑] the Sherman Act was not intended to reach activities directed by a state legislature. [Parker, 317 U.S. at 350-51, 63 S. Ct. at 313](#). The Supreme Court later expanded the scope of *Parker*, finding that municipalities also enjoyed antitrust immunity. See [Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 \(1978\)](#) (opinion of Brennan, J.).

[HN8](#)[↑] A two-prong test governs antitrust immunity under *Parker* when the actions of private parties are challenged. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." [Ticor, 504 U.S. at 633, 112 S. Ct. at 2176](#) (quoting [**18 California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 943, 63 L. Ed. 2d 233 \(1980\)](#)). The first prong is satisfied where the legislative policy is "forthrightly stated and clear in its purpose" to permit activities that would otherwise run afoul of the Sherman Act. [Midcal, 445 U.S. at 105, 100 S. Ct. at 943](#).

The Puerto Rico Legislative Assembly has clearly articulated a state policy to displace competition in the operation and management of air transportation facilities. In creating the Ports Authority, the Legislative Assembly vested it with the authority "to develop and improve, own, operate, and manage any and all types of air . . . transportation facilities and services, . . . and make available the benefits thereof in the most extensive and least costly manner . . ." *P.R. Laws Ann. tit. 23, § 336 (1995)*. To this end, the Legislative Assembly granted the Ports Authority the power "to determine, fix, alter, charge and collect rates, fees, rentals and other charges for the use of the facilities or services of the Authority, or other commodities sold, rendered, or furnished by the Authority, which shall [**19](#) be fair and reasonable." *Id.* at § [HN9](#)[↑] 336(l). The legislative policy to entrust to the Ports Authority the exclusive power to manage Puerto Rico's air transportation facilities has been forthrightly stated, in satisfaction of the first

prong of the state action doctrine. See *Town of Hallie v. Eau Claire*, 471 U.S. 34, 43, 105 S. Ct. 1713, 1718, 85 L. Ed. 2d 24 (1985).

HN10 [↑] The active supervision prong, on the other hand, "mandates that the State exercise ultimate control over the challenged anticompetitive conduct. . . . The active supervision [*234] 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." *Ticor*, 504 U.S. at 634, 112 S. Ct. at 2177 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-01, 108 S. Ct. 1658, 1666, 100 L. Ed. 2d 83 (1988)). The Supreme Court has made clear that the mere presence of some state involvement or monitoring is insufficient. See *id.* Rather, the touchstone is "whether the anticompetitive scheme is the State's own," such that the details of the rates or prices have been [*20] established by "deliberate state intervention, not simply by agreement among private parties." 504 U.S. at 634-35, 112 S. Ct. at 2177. The Supreme Court elaborated that **HN11** [↑] where "prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-setting or ratesetting scheme." *Id. at 638, 112 S. Ct. at 2179.*

American argues that the active supervision prong is satisfied in this case because the Ports Authority has played a substantial role in determining the specifics of American's operating policies. In particular, American points to the June 12, 1996 agreement ("Agreement") between the Ports Authority and American which provides for the construction and operation of a new FIS Facility by American, and authorizes American to charge other airlines a "reasonable, nondiscriminatory fee" for use of the Facility. See American's Motion to Dismiss, Exh. A, §§ 7.01, 9.08.

The Ports Authority set the initial FIS Facilities fee at \$ 5.66 per passenger. The Agreement permits American to adjust [*21] the FIS fee on a yearly basis, and details a formula for calculating the fee. The formula requires American to charge a fee equal to the cost per passenger multiplied by the number of passengers using the FIS Facility each year. See *id.*, § 9.08(b). The cost per passenger is determined by taking the sum of (1) the annual debt service payments made by American on account of the FIS Facility; (2) the annual maintenance cost for the FIS Facility, including baggage system maintenance costs; (3) the annual operating expenses for the FIS Facilities, such as utilities and cleaning expenses; (4) annual rent or other payments made by American to the Authority with respect to the FIS Facility; and (5) any and all other payments made or costs or taxes incurred by American in connection with the ownership, use or operation of the FIS Facility. See *id.*

In addition to establishing the initial FIS Facilities fee and detailing a formula for the yearly adjustment of the FIS fee, the Ports Authority built a supervisory mechanism into the Agreement. Section 6.01 of the agreement requires American to submit a monthly report to the Authority, setting forth "passenger, traffic and cargo data as [*22] may reasonably be requested by the Authority to determine the amount of any rental, fees or charges hereunder." *Id.*, § 6.01. Further, section 6.03 of the agreement provides that the Authority has the right to require the preparation of an annual independent audit, which might include a review of the passenger, traffic and cargo data supplied by American during the previous fiscal year. See *id.*, § 6.03. And in each year since American began managing the FIS Facility and charging a user fee, the Ports Authority has enacted public resolutions confirming American's power to collect a fee for each arriving international passenger using the Facility. See *id.*

COPA contends that the Ports Authority has failed to exercise active supervision over the setting of the FIS Facility fee. While the Ports Authority determined the initial FIS fee of \$ 5.66 per inbound passenger, by contract it gave American the authority to unilaterally raise this fee each year without first submitting the change to Ports Authority for approval. On January 1, 1999, American raised the FIS fee from [*235] \$ 5.66 to \$ 5.88 per inbound passenger without pre-approval or scrutiny by the Ports Authority. COPA concedes [*23] that Article 6(l) of the Puerto Rico Ports Authority Act provides that the Ports Authority shall conduct an economic study of its tariffs each year to determine if the fees being charged are reasonable. See *P.R. Laws Ann. tit. 23, § 336(l)*. It argues, however, that while the Ports Authority annually conducts a detailed economic study of the reasonableness of the fees charged at the LMM Airport, these studies have not encompassed the FIS Facility fee that American charges its competitors. COPA further contends that other aspects of the supervisory scheme do not afford the Ports Authority any real supervisory powers over the setting, raising, and collection of the FIS fee by American.

In *Ticor*, the U.S. Supreme Court held that "the mere potential for state supervision" is not enough to constitute active state supervision as required by *Midcal*. See [*Ticor, 504 U.S. at 638, 112 S. Ct. at 2179*](#). *Ticor* involved a suit against six of the country's largest title insurance companies for price fixing in their fees for title searches and title examinations through rate bureaus. Each title insurance rate bureau was licensed by the State and authorized to establish [**24] rates for its member insurance companies. The rates set by these private parties went into effect automatically unless the regulatory agency chose to exercise a veto within a specified period of time. The findings of fact demonstrated that although a mechanism for regulatory review existed on a theoretical level, the agency failed to check many of the rate filings, and rates remained in effect despite the failure of the rating bureaus to provide additional information requested by the agency. See [*id. at 638, 112 S. Ct. at 2179*](#). Thus, the agency did not in fact engage in active state supervision. See *id.* As a result, the Supreme Court held that the title insurance companies did not enjoy antitrust immunity. See *id.*

As in *Ticor*, the FIS Facility Fee established by American goes into effect automatically. A scheme exists for the Ports Authority to review the reasonableness of the FIS Fee, but that scheme neither subjects the determination of the FIS Fee to prior Ports Authority approval nor specifically grants Ports Authority veto power over the setting of the FIS Fee.

The present case, however, is distinguishable from *Ticor*. A detailed contractual formula [**25] leaves American virtually no discretion in the setting of the FIS Fee. In [*324 Liquor Corp. v. Duffy, 479 U.S. 335, 107 S. Ct. 720, 93 L. Ed. 2d 667 \(1987\)*](#), the Supreme Court struck down a New York statute providing that liquor retailers must charge at least 112% of the wholesaler's "posted" bottle price in effect at the time the retailer sells or offers to sell an item. Because each wholesaler set its own "posted" prices without supervision by the State, and New York did not engage in any monitoring of the price schedules, the Court held that the scheme did not satisfy the active supervision prong. See *id. at 345-45, 107 S. Ct. 725-26*.

The Court noted, however, that a simple "minimum markup" statute requiring retailers to charge 112 percent of their actual wholesale cost may satisfy the "active supervision" requirement, presumably because it does away with the discretionary component present in the New York statute. See [*id. at 344 n.6, 107 S. Ct. at 725*](#). In that vein, the Court cited favorably [*Morgan v. Division of Liquor Control, 664 F.2d 353 \(2d Cir. 1981\)*](#), in which the Second Circuit found that the active supervision [**26] requirement was satisfied where Connecticut had structured "a detailed mechanism for determining prices," which required that prices not be below wholesaler's cost, and cost was defined to include actual cost, transportation charges, insurance and a minimum markup. [*Morgan, 664 F.2d at 354, 355*](#). Similarly, in [*Woolen v. Surtran Taxicabs, Inc., 801 F.2d 159 \(5th Cir. 1986\)*](#), the Fifth Circuit found the active supervision prong satisfied [**236] where the details of an exclusive contract for taxicab service at the Dallas/Fort Worth Regional Airport were set forth comprehensively in contracts between the airport board and the taxicab company to whom the board granted exclusive rights. See [*Woolen, 801 F.2d at 164; cf. Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495 \(10th Cir.\), cert. denied, 522 U.S. 948, 139 L. Ed. 2d 284, 118 S. Ct. 365 \(1997\)*](#) (holding that active supervision unnecessary where challenged ordinance left defendants, car rental companies at Denver International Airport, virtually no discretionary authority in setting and collecting usage fees from their customers because usage fee determined by detailed [**27] formula).

This Court finds that, as in *Morgan*, *Woolen*, and *Zimomra*, a detailed structure governs the challenged anticompetitive conduct. The Agreement between American and the Ports Authority sets forth a detailed formula for annually adjusting the FIS Facility fee. Pursuant to this formula, American has virtually no discretion in the establishment of the fee. Moreover, a mechanism exists by which the Ports Authority can monitor the data used by American in fixing the fee. Even if the Ports Authority has not reviewed the reasonableness of the FIS Facility fee pursuant to *P.R. Laws Ann. tit. 23, § 336(l)*, the Agreement itself specifies two additional mechanisms for reviewing the reasonableness of the FIS fee. COPA has not alleged that the Ports Authority failed to pursue those mechanisms set forth in the Agreement for reviewing the reasonableness of the FIS fee. Thus, the active supervision prong is satisfied in this case.

Both prongs of the *Midcal* test for antitrust immunity have been satisfied. It therefore follows that American enjoys antitrust immunity. The Court notes, however, that the Ports Authority has the responsibility to exercise oversight in American's levying [**28] of the FIS Facility fee by, for example, examining the data submitted in the monthly

reports and periodically ordering an independent audit. COPA does not contend that the Ports Authority has failed to exercise its supervisory responsibility; rather, it contends that it lacks sufficient powers to exercise real supervision over the adjustment of the FIS fee. Because the Court finds that the Agreement belies COPA's contention, it finds for American.

IV. THE NOERR-PENNINGTON DOCTRINE

American raises the defense of the Noerr-Pennington doctrine to the extent that COPA alleges that American engaged in unlawful monopolistic conduct by obtaining or influencing legislative, executive, judicial or administrative action. COPA assures the Court, however, that it does not allege the type of unlawful monopolistic conduct for which the Noerr-Pennington doctrine can provide immunity. "The Noerr-Pennington Doctrine is clearly inapplicable to the facts of the case at bar, inasmuch as this case does not have anything to do with efforts, bona fide or otherwise, by American to obtain or influence legislative, executive, judicial or administrative action . . ." *Id. at 21*. Thus, by COPA's **[**29]** own admission, it does not allege unlawful monopolistic conduct for any attempts that American may have made to obtain or influence legislative, executive, judicial or administrative action. American's defense of Noerr-Pennington immunity is therefore inapposite.

The Court's holding on the issue of state action immunity and COPA's admission with respect to Noerr-Pennington immunity disposes of COPA's antitrust claims. It is unnecessary, therefore, to address the remaining antitrust defenses raised by American.

V. CONCLUSION

In view of the foregoing, the Court hereby **GRANTS** American's Motion to Dismiss, and **ENTERS JUDGMENT, DISMISSING** **[*237]** COPA's antitrust counterclaims against American.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 22nd day of November, 1999.

JAIME PIERAS, JR.

U.S. SENIOR DISTRICT JUDGE

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Chromalloy Gas Turbine Corp. v. United Techs. Corp.

Court of Appeals of Texas, Fourth District, San Antonio

November 24, 1999, Delivered ; November 24, 1999, Filed

No. 04-97-00674-CV

Reporter

9 S.W.3d 324 *; 1999 Tex. App. LEXIS 8791 **; 1999-2 Trade Cas. (CCH) P72,718

CHROMALLOY GAS TURBINE CORPORATION, Appellant v. UNITED TECHNOLOGIES CORPORATION, Appellee

Subsequent History: [**1] Petition for Review Denied December 7, 2000. Motion for Rehearing Denied November 24, 1999.

Petition for review denied by, 12/07/2000

Rehearing denied by, 03/01/2001

Prior History: From the 225th Judicial District Court, Bexar County, Texas. Trial Court No. 95-CI-12541. Honorable John J. Specia, Jr., Judge Presiding.

This Opinion Substituted on Overrule of Rehearing for Withdrawn Opinions of November 17, 1999, Previously Reported at: [1999 Tex. App. LEXIS 8572](#) and October 14, 1998, Previously Reported at: [1998 Tex. App. LEXIS 6325](#).

[Chromalloy Gas Turbine Corp. v. United Techs. Corp., 1999 Tex. App. LEXIS 8572, 1999 WL 1036583 \(Tex. App. San Antonio, Nov. 17, 1999\)](#)

Disposition: MOTION FOR REHEARING OVERRULED.

Core Terms

injunctive relief, antitrust, illegal conduct, trial court, monopoly, monopolistic, monopoly power, injunction, ongoing, repairs, probability

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[HN1\[\] Attempts to Monopolize, State Regulation](#)

The Texas Free Enterprise and Antitrust Act prohibits monopolies or attempts to monopolize. [Tex. Bus. & Com. Code Ann. § 15.05\(b\)](#) (Vernon 1987). However, the mere possession of monopoly or market power is not forbidden.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[HN2](#) **Monopolies & Monopolization, Attempts to Monopolize**

The prohibition against attempted monopoly does not encompass all efforts to acquire market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[HN3](#) **Monopolies & Monopolization, Attempts to Monopolize**

The Texas Free Enterprise and Antitrust Act, [Tex. Bus. & Com. Code Ann. § 15.05\(b\)](#) (Vernon 1987), was not intended, for example, to protect against increasing competition.

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

[HN4](#) **Monopolies & Monopolization, Actual Monopolization**

To establish an illegal monopoly, a plaintiff must show (1) the defendant's 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 > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[HN5](#) **Monopolies & Monopolization, Attempts to Monopolize**

To prove attempted monopoly, a plaintiff must show (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.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[HN6](#) **Monopolies & Monopolization, Attempts to Monopolize**

The difference between actual monopoly and attempted monopoly rests in the requisite intent and the necessary level of monopoly power.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

[HN7](#) **Private Actions, Remedies**

Once a monopoly or attempted monopoly is established, the Texas Free Enterprise and Antitrust Act (the Act), [Tex. Bus. & Com. Code Ann. § 15.05\(b\)](#) (Vernon 1987), permits recovery of damages as well as injunctive relief. Injunctive relief is available to a plaintiff if a violation of the Act threatens it with injury.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

[HN8](#) [down] **Private Actions, State Regulation**

Any person whose business or property is threatened with injury by reason of anything declared unlawful in the Texas Free Enterprise and Antitrust Act (Act), [Tex. Bus. & Com. Code Ann. § 15.05\(b\)](#) (Vernon 1987), may sue any person to enjoin the unlawful practice temporarily or permanently. In any such suit, the court shall apply the same principles as those generally applied by courts of equity in suits for injunctive relief against threatened conduct that would cause injury to business or property. [Tex. Bus. & Com. Code Ann. § 15.21\(b\)](#) (Vernon 1987).

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

[HN9](#) [down] **Private Actions, Remedies**

A jury may determine whether the Texas Free Enterprise and Antitrust Act (the Act), [Tex. Bus. & Com. Code Ann. § 15.05\(b\)](#) (Vernon 1987), has been violated, but the trial court determines the propriety of injunctive relief; that is, whether the illegal conduct threatens the plaintiff with injury. To make its determination, the trial court must consider the ultimate facts found by the jury and may consider that a settled course of conduct will continue, absent clear proof to the contrary. Thus, the trial court's ruling is a mixed question of law and fact.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN10](#) [down] **Standards of Review, Abuse of Discretion**

As with other mixed questions of law and fact, an appellate court reviews the trial court's decision to issue an injunction with the abuse of discretion standard.

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

[HN11](#) [down] **Monopolies & Monopolization, Actual Monopolization**

There are different proof requirements for injunctive relief between government and private antitrust actions.

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

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

9 S.W.3d 324, *324L999 Tex. App. LEXIS 8791, **1

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

[**HN12**](#) [L] Monopolies & Monopolization, Actual Monopolization

In a government antitrust action, injunctive relief is available upon a finding that a defendant has engaged in monopolistic conduct.

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

[**HN13**](#) [L] Private Actions, Standing

In a private action, a general threat to the public is insufficient to establish a plaintiff's right to an injunction.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

[**HN14**](#) [L] Private Actions, Remedies

In a private anti-trust action, the burden rests with the plaintiff to establish that its private interests are threatened with harm due to the impending or ongoing illegal conduct of the defendant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN15**](#) [L] Monopolies & Monopolization, Attempts to Monopolize

Attempt to engage in monopolistic conduct means (1) a party has engaged in exclusionary conduct (2) with the specific intent to acquire or maintain monopoly power and (3) there is a dangerous probability of the party achieving monopoly power in a relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN16**](#) [L] Monopolies & Monopolization, Attempts to Monopolize

The elements of attempted monopoly must be contemporaneous; that is, the dangerous probability of achieving monopoly power must exist while a party has engaged in exclusionary conduct.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

[**HN17**](#) [L] Private Actions, Remedies

To obtain injunctive relief, a private antitrust plaintiff is required to show it is threatened with injury due to an antitrust violation.

Counsel: ATTORNEYS FOR APPELLANT: Timothy Patton, POZZA & PATTON, John W. Davidson, Lea A. Ream, DAVIDSON & TROILO, P.C., San Antonio, TX. Salem M. Katsh, P. Michael Jung, STRASBURGER & PRICE, L.L.P., Dallas, TX. Richard P. Hogan, Jr., Roger Townsend, HOGAN, DUBOSE & TOWNSEND, L.L.P., Houston, TX. Staci B. Barber, David Lender, WEIL, GOTSHAL & MANGES, L.L.P., Stuart N. Krinsky, Ira Schreger, Steven R. Lowson, New York, NY.

ATTORNEYS FOR APPELLEE: Paul A. Drummond, Zachary B. Aoki, JENKENS & GILCHRIST, GROCE, LOCKE & HEBDON, P.C., San Antonio, TX. Fred H. Bartlit, Jr., Donald E. Scott, Mark L. Levine, Ryan D. Downs, BARTLIT, BECK, HERMAN, PALENCHAR & SCOTT, Chicago, IL. Ricardo G. Cedillo, DAVIS, ADAMI & CEDILLO, INC., San Antonio, TX. David E. Keltner, Karen S. Precella, JOSE, HENRY, BRANTLEY & KELTNER, L.L.P., Fort Worth, TX. Thomas H. Crofts, Jr., Ellen B. Mitchell, CROFTS, CALLAWAY & JEFFERSON, P.C., San Antonio, TX.

Judges: Opinion by: Paul W. Green, Justice. Sitting: Phil Hardberger, Chief Justice, Alma L. Lopez, Justice, Paul W. Green, Justice.

Opinion by: PAUL W. GREEN

Opinion

[*326] ON MOTION FOR REHEARING

The opinions of the court dated October 14, 1998, and November 17, 1999, are withdrawn and the following is substituted. The motion for rehearing is overruled.

The question is whether a private plaintiff in an antitrust action is entitled to injunctive relief when the defendant attempted to engage in monopolistic conduct, but the illegal conduct caused the plaintiff neither damage nor irreparable injury. Under the antitrust statute, a plaintiff who is threatened with injury because of the monopolistic conduct of a defendant may enjoin the illegal conduct. In this case, [**2] because the evidence is inconclusive that the plaintiff is threatened with injury, we hold it was not an abuse of discretion for the trial court to deny injunctive relief. Accordingly, we affirm the judgment of the trial court.

Background

Chromalloy Gas Turbine Corporation ("Chromalloy") repairs commercial jet engines, including those made and sold by the Pratt & Whitney Aircraft Division of United Technologies Corporation ("Pratt"). In 1995, Chromalloy sued Pratt for violations of the state antitrust law. Specifically, Chromalloy alleged that Pratt offset its losses from the sale of new engines with monopolistic profits from the sale of spare parts. According to Chromalloy, Pratt increased the spare parts market by restricting the repaired parts market through a variety of anticompetitive activities, including withholding technical data, denying "approved status" to independent repairs, and advising airlines to reject repaired parts.

Pratt counterclaimed for declaratory and injunctive relief, alleging Chromalloy engaged in unfair competition. According to Pratt, Chromalloy possessed both the technical ability and the legal authority to develop and sell its own repairs, [**3] without Pratt intervention. Essentially, Pratt characterized Chromalloy's complaints as "sour grapes" about its own increasing competition and decreasing quality.

After a three-month trial, the parties' claims were submitted to a jury, which found that Pratt "willfully or flagrantly" attempted to engage in monopolistic conduct, but that Chromalloy was not damaged by the illegal conduct. The jury

further found that Pratt's conduct would not cause irreparable injury to Chromalloy. Lastly, the jury found against Pratt on its claims against Chromalloy. The trial court rendered a take-nothing judgment against both parties. Pratt did not appeal. Chromalloy's appeal is limited to the trial court's refusal to grant injunctive relief.

[*327] The Texas Antitrust Act

HN1 The Texas Free Enterprise and Antitrust Act ("the Act") prohibits monopolies or attempts to monopolize. *TEX. BUS. & COM. CODE ANN. § 15.05(b)* (Vernon 1987). However, the mere "possession of monopoly or market power is not forbidden." E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST & ITS ECONOMIC IMPLICATIONS* 244 (1988). **HN2** Likewise, the prohibition against attempted monopoly does not encompass "all efforts to acquire market power." *Id.* **HN3** The Act was not intended, for example, to protect against increasing competition. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 122, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986).

To establish an illegal monopoly, a plaintiff must show (1) the defendant's 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. **HN5** *Caller-Times Pub. Co., Inc. v. Triad Communications, Inc.*, 826 S.W.2d 576, 580 (Tex. 1992). To prove attempted monopoly, a plaintiff must show (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. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993).¹ **HN6** The difference between actual monopoly and attempted monopoly rests in the requisite intent and the necessary level of monopoly power. *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997), ****5** cert. denied, 523 U.S. 1094, 118 S. Ct. 1560, 140 L. Ed. 2d 792 (1998).

HN7 Once a monopoly or attempted monopoly is established, the Act permits recovery of damages as well as injunctive relief. Injunctive relief is available to a plaintiff if a violation of the Act threatens it with injury.

HN8 Any person . . . whose business or property is threatened with injury by reason of anything declared unlawful in . . . this Act may sue any person . . . to enjoin the unlawful practice temporarily or permanently. In any such suit, the court shall apply the same principles as those generally applied by courts of equity in suits for injunctive relief against threatened conduct that would cause injury to business or property.

*TEX. ***61 BUS. & COM. CODE ANN. § 15.21(b)* (Vernon 1987) (emphasis added), and see *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969) (injunction authorized on demonstration of significant threat of injury from impending or ongoing violation).

Standard and Scope of Review

HN9 A jury may determine whether the Act has been violated, but the trial court determines the propriety of injunctive relief; that is, whether the illegal conduct threatens the plaintiff with injury. See *Valenzuela v. Aquino*, 853 S.W.2d 512, 514 n.2 (Tex. 1992); *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979). To make its determination, the trial court must consider the ultimate facts found by the jury and may consider that a settled course of conduct "will continue, absent clear proof to the contrary." See *Texas Pet Foods*, 591 S.W.2d at 804.

¹ Because the Texas Antitrust Act is derived from federal law, it should be construed in harmony with federal authority. *TEX. BUS. & COM. CODE ANN. § 15.04* (Vernon 1987); *De Santis v. Wackenhut Corp.*, 793 S.W.2d 670, 687 (Tex. 1990).

Thus, the trial court's ruling is a mixed question of law and fact. [Alamo Title Co. v. San Antonio Bar Ass'n, 360 S.W.2d 814, 816](#) (Tex. Civ. App.--Waco 1962, writ ref'd n.r.e.).²

[**7] [*328]

[HN10](#)[↑] As with other mixed questions of law and fact, we review the trial court's decision to issue an injunction with the abuse of discretion standard. See [Priest v. Texas Animal Health Comm'n, 780 S.W.2d 874, 875](#) (Tex. App.-Dallas 1989, no writ). Under this standard, we defer to the trial court's ruling on factual matters while reviewing legal questions *de novo*. [Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 820](#) (Tex. App.--San Antonio 1996, no writ). The trial court abuses its discretion when it fails to properly apply the law to the undisputed facts, when it acts arbitrarily or unreasonably, or when it bases its ruling on factual assertions unsupported by the record. [Remington Arms Co., Inc. v. Luna, 966 S.W.2d 641, 643](#) (Tex. App.--San Antonio 1998, pet. denied).

Discussion

Chromalloy contends the trial court erred in refusing to grant an injunction because the verdict and record conclusively establish that Pratt's illegal conduct constitutes a threat of injury. Conversely, Pratt argues that Chromalloy failed to establish either a threat of injury or ongoing illegal conduct. We agree with Pratt and, by doing [*8] so, reject Chromalloy's contention that in a private action the finding of an antitrust violation, standing alone, automatically entitles the plaintiff to injunctive relief unless the defendant proves it has ended its anticompetitive practices.

[HN11](#)[↑] There are different proof requirements for injunctive relief between government and private antitrust actions. [HN12](#)[↑] In a government antitrust action, injunctive relief is available upon a finding that a defendant has engaged in monopolistic conduct. The inherent threat to the public interest is deemed sufficient to entitle the government to injunctive relief. [HN13](#)[↑] But in a private action, a general threat to the public is insufficient to establish a plaintiff's right to an injunction. See [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 122, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#) (private plaintiff must show injury or threatened injury to its own interests); [Credit Bureau Reports, Inc. v. Retail Credit Co., 476 F.2d 989, 992 \(5th Cir. 1973\)](#) (mere showing by private plaintiff of antitrust violation has no actionable significance because, while government action need only show antitrust violation, private litigant [*9] must show violation together with injury or threatened injury to its own interests caused by the violation). [HN14](#)[↑] Therefore, as in any suit for injunctive relief, the burden rests with the plaintiff to establish that its private interests are threatened with harm due to the impending or ongoing illegal conduct of the defendant.

The trial court did not give a reason for its refusal to grant an injunction except to say that it based its decision on the jury verdict and the record. The jury found Chromalloy was not damaged or irreparably injured as a result of Pratt's illegal conduct, and the evidence tending to show Chromalloy is threatened with injury is both disputed and inconclusive.

Chromalloy relies on the jury's affirmative answer to the attempted monopoly question to show that it was threatened with harm. Specifically, it focuses on the question's definition of "attempted monopoly" and its reference to "dangerous probability":

Did Pratt & Whitney attempt to engage in monopolistic conduct which was a material cause of injury to Chromalloy?

² The Supreme Court has characterized "imminent harm" as a legal question for the court. [Operation Rescue- Nat'l v. Planned Parenthood, Inc., 975 S.W.2d 546, 554 \(Tex. 1998\)](#). Legal questions may involve factual determinations. See [EI Paso Natural Gas Co. v. Minco Oil & Gas Co., 964 S.W.2d 54, 60-61](#) (Tex. App.--Amarillo 1998, pet. filed).

HN15[] "Attempt to engage in monopolistic conduct" means (1) a party has engaged in exclusionary conduct (2) with the specific intent to acquire or [**10] maintain monopoly power and (3) there is a dangerous [*329] probability of the party achieving monopoly power in a relevant market.³

According to Chromalloy, because the jury found there is a "dangerous probability" of Pratt achieving monopoly power in the replacement parts market, we must infer that Chromalloy is threatened by Pratt's ongoing illegal conduct. We disagree.

HN16[] The elements [**11] of attempted monopoly must be contemporaneous; that is, the "dangerous probability" of achieving monopoly power must exist while "a party has engaged in exclusionary conduct." See *Spectrum Sports, Inc., 506 U.S. at 456* (requiring coexisting elements); *United States v. American Airlines, Inc., 743 F.2d 1114, 1118 (5th Cir. 1984)* (same). The answer to the jury question establishes that Pratt engaged in attempted monopolistic conduct at some indeterminate time in the past, but it does not imply a finding of continuing illegal activity that threatens Chromalloy with injury. The trial court was obliged to consider this when deciding whether or not to issue an injunction. See *Alamo Title Co., 360 S.W.2d at 816*. Given the limited nature of the finding, the trial court was not required to conclude that ongoing illegal conduct threatened Chromalloy with injury. See *Kneip v. Unitedbank-Victoria, 734 S.W.2d 130, 138* (Tex. App.--Corpus Christi 1987, no writ) (Dorsey, J., concurring) (stating "no findings of fact [made by the jury] can mandate an injunction"). Thus, we turn to Chromalloy's assertion that Pratt's threatening, [**12] illegal conduct was established by the evidence as a matter of law.

Chromalloy asserted a number of separate acts for which it claimed damages and upon which it based its claim for injunctive relief. According to Chromalloy, these acts, taken together, constituted a settled course of conduct that violated the **antitrust law**. However, the evidence characterizing these events was hotly contested. For example, Chromalloy complained that Pratt failed to approve repairs as early as 1989 and as late as 1995. Pratt claimed it denied the approvals for various legitimate business reasons. In short, the record is subject to differing, but reasonable, interpretations on the question of whether there was ongoing illegal conduct that threatened Chromalloy with injury. Consequently, the trial court, in exercising its discretion, could conclude that Chromalloy was not threatened by Pratt.

Conclusion

HN17[] To obtain injunctive relief, a private antitrust plaintiff is required to show it is threatened with injury due to an antitrust violation. In this case, neither the jury findings nor the record conclusively establish that Chromalloy is threatened with injury as a result of

Pratt's illegal [**13] conduct.⁴ Accordingly, it was not an abuse of discretion for the trial court to deny Chromalloy injunctive relief. The judgment is affirmed.

PAUL W. GREEN

Justice

End of Document

³ Several terms from the definition of "attempted monopoly" were defined in the present tense, including the terms "exclusionary conduct," "monopoly power," and "relevant market." The definition of "exclusionary conduct" included the phrase "legitimate business justification," which, in turn, was also defined in the present tense. During jury deliberations, the jury asked whether the three elements of attempted monopoly were "independent or dependent of each other." The trial court referred the jury to the charge, but when the court received a second question asking whether "all 3 factors have to apply," the court responded, "Yes."

⁴ Because threat of injury was not established, we need not address whether, under the Texas Antitrust Act, Chromalloy was required to also demonstrate irreparable injury.



Dauro Adver., Inc. v. GMC

United States District Court for the District of Colorado

November 24, 1999, Decided ; November 24, 1999, Filed

Civil Action No. 99 - D - 1263

Reporter

75 F. Supp. 2d 1165 *; 1999 U.S. Dist. LEXIS 18802 **; 2000-1 Trade Cas. (CCH) P72,747

DAURO ADVERTISING, INC, Plaintiff, v. GENERAL MOTORS CORPORATION, a Delaware Corporation, Defendant.

Disposition: **[**1]** Defendant's Motion to Dismiss filed September 8, 1999, DENIED.

Core Terms

advertising, dealers, alleges, antitrust, cars and trucks, illegal restraint, anti trust law, percent, manufacturer

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN1 [blue icon] **Defenses, Demurrsers & Objections, Motions to Dismiss**

If, accepting all well-pleaded allegations as true and drawing all reasonable references in favor of the plaintiff, it appears beyond doubt that no set of facts entitle plaintiffs to relief, then the court should grant a motion to dismiss. A complaint must be dismissed if, accepting the allegations as true, it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN2 [blue icon] **Defenses, Demurrsers & Objections, Motions to Dismiss**

A complaint may be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)* only if the plaintiff can prove no set of facts to support a claim for relief. The court must accept all the well-pleaded allegations as true and must construe them in the light most favorable to the plaintiff.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

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Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN3 [down] **Clayton Act, Claims**

To maintain standing to bring an antitrust claim under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), a plaintiff must show (1) an "antitrust injury" and (2) a direct causal connection between that injury and defendant's violation of the antitrust laws.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Sherman Act > General Overview

HN4 [down] **Clayton Act, Claims**

To meet the first prong to maintain standing to bring an antitrust claim under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), the plaintiff must allege a business or property injury, an antitrust injury, as defined by the Sherman Act. An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. A violation of the Sherman Act without resultant injury to the plaintiffs is insufficient to confer standing.

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

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

HN5 [down] **Private Actions, Standing**

When evaluating antitrust standing, factors to consider include: (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. These factors are not black letter rules, however, but merely give more specificity to the inquiry mandated by the two-part test to evaluate antitrust standing.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN6 [down] **Private Actions, Standing**

The Sherman Act ultimately must protect competition, not a competitor, and were the court tempted to collapse the distinction, the court would distort its continuing viability to safeguard consumer welfare.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN7 [down arrow] **Private Actions, Purchasers**

The Supreme Court has consistently held that only direct purchasers suffer injury within the meaning of § 4 of the Clayton Act, [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN8 [down arrow] **Regulated Practices, Private Actions**

In antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissal prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Antitrust & Trade Law > Sherman Act > Scope > 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

HN9 [down arrow] **Sherman Act, Scope**

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. Generally, a tying arrangement is illegal under [§ 1](#) of the Sherman Act if the following can be shown: (1) two separate products or services are involved; (2) the sale or agreement to sell one product or service is conditioned on the purchase of another; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a not insubstantial amount of interstate commerce in the tied product is affected.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10 [down arrow] **Regulated Practices, Market Definition**

Market definition is a question of fact. The Supreme Court has noted a retail seller may have in one sense a monopoly on certain trade because of location, as an isolated country store or filling station, or because no one else makes a product of just the quality or attractiveness of his product, as for example in cigarettes. Thus one can theorize that monopolistic competition exists in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that automobile or soft-drink

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manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN11 [L] **Regulated Practices, Market Definition**

Defining the relevant market first necessitates an examination of which commodities are reasonably interchangeable by consumers for the same purposes.

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

HN12 [L] **Private Actions, Remedies**

An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Interpretation

HN13 [L] **Antitrust & Trade Law, Sherman Act**

The language of [Colo. Rev. Stat. § 6-4-104](#) is virtually identical to [§ 1](#) of the Sherman Act. Consequently, because both the case law and the legislative history suggest that the federal statutes should be construed together, analysis on a plaintiff's federal antitrust claims applies equally to state law antitrust claims.

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

HN14 [L] **Commercial Interference, Prospective Advantage**

In determining whether an actor's conduct is wrongful, the Colorado courts consider 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 social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

Counsel: For Plaintiff: Jeffrey A. Chase, Esq., Elizabeth L. Smith, Esq., Jacobs, Chase, Frick, Kleinkopp & Kelley, L.L.C., Denver, CO.

For Defendant: Gale T. Miller, Esq., Davis, Graham & Stubbs, L.L.P., Denver, CO.

For Defendant: William B. Slowey, Esq., Dennis A. White, Esq., General Motors Corporation, Detroit, MI.

Judges: Wiley Y. Daniel, U.S. District Judge.

Opinion by: Wiley Y. Daniel

Opinion

[*1166] ORDER

DANIEL, Judge

THIS MATTER is before the Court on the Defendant's Motion to Dismiss filed September 8, 1999. The Court has fully considered the motion, heard argument from the Plaintiff's and Defendant's counsel on November 17, 1999, and concludes, for the reasons stated herein, that the Defendant's motion should be denied.

BACKGROUND

The Plaintiff, Dauro Advertising, Inc. ("Dauro"), is an advertising agency incorporated in Colorado. The Defendant, General Motors Corporation ("GM"), is incorporated under the laws of Delaware. The Plaintiff services the advertising interests of a variety of businesses and clientele throughout the United States. The bulk of Dauro's work, and its primary source of revenue [*2] has been derived from the advertising work it performs for GM dealers and the various GM Dealer Marketing Groups ("DMGs") which service the advertising needs of GM's dealers. The DMGs were funded by voluntary assessments that member dealers agreed to pay when purchasing new automobiles from GM. By the late 1980's, the dealers' voluntary assessments generally equaled or exceeded one percent of the manufacturer's suggested retail price of new cars purchased. In the late 1980's and early 1990's dealer participation was entirely optional. The GM dealers could elect to contribute the one percent per vehicle, with GM distributing those funds to the dealers' DMG for advertising in the local market, or the dealers could elect to participate and advertise on their own.

In early 1990, Dauro began to service the advertising needs of various GM dealers and GM DMGs throughout the country. The Complaint alleges that by 1997 Dauro had billings in connection with GM clients in excess of \$ 9,000,000.00, and that, at times relevant to this lawsuit, over 90 [*1167] percent of Dauro's annual gross revenues were derived from GM dealers and DMGs.

In 1993, GM announced its objective to have all advertisements [*3] for GM cars and trucks speak in "one voice." The Complaint alleges that GM's implementation of the "one voice" initiative was a sham operation designed to foreclose competition for advertising services for GM cars and trucks. GM implemented a process by which several "key" or select advertising agencies would be chosen to do the majority of the advertising work for GM's respective divisions. Under the new "key" or "select" agency program, the GM dealers were encouraged to utilize the identified agencies for their advertising needs. As a result of this process, Dauro alleges that it lost all of its Cadillac accounts and its Oklahoma Buick account.

On April 1, 1999, GM implemented a new Field Market Strategy Program. Under the Strategy Program, GM still collects the one percent per vehicle contribution that was formerly returned to either the Dealers or their respective DMGs for advertising in their local markets. Instead of returning the contribution, however, the contribution is retained by GM and spent on national advertising for GM products. The GM dealers are required to participate in the Strategy Program. Dauro alleges that as a result of the implementation of the Strategy Program, [*4] it has lost all but one of the remaining accounts that it had with the various GM DMGs.

The Complaint alleges that GM's Strategy Program implicates the tying of a distinct product (GM cars and trucks) to a distinct service (advertising for GM cars and trucks). The Complaint also alleges that the market for the tying product (GM cars and trucks) is separate and distinct from the market for the tying item (advertising for GM cars and trucks), and that GM has sufficient market power with respect to the tying product to force GM dealers to purchase the tying item. Consequently, the Complaint pleads three claims of relief: (1) Illegal Restraint of Trade in

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Violation of [15 U.S.C. § 1](#); (2) Illegal Restraint of Trade in Violation of [C.R.S. § 6-4-104](#); and (3) Tortious Interference With Ongoing and Business Relations.

ANALYSIS

I. Defendant's Motion to Dismiss.

A. Standard.

HN1 If, accepting all well-pleaded allegations as true and drawing all reasonable references in favor of the plaintiff, it appears beyond doubt that no set of facts entitle plaintiffs to relief, then the court should grant a motion to dismiss. See [Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n, 908 F.2d 578, 582 \(10th Cir. 1990\)](#). [**5] A complaint must be dismissed if, accepting the allegations as true, it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief. [Meade v. Grubbs, 841 F.2d 1512, 1526 \(10th Cir. 1988\)](#).

"A **HN2** complaint may be dismissed pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#) only 'if the plaintiff can prove no set of facts to support a claim for relief.'" [Trierweiler, 90 F.3d 1523 at 1533](#). (quoting [Jojola v. Chavez, 55 F.3d 488, 490 \(10th Cir. 1995\)](#)). The court "'must accept all the well-pleaded allegations as true and must construe them in the light most favorable to the plaintiff.'" [David v. City and County of Denver, 101 F.3d 1344, 1352 \(10th Cir. 1996\)](#) (quoting [Gagan v. Norton, 35 F.3d 1473, 1474 n. 1 \(10th Cir. 1994\)](#)).

B. Antitrust Standing.

"To **HN3** maintain standing to bring an antitrust claim under § 4 of the Clayton Act, [15 U.S.C. § 15](#), a plaintiff must show (1) an 'antitrust injury;' and (2) a direct causal connection between that injury and defendant's violation of the antitrust laws." [Sports Racing Services, Inc. v. Sports Car Club of America, 131 F.3d 874, 882 \(10th Cir. 1997\)](#). [**6] **HN4** To meet the first prong, the plaintiff must allege a business or property injury, an antitrust injury, as defined by **[*1168]** the Sherman Act. *Id.* "An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. A violation of the Act without resultant injury to the plaintiffs is insufficient to confer standing." *Id.* (citation omitted). To satisfy the second prong, the plaintiff must show the antitrust injury resulted directly from the defendant's violation of **antitrust law**. *Id.* (citation omitted).

HN5 When evaluating antitrust standing, factors to consider include:

- (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.

Id. (internal citations omitted). These factors are not black letter rules, **[**7]** however, "but merely 'give more specificity to the inquiry mandated by the two part test.'" *Id.* (citing [Sharp v. United Airlines, Inc., 967 F.2d 404, 406 n.2 \(10th Cir. 1992\)](#)).

An analysis of the standing issue in the instant case in light of the two part antitrust standing test and the six enumerated factors leads me to the conclusion that the Plaintiff has standing to bring this antitrust case.

In terms of the first prong of the standing test, Dauro alleges that as a result of the implementation of the Strategy Program, it has lost all but one of the remaining accounts that it had with the various GM DMGs. Although the Plaintiff was not the party that would be required to pay the incremental costs of the price increase, the Complaint alleges that "Dauro Advertising alone will lose over \$ 1,000,000.00 in commissions this year as a result of the implementation of the Strategy Program." Complaint at 10, P 50. Construing the facts alleged in the Complaint in the light most favorable to the Plaintiff, this is a business or property injury resulting directly from the Defendant's

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alleged violation of **antitrust law**. Therefore, the Plaintiff has alleged sufficient facts **[**8]** to establish standing in its Complaint. Consequently, the Motion to Dismiss must be denied on this basis.

"The **HN6** Sherman Act ultimately must protect competition, not a competitor, and were we tempted to collapse the distinction, we would distort its continuing viability to safeguard consumer welfare." *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 972 (10th Cir. 1994)*. Also, "the **HN7** Supreme Court has consistently held that only direct purchasers suffer injury within the meaning of § 4 of the Clayton Act." *Sports Racing Services, Inc., 131 F.3d at 883*. Here, the Defendant asserts that the loss of income suffered by the Plaintiff was only tangentially related to the GM implementation of the Strategy Program and that this is not an injury of the type the antitrust laws were intended to prevent. I disagree.

HN8 In antitrust cases, where the proof is largely in the hands of the alleged conspirators, "dismissal prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*. Applying this rigorous standard, **[**9]** although the Defendant's argument may have credence at the summary judgment stage, this case is not one in which dismissal should be granted on the basis of a lack of standing. Consequently, the Defendant's motion with respect to the Plaintiff's federal illegal restraint of trade claim still must be denied on the basis of standing.

C. Unlawful Tying Claim.

"A **HN9** 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 **[*1169]** at least agrees that he will not purchase that product from any other supplier." *Sports Racing Services, Inc., 131 F.3d at 886* (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*). Generally, a tying arrangement is illegal under Section 1 of the Sherman Act if the following can be shown: (1) two separate products or services are involved; (2) the sale or agreement to sell one product or service is conditioned on the purchase of another; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) **[**10]** a not insubstantial amount of interstate commerce in the tied product is affected. *Id.* (citations omitted).

In this case, the Complaint alleges that GM's Strategy Program implicates the tying of a distinct product (GM cars and trucks) to a distinct service (advertising for GM cars and trucks). Thus, two separate products or services are involved. Additionally, the Complaint alleges that prior to GM's implementation of the Strategy Program, the GM dealers purchased cars and trucks from GM and advertising services separately and that GM is charging a one percent contribution per vehicle for advertising services. Therefore, the sale or agreement to sell one product or service is conditioned on the purchase of another. Finally, the Complaint alleges that GM has sufficient market power in the alleged relevant market, the market for GM cars and trucks, to require the GM dealers to pay higher prices to cover the national advertising. As a result, GM has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market. Consequently, the Complaint alleges sufficient facts to satisfy the requirements for an unlawful tying claim with respect **[**11]** to the Plaintiff's federal illegal restraint of trade claim.

D. Proper Relevant Product Market.

HN10 Market definition is a question of fact. *Westin Comm. Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)*. As the Supreme Court has noted:

A retail seller may have in one sense a monopoly on certain trade because of location, as an isolated country store or filling station, or because no one else makes a product of just the quality or attractiveness of his product, as for example in cigarettes. Thus one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.

75 F. Supp. 2d 1165, *1169 (1999 U.S. Dist. LEXIS 18802, **11

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392-93, 76 S. Ct. 994, 100 L. Ed. 1264 (1956).

HN11 Defining the relevant market first necessitates an examination of which commodities are "reasonably interchangeable by consumers for the [**12] same purposes." 796 F.2d at 1221 (citing E.I. du Pont de Nemours & Co., 351 U.S. at 395). Here, the GM dealers are the consumers adversely affected by the Strategy Program. GM dealers have no interest in purchasing cars or trucks from any other manufacturer. Therefore, cars and trucks from manufacturers other than GM are not reasonably interchangeable. Thus, the Plaintiff has alleged sufficient facts in its Complaint to define a relevant market. Consequently, the Complaint's federal illegal restraint of trade claim should not be dismissed on this basis.

E. Type of Injury That the Antitrust Laws Were Intended to Prevent.

As previously noted, "an **HN12** antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Sports Racing Services, Inc., 131 F.3d at 882. Although [*1170] the Plaintiff was not the party that would be required to pay the incremental costs of the price increase, the Complaint alleges that "Dauro Advertising alone will lose over \$ 1,000,000.00 in commissions this year as a result of the implementation of the Strategy Program." Complaint at 10, [**13] P 50. Construing the facts alleged in the Complaint in the light most favorable to the Plaintiff, this is a business or property injury resulting directly from the Defendant's alleged violation of antitrust law. Consequently, the Complaint's federal illegal restraint of trade claim should not be dismissed on this basis.

F. The Colorado Antitrust Act.

HN13 The language of C.R.S. § 6-4-104 is virtually identical to Section 1 of the Sherman Act. See C.R.S. § 6-4-104. Consequently, because both the case law and the legislative history suggest that the federal statutes should be construed together, analysis on a plaintiff's federal antitrust claims applies equally to state law antitrust claims. See Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503, 1516 (D. Colo. 1992). As a result, my analysis above with respect to the federal illegal restraint of trade claim is equally applicable to the Colorado illegal restraint of trade claim. Consequently, dismissal of the Complaint's Colorado illegal restraint of trade claim is not appropriate.

G. Tortious Interference Claim.

HN14 In determining whether an actor's conduct is wrongful, the Colorado courts consider [**14] 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 social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

Westfield Dev. Co. v. Rifle Inv. Assoc., 786 P.2d 1112, 1118 (Colo. 1990). In this case, the Complaint alleges that GM sold advertising services to its dealers, through the one percent contribution, as a condition of the GM dealers ability to purchase GM cars and trucks. This is an unlawful tying claim. Therefore, construing the facts alleged in the Complaint in the light most favorable to the Plaintiff, GM engaged in improper conduct. Consequently, granting the Defendant's motion to dismiss as to the Plaintiff's Tortious Interference Claim is not appropriate. Accordingly, it is

ORDERED that the Defendant's Motion to Dismiss filed September 8, 1999 is DENIED.

Dated: November 24, 1999.

BY THE COURT:

[**15] Wiley Y. Daniel

U.S. District Judge

End of Document



Jeffers Vet Supply, Inc. v. Rose Am. Corp.

United States District Court for the Middle District of Alabama, Southern Division

November 24, 1999, Decided ; November 24, 1999, Filed; November 24, 1999, Entered

Civil Action No.98-A-1329-S

Reporter

75 F. Supp. 2d 1332 *; 1999 U.S. Dist. LEXIS 18692 **; 2000-1 Trade Cas. (CCH) P72,770

JEFFERS VET SUPPLY, INC., Plaintiff, v. ROSE AMERICA CORP., d/b/a BMB, a division of Rose America Corporation, Defendants.

Disposition: **[**1]** Defendant's Motion for Summary Judgment GRANTED and Motion to Preclude Plaintiff from Presenting Damages Evidence DENIED as MOOT. Judgment entered in favor of Defendant, Rose America Corp., d/b/a BMB, division of Rose America Corporation and against Plaintiff, Jeffers Vet Supply, Inc.

Core Terms

dealers, pricing policy, prices, terminated, manufacturer, distributor, Sherman Act, Helicopter, summary judgment, conspiracy, depositions, customer, announced, argues, resale price, calculate, products, alleges, sheets, present case, retail, per se violation, material fact, communications, antitrust, assurance, employees, brand, logs, summary judgment motion

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > 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 > Legal Entitlement

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

HN1 [] Discovery, Methods of Discovery

Under [Fed. R. Civ. P. 56\(c\)](#), summary judgment is generally 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law.

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

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Evidence > Burdens of Proof > Ultimate Burden of Persuasion

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

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

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

HN2 [down] Discovery, Methods of Discovery

The party asking for summary judgment 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 movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing, or pointing out to, the district court that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof.

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

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

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

HN3 [down] Methods of Discovery, Interrogatories

Once the moving party has met its burden, *Fed. R. Civ. P. 56(e)* requires the nonmoving party to go beyond the pleadings, and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.

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

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

HN4 [down] Summary Judgment, Opposing Materials

To avoid summary judgment, the nonmoving party must do more than show that there is some metaphysical doubt as to the material facts.

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

HN5 [down] Summary Judgment, Entitlement as Matter of Law

In summary judgment, the evidence of the nonmovant must be believed and all justifiable inferences must be drawn in its favor.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

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

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

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

HN6 **Summary Judgment, Motions for Summary Judgment**

After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#).

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

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

Contracts Law > Defenses > Illegal Bargains

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN7 **Distributorships & Franchises, Antitrust Issues**

The Eleventh Circuit has modified the summary judgment standard for antitrust violations arising out of allegations that a distributor was terminated because it failed to adhere to an illegal resale price agreement.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8 **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1 \(1997\)](#).

Antitrust & Trade Law > Sherman Act > General Overview

HN9 **Antitrust & Trade Law, Sherman Act**

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#), 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 will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.

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

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

HN10 **Entitlement as Matter of Law, Materiality of Facts**

75 F. Supp. 2d 1332, *1332 (1999 U.S. Dist. LEXIS 18692, **1

The issues of material fact which must exist in order to survive summary judgment in a price-fixing case are whether a conspiracy to fix prices existed and whether the dealer was terminated pursuant to that conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN11 [blue icon] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

According to the Helicopter test, in order to establish that fact issues exist, the plaintiff must: (a) satisfy the court that the conspiracy which he alleges is objectively an economically reasonable one, and (b) produce evidence which tends to exclude the possibility that the manufacturer was operating independently in making his determination to terminate the distributor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN12 [blue icon] **Price Fixing & Restraints of Trade, Vertical Restraints**

To prove an agreement to restrain trade in a dealer termination case, the plaintiff must produce 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.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN13 [blue icon] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Under the Helicopter test, there are two things that plaintiff needs to show to exclude the possibility that defendant was acting independently: (1) defendant sought an agreement from its dealers to adhere to a resale price, and (2) the dealers communicated their acceptance of the proposed agreement.

Antitrust & Trade Law > Sherman Act > General Overview

HN14 [blue icon] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, [15 U.S.C.S. §1 et seq.](#), does not restrict the right of a manufacturer to freely choose which parties it will deal with and a manufacturer can announce in advance the circumstances under which it intends to deal.

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

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 > Resale Price Maintenance

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN15 [+] Per Se Rule & Rule of Reason, Per Se Violations

That a manufacturer may give preferential pricing and delivery terms to one distributor does not establish a per se violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), even though other distributors suffer losses in sales.

Counsel: For Plaintiff: James F. Hinton, Jr., Ellen E. Henderson.

For Defendant: Jackson R. Sharman, Anne Sikes Hornsby, Ken M. Peterson, William B. Sorensen.

Judges: W. HAROLD ALBRITTON, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: W. HAROLD ALBRITTON

Opinion

[*1332] MEMORANDUM OPINION

I. INTRODUCTION

This action is brought under [Section 1](#) of the Sherman Antitrust Act alleging that the Defendant engaged in price fixing and terminated the Plaintiff as one of its dealers in furtherance of a price fixing conspiracy, [*1333] in violation of [15 U.S.C. § 1](#). The case is before the court on a Motion for Summary Judgment (Doc. # 12) filed by the Defendant, Rose America Corporation, d/b/a BMB ("BMB"), on August 23, 1999. Also before this court is Defendant's Motion to Preclude Plaintiff from Presenting Damages Evidence (Doc. # 31) filed on November 12, 1999.

On September 17, 1999, the Plaintiff, [**2] Jeffers Vet Supply, Inc. ("Jeffers Vet") requested an extension of time to respond to the Motion for Summary Judgment so that it could take additional depositions, including depositions of other dealers. The court granted the request and extended the response time to November 5, 1999. No further extension was requested. The court has considered all evidence submitted, and oral argument was heard in this case on November 18, 1999.

For the reasons to be discussed, BMB's Motion for Summary Judgment is due to be GRANTED.

II. SUMMARY JUDGMENT STANDARD

HN1 [+] Under [Rule 56\(c\) of the Federal Rules of Civil Procedure](#), summary judgment is generally 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

HN2 [↑] The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, [**3] 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." *Id. at 323*. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing, or pointing out to, the district court that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. See *id. at 322-24*.

HN3 [↑] Once the moving party has met its burden, *Rule 56(e)* "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id. at 324*. **HN4** [↑] To avoid summary judgment, the nonmoving party "must do more than 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). **HN5** [↑] On the other hand, the evidence of the nonmovant must be believed [**4] and all justifiable inferences must be drawn in its favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

HN6 [↑] After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

HN7 [↑] The Eleventh Circuit has modified this summary judgment standard for "antitrust violations arising out of allegations that a distributor was terminated because it failed to adhere to an illegal resale price agreement." See *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1532 (11th Cir. 1987). The modifications will be discussed below.

III. FACTS

The submissions of the parties establish the following facts:

[*1334] Jeffers Vet is a distributor of animal care supplies, with stores in Dothan, Alabama, and West Plains, Missouri. BMB is a division of Rose America Corporation and manufactures equine products. Among the products that BMB sells are horse blankets and sheets. In fact, BMB's total revenues for 1998 totaled \$ 7,864,372, of [**5] which \$ 3,783,501 was from the sale of horse blankets and sheets. See Barnhard Aff.

On or about February 12, 1996, Jeffers Vet became an authorized dealer of BMB. BMB would sell horse blankets and sheets at wholesale price to Jeffers Vet, which in turn sold these products to its customers through its catalogs and at its stores.

On June 1, 1998, BMB sent a letter to all of its dealers outlining a new pricing policy BMB was implementing. Jeffers Vet received the letter. The letter stated in pertinent part:

As of October 1, 1998 our policy will be to terminate the dealer status of any dealer who sells or offers to sell BMB brand products at a price less than 90% of the retail prices established, and as modified from time to time, in our catalog. Our decision in this regard is completely unilateral and nonnegotiable. BMB does not seek either your approval or your agreement or other assurance of compliance. In the event of your failure to comply, you will simply be terminated as one of our dealers. Please do not report to us about the pricing behavior of other dealers. We have adopted this policy to maintain the brand integrity of BMB.

Pl. Br. Letter Exh.2.

Jeffers [**6] Vet issued its fall catalog containing prices for BMB horse blankets and sheets in August of 1998. The prices in the catalog did not conform with BMB's new price policy. On or about October 16, 1998, BMB notified Jeffers Vet that it was terminating Jeffers Vet's dealership. The letter succinctly stated: "For failure to comply with

our pricing policies, which we have unilaterally established, we regret to inform you that we are terminating your dealership." Pl. Br. Letter Exh.9.

As a result of this termination letter, Dr. Keith Jeffers, the president of Jeffers Vet, called BMB in an attempt to "work out something." Jeffers Depo., p.52, line 17-18. Then, in November of 1998, Jeffers Vet had its counsel send a letter to BMB demanding to be reinstated as a BMB dealer. BMB has refused to reinstate Jeffers Vet as a dealer. Jeffers Vet has had to find another wholesaler from which to purchase horse blankets and sheets.

Jeffers Vet has filed a Complaint alleging that BMB has engaged in price fixing, a per se violation of [15 U.S.C. § 1](#). See Complaint P8. Jeffers Vet further alleges that "BMB's termination of Jeffers [Vet] in furtherance of a price-fixing conspiracy [\[**7\]](#) is a per se violation of [15 U.S.C. § 1](#)." Complaint P10.

IV. DISCUSSION

Section 1 of the Sherman Antitrust Act ("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, or with foreign nations, is hereby declared to be illegal." [HN8](#) [15 U.S.C. § 1 \(1997\)](#). In 1919, however, the Supreme Court, in the case of [United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465](#), held that [HN9](#) the Sherman Act "[did] 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 will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell." [Colgate, 250 U.S. at 307](#). Case law over the years has developed a fine line between permissible manufacturer dealing [\[*1335\]](#) and illegal pricing activity. The present case illustrates permissible contact between manufacturers and dealers under [Colgate](#).

A. The Modified Summary Judgment Standard

[\[**8\]](#) According to the Eleventh Circuit, summary judgment in cases claiming "antitrust violations arising out of allegations that a distributor was terminated because it failed to adhere to an illegal resale price agreement" requires a modified standard. [Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1532 \(11th Cir. 1987\)](#) ("[Helicopter](#)"). The Eleventh Circuit, in the [Helicopter](#) case, incorporated the Supreme Court holdings of [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#), and [Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#), and created what is known as the "[Helicopter](#) test" for summary judgment. This test was followed in the [DeLong Equipment Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1508-09 \(11th Cir. 1989\)](#) ("The summary judgment standard in vertical restraint cases is more stringent than in other areas of antitrust law because a higher possibility of capturing and invalidating legitimate business conduct exists."), and has remained the test used to analyze [\[**9\]](#) summary judgment in manufacturer and dealer claims under [§ 1](#) of the Sherman Act in the Eleventh Circuit.

[HN10](#) The issues of material fact which must exist in order to survive summary judgment are whether a conspiracy to fix prices existed and whether the dealer was terminated pursuant to that conspiracy. [DeLong, 887 F.2d at 1508](#).

[HN11](#) According to the [Helicopter](#) test, in order to establish that such fact issues exist the plaintiff must (a) "satisfy the court that the conspiracy which he alleges is, objectively, an economically reasonable one" and (b) produce "evidence which tends to exclude the possibility that the manufacturer was operating independently in making his determination to terminate the distributor." [Helicopter, 818 F.2d at 1534](#). The Supreme Court had stated earlier that [HN12](#) to prove an agreement to restrain trade in a dealer termination case the plaintiff must produce "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." [Monsanto, 465 U.S. at 768](#).

The first prong of the Helicopter test does not require [**10] much discussion.¹ In the present case it is economically reasonable to exclude dealers who sell at lower prices than recommended. BMB, as stated in its pricing letter, wanted to maintain brand integrity by keeping prices at a specific level. See Pl. Br. Letter Exh.2. If customers recognize BMB as a quality brand, they will be willing to pay more for the product. Thus, it would be economically reasonable for BMB to conspire with its other dealers to keep low price selling dealers out of the BMB product market.

The second prong of the Helicopter test requires a deeper analysis. In order for Jeffers Vet to survive a summary judgment motion, Jeffers Vet must produce "evidence that tends to exclude the possibility" that BMB was acting independently. See Helicopter, 818 F.2d at 1534. [**11] HN13[↑] Under the Helicopter test, there are two things that Jeffers Vet needs to show to exclude the possibility that BMB was acting independently: (1) BMB sought an agreement from its dealers to adhere to a resale price, and (2) the dealers communicated their acceptance of BMB's proposed [*1336] agreement. See Helicopter, 818 F.2d at 1533. In order to fully discuss the agreement requirements of the second prong of the Helicopter test, the court must address the Colgate case and its progeny.

B. Colgate and its Progeny

Colgate was the first case that illustrated legal activity for a manufacturer to engage in when setting a pricing policy. See United States v. Colgate, 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919).² [**13] In Colgate, the plaintiff alleged that the defendant manufacturer "knowingly and unlawfully created and engaged in a combination with . . . wholesale and retail dealers . . . for the purpose and with the effect of procuring adherence on the part of such dealers . . . to resale prices fixed by the defendant . . ." Id. at 302. There was a list of acts allegedly performed by the defendant in [**12] order to carry out the conspiracy, among which were "distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; . . . uniform refusals to sell to any who failed to give the [assurances to adhere to prices] . . ." Id. at 303. The Court found that there was no allegation that the manufacturer did anything other than refuse to deal with dealers who would not resell at a specified price. See id. at 305. Ultimately, the Court held that HN14[↑] the Sherman Act did not restrict the right of a manufacturer to freely choose which parties it would deal with and that a manufacturer could announce in advance the circumstances under which it intended to deal. See id. at 307. The Colgate doctrine remains good law today.³

[**14] BMB denies that there was any conspiracy and argues that it acted independently when it established its price policy. See Def. Br. at 11-16. According to BMB, the letter it sent out on June 1, 1998, detailing its new pricing policy, complied with the Colgate holding and its progeny. See Def. Br. at 11 & Pl. Br. Letter Exh.2. BMB argues that the letter merely announced the prices that would be effective October 1, 1998, and "set forth the

¹ The court notes that neither party even addresses this prong of the test in brief. At oral argument, the Defendant argued that there were too many dealers to make an agreement possible or economically reasonable.

² Prior to Colgate, the leading case on price maintenance was Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911). Dr. Miles held that minimum resale price maintenance was per se unlawful. See id. In Dr. Miles, the court was concerned that price maintenance restricted "the freedom of trade on the part of dealers who own what they sell." Id. at 407-08.

³ The Supreme Court has frequently narrowed the Colgate doctrine, but has never overruled the precedent. See, e.g., Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977) (White, J., concurring); United States v. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966); Simpson v. Union, Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964); Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503; FTC v. Simplicity Pattern Co., Inc., 360 U.S. 55, 3 L. Ed. 2d 1079, 79 S. Ct. 1005 (1959); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953); Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 88 L. Ed. 1024, 64 S. Ct. 805 (1944); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 84 L. Ed. 852, 60 S. Ct. 618 (1940); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 66 L. Ed. 307, 42 S. Ct. 150 (1922); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 65 L. Ed. 892, 41 S. Ct. 451 (1921); United States v. A. Schrader's Son, Inc., 252 U.S. 85, 64 L. Ed. 471, 40 S. Ct. 251 (1920). Despite this narrowing, many courts believe that the Monsanto case revitalized Colgate.

circumstances (failure to follow pricing policy) which would result in dealer termination." Def. Br. at 11. BMB also alleges that the letter clearly indicated that its new policy was "completely unilateral" and that no approval, agreement or assurance of compliance were sought from its dealers. See Pl. Br. Letter Exh.2. BMB notes that because it did not seek assurance of compliance with its new price policy, as the defendant [*1337] did in United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960), its actions remained unilateral.⁴ See id. At oral argument, Jeffers Vet conceded that the letter itself sent out on June 1, announcing the pricing policy complied with the Colgate requirements.

[**15] The court finds that the letter sent out by BMB on June 1 closely tracked the language of the Colgate doctrine. The letter, therefore, standing alone is not a violation of the Sherman Act. Consequently, the court must turn its attention to the other evidence submitted by Jeffers Vet alleging an agreement between BMB and its dealers. Jeffers relies primarily on two other types of evidence to support its theory that BMB's implementation of its pricing policy violated the Colgate doctrine and the Sherman Act. The first type of evidence is the customer contact logs and the deposition testimony that William "Barney" Barnhard ("Barnhard") and Ruth Bush ("Bush") helped calculate the prices for some dealers. The second type of evidence is evidence indicating that BMB did not terminate all dealers who did not comply with its pricing policy.

Jeffers Vet submitted customer reply logs to evidence BMB's policy of discussing the operation and enforcement of its pricing policy. See Pl. Br. Exh. A & Pl. Supp. Br. Exh. C. These customer contact logs are records of when a dealer called in with a question or complaint about the pricing policy set out by BMB. See generally Pl. Supp. [**16] Br. Exh. C. Also included with these contact sheets is a document entitled "Price Policy Calls." See id. This document is undated but instructs employees to "fill out a blue sheet" customer contact log when a customer calls regarding the "new pricing policy." Id. Employees were instructed to allow dealers to complain about the policy, but to say, "My role is to listen to your concerns and pass them on. But, I can't debate the policy with you." Id. Employees were also instructed to notify Bush or Barnhard if a dealer wanted someone to call them back about the pricing policy. See id. Jeffers Vet argues that these customer contact logs illustrate that "BMB was engaged in an illegal price maintenance scheme" when BMB contacted the dealers. See Pl. Br. at 7.

Further, the focus of Jeffers Vet's additional discovery was on whether or not BMB had a policy of discussing its pricing policy with its dealers. Barnhard testified at his deposition that he "felt like that [BMB] would be able to clarify for a dealer the computational method that would be used to determine the 90 percent." Barnhard Depo. at 57. Bush also testified that she would clarify prices with dealers in [**17] relation to the math required to calculate the prices. See Bush Depo. at 33, 49, 50, 51, 58, 59. In fact, Bush "clarified" the "90 percent calculation" with several dealers. [*1338] See id. She stated that, "We'd have our calculators out and we would calculate it." Bush Depo. at 149. According to Jeffers Vet at oral argument, these contacts with dealers to help them calculate their prices are a per se violation of the Sherman Act.

Citing to the Monsanto case, BMB argues that evidence that BMB sought agreement from its dealers as to the new prices has not been produced. See Def. Br. at 12. BMB alleges that the pricing letter specifically illustrated that no assurances of agreement were ever sought. See id. BMB avers that Jeffers Vet has "admitted that it has no evidence of what communications, if any, existed between BMB and its non-terminated dealers." Def. Br. at 14.

⁴ Parke Davis involves an action against a drug manufacturer alleging that the drug manufacturer conspired with retail and wholesale druggists to maintain wholesale and retail prices of the manufacturer's pharmaceutical products. Parke Davis would send out a catalog with a "Net Price Selling Schedule" listing suggested minimum resale prices. Parke Davis, 362 U.S. at 32. The catalog also stated that it was Parke Davis' "continuing policy to deal only with drug wholesalers who observed that schedule . . ." Id. The government argued that Parke Davis by "entwining the wholesalers and retailers in a program to promote general compliance with its price maintenance policy went beyond mere customer selection and created combinations . . . to enforce resale price maintenance . . ." Id. at 37-38. The court found that the Parke Davis program "clearly exceeded the limitations of the Colgate doctrine . . ." Id. at 45. Parke Davis used the "refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby gain the retailers' adherence to its suggested minimum retail prices." Id. Parke Davis also violated the Colgate doctrine by discussing the policy with its wholesalers and retailers before implementing it. Id. at 46.

BMB points out that even after the extended discovery period granted by this court, no dealers were deposed and no dealers submitted affidavits saying they discussed the pricing policy with BMB. See Oral Argument.

BMB further argues that its dealings with Jeffers Vet illustrate its unwillingness to discuss **[**18]** its pricing policy. When Dr. Jeffers contacted BMB after Jeffers Vet was terminated Barney Barnhard refused to discuss the pricing policy and refused to reinstate Jeffers Vet as a dealer. See Def. Br. at 12. This refusal to discuss the policy, according to BMB, is precisely what Colgate dictates. BMB argued that if it complied with Jeffers Vet's demands it would then have been in violation of the Sherman Act.

Moreover, after the extended discovery period, BMB argues that all of the new depositions only strengthen its argument that BMB has not violated the Sherman Act. See Def. Supp. Br. at 1. According to the deposition of Barnhard, the pricing policy "centered on methods to maintain [BMB's] brand integrity and create value in the customer's mind for the BMB brand." See Barnhard Depo. at 17. Barnhard testified that he had no conversation with dealers prior to or after implementation of the pricing policy about the policy itself. See id. at 48. Ruth Bush, the Vice President of Sales for Rose America, stated in her deposition that she told dealers who wanted to discuss the pricing policy that, "I could not discuss it." Bush Depo. at 148-49. Finally, **[**19]** Kim Walker, Director of Customer Services, noted that BMB employees were "directed that they 'can't debate' and 'cannot discuss' the retail pricing policy with dealers." Def. Supp. Br. at 5 (citing Walker Depo. at 13).

The Monsanto court addresses the question of how much contact a manufacturer could have with its dealers in light of the Colgate doctrine. In Monsanto, a distributor of agricultural herbicides, Spray-Rite, brought suit against the manufacturer, Monsanto, alleging an antitrust violation after Spray-Rite was terminated. See Monsanto, 465 U.S. at 755-56. Other distributors were complaining about Spray-Rite's price-cutting practices. See id. at 758-59. There was also some testimony that indicated Monsanto officials terminated Spray-Rite because of price complaints. See id. at 759. Moreover, there was testimony from a Monsanto district manager that Monsanto told price-cutting distributors that if they did not maintain the suggested resale price, "they would not receive adequate supplies of Monsanto's new corn herbicide." Id. at 765. There was also evidence of a newsletter that discusses Monsanto's **[**20]** pricing and assured distributors that outlets would not sell the Monsanto products for less than the suggested retail price. See id. at 766. The Court found that it was "reasonable to interpret this newsletter as referring to an agreement or understanding that distributors and retailers would maintain prices . . ." Id.

The Court in Monsanto reaffirmed the holding of Colgate: "Under Colgate, the manufacturer can announce its resale **[*1339]** 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." Id. at 761. The Court did not find the evidence of complaints from other distributors of no probative value, but rather found that the burden was on the plaintiff to produce "additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy." Id. at 764 n.8. The Court stated that some contact between manufacturer and dealer had to be allowed: "To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational **[**21]** dislocation in the market." Id. at 764.

In the present case, Jeffers Vet submits the contact logs and the deposition testimony concerning the calculation of the prices for dealers as a per se violation of § 1 of the Sherman Act. Jeffers Vet does not cite any law to support its proposition that such contact was in violation of the Colgate doctrine and the court finds none. In fact, the Monsanto case illustrates that there can be some contact between a manufacturer and a dealer without violating the Colgate doctrine. See Monsanto, 465 U.S. at 764-65. The Court says, "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." Id. BMB was not going beyond a mere announcement and refusal to deal, as proscribed by Colgate, when it answered dealer questions concerning the specific calculation of prices in order to comply with the pricing policy. BMB's actions fall within Monsanto's acceptable communications between manufacturers and dealers.

The Eleventh Circuit embraced the Colgate **[**22]** and Monsanto line of cases in Helicopter. In Helicopter, Hughes manufactured helicopters and helicopter parts. See Helicopter, 818 F.2d at 1531. HSS was a franchised Hughes service center, often providing support services for Hughes helicopters at a significant discount. See id. HHS

argues it was terminated as a Hughes distributor "because it undersold other Hughes distributors in the sale of Hughes parts overseas." [Id. at 1532](#). HHS brought a [§ 1](#) Sherman Act claim against Hughes for allegedly engaging in a price fixing conspiracy. [See id.](#)

As discussed above, the Eleventh Circuit applied a "revised standard of proof" for summary judgment in this case. [Id.](#) Among the evidence reviewed by the district court was a series of communications from an overseas distributor. [See id. at 1535](#). The Eleventh Circuit found that these communications could be read as more than complaints. Other evidence included Hughes' international distributorship agreement which said amendments to the "suggested price lists . . . will be binding on Distributor upon notification in writing." [Id. at 1536](#). Further, there was [**23] evidence of threats of termination, a direct request by Hughes to HHS to stop its discounting tactics, and evidence that Hughes retaliated against HHS by franchising another service center in Florida. [See id. at 1536 n.10](#). The court found this evidence convincing of a "conscious commitment to a common scheme to achieve an unlawful objective." [Id. at 1535](#). Accordingly, the court held that "HHS has both alleged an economically reasonable conspiracy, and adduced evidence which tends to exclude the possibility that Hughes was acting independently." [Id. at 1534](#).

The present case is distinguishable from [Helicopter](#) because there is no evidence of a "conscious commitment" to a common scheme. Unlike in [Helicopter](#), in the present case there is no evidence of continued communications between BMB and its [*1340] dealers about the pricing policy or others violating the pricing policy. In fact, no evidence that other dealers discussed the pricing policy with BMB prior to the enactment of the policy has been submitted to the court. Fewer than ten customer call sheets have been submitted, out of over 1000 dealers, where dealers even called with questions [**24] about the pricing policy after it was enacted. [See Supp. Pl. Br. Exh. D, G, & H.](#) The depositions illustrate that BMB employees were only willing to explain to the dealers how to calculate prices to conform to the pricing policy. Thus, the court finds that this evidence of dealer contact does not "tend to exclude the possibility" that BMB was "operating independently" as required by the [Helicopter](#) standard.

Jeffers Vet also argues that BMB has violated the Sherman Act because BMB did not follow its pricing policy with every dealer. Jeffers Vet argues that at least one document shows that dealers were reporting other non-conforming BMB dealers to BMB (see Pl. Supp.2 Br. Exh. J) and that BMB was not uniformly enforcing its pricing policy. For example, Jeffers Vet alleges that Offut's West, another BMB dealer, notified BMB that it would be selling some BMB products below the 90% requirement at a Christmas sale. [See Pl. Supp.2 Br. at 8.](#) Offut's West has not been terminated as a dealer. [See id.](#)

BMB conceded at oral argument that it was notified of the Christmas sale held by Offut's West, where BMB products were sold below the prices permitted by the pricing policy. BMB [**25] also conceded that Offut's West was not terminated as a dealer. BMB argued, however, that BMB's dealing with Offut's West has no impact on whether BMB violated the Sherman Act. According to BMB, BMB not following its pricing policy in one instance with one dealer does not evidence a [Section 1](#) violation of the Sherman Act.

The court agrees with BMB. The evidence that Jeffers Vet has submitted to illustrate that BMB did not enforce its pricing policy does not "tend[] to exclude the possibility" that BMB and Offut's West were "acting independently." Evidence that BMB did not follow its pricing policy in the one instance of Offut's West's Christmas sale does not suggest a price fixing agreement between BMB and its dealers. [Section 1](#) of the Sherman Act was enacted to prevent concerted action from unreasonably restraining trade. [See ABA Section of Antitrust Law, Antitrust Law Developments 3](#) (4th ed. 1997). By not complying with its pricing policy, BMB cannot have a "conscious commitment to a common scheme" to fix prices. Cf. [Alliance Shippers v. Southern Pac. Transp. Co., 858 F.2d 567, 570 \(9th Cir. 1988\)](#) (noting that vertical arrangements resulting in price discrimination [**26] are not per se violations); [Seaboard Supply co. v. Congoleum Corp., 770 F.2d 367, 375 \(3d Cir. 1985\)](#) ("Moreover, [HN15](#) that a manufacturer may give preferential pricing and delivery terms to one distributor does not establish a per se violation of the [section 1](#) of the Sherman Act even though other distributors suffer losses in sales."). In other words, by not holding Offut's West to the prices set out by BMB, BMB cannot be said to be unlawfully maintaining its resale prices.

C. Coercion

Jeffers Vet argues that it can establish that BMB engaged in an illegal pricing scheme because BMB used coercive means to force dealers to comply with the suggested pricing. See Pl. Br. at 8. First, Jeffers Vet cites to Belk-Avery, Inc. v. Henry I. Siegel Co., 457 F. Supp. 1330, 1334 (M.D. Ala. 1978), to argue that a dealer must agree to the prices set by the manufacturer through free choice, prompted only the desirability of the product. Quoting from Carlson Machine Tools, Inc. v. American Tool, 678 F.2d 1253 (5th Cir. 1982), Jeffers Vet alleges: "Resale price maintenance occurs, 'when a price is announced [*1341] and some course of action is [**27] undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price . . . [resale price maintenance] must involve making a meaningful event depend on compliance or non-compliance with the 'suggested' or 'stated price'." Carlson, 678 F.2d at 1261. Jeffers Vet submits the letter from BMB to all of its dealers on June 1, stating, "In the event of your failure to comply . . . , you will be terminated as one of our dealers." Id. According to Jeffers Vet, the impending termination for failure to comply with the October price list "makes it unlikely that dealers were prompted solely by a desire to market BMB products when they followed BMB's suggested retail prices." Id.

Jeffers Vet's reliance on Belk-Avery and Carlson is misplaced. The proposition that Jeffers Vet relies on from Belk-Avery is a true statement. However, in the present case there is no coercion. Dealers must decide whether they want BMB products and if they do they must conform to BMB's pricing policy.⁵ [**29] The threatened action referred to by the Carlson court is to action by the manufacturer after it has agreed to deal with a dealer. Carlson [**28] says that a manufacturer's threats of termination and other coercive actions taken after a dealer fails to conform to the manufacturer's predetermined prices are "other means" and therefore the actions are in violation of the Sherman Act. Carlson, 678 F.2d at 1261. In the present case, BMB announced its terms of dealing before it implemented the price Policy.⁶ Another Georgia court agrees with Carlson. See Ben Sheftall Distributing Co., Inc. v. Mirta De Perales, Inc., 791 F. Supp. 1575 (S.D. Ga. 1992). This court found: "Where the actions involved are announcement and termination; monitoring of dealer performance through one's own employees or otherwise; or the use of third parties--to carry the message or to contact customers or replacement dealers--to effect a termination, no agreement is shown." Id. at 1583. Consequently, the court finds Jeffers Vet's arguments unpersuasive and finds that the evidence cannot establish that BMB illegally coerced its dealers into compliance with its announced pricing.

V. CONCLUSION

For the foregoing reasons, the Defendant's Motion for Summary Judgement is due to be GRANTED. There is simply no evidence before the court from which a reasonable jury could conclude the BMB illegally fixed prices through a conspiracy with dealers and that it terminated Jeffers Vet as a dealer in furtherance of such a conspiracy. The Defendant's Motion to Preclude Plaintiff from Presenting Damages Evidence is due to be DENIED as MOOT.⁷ A separate order will be entered in accordance with this memorandum opinion.

[**30] Done this 24th day of November, 1999.

W. HAROLD ALBRITTON

⁵ Citing Belk-Avery for any other proposition in this case would be fruitless as Belk-Avery is so factually dissimilar from the present case.

⁶ The court notes that even in Carlson the court did not determine that the activity of the manufacturer rose to the level of illegal activity. The court found that the dispute between the parties was not related to the pricing policy. See Carlson, 678 F.2d at 1261.

⁷ Because Defendant's Motion for Summary Judgment is due to be granted, no trial will be held in this case. Consequently, the Defendant's Motion to preclude Damages Evidence at trial is MOOT.

CHIEF UNITED STATES DISTRICT JUDGE

ORDER AND JUDGMENT

In accordance with the Memorandum Opinion entered on this day, it is hereby ORDERED as follows:

1. Defendant's Motion for Summary Judgment (Doc. # 12) is GRANTED.
2. Defendant's Motion to Preclude Plaintiff from Presenting Damages Evidence (Doc. # 31) is DENIED as MOOT.
- [*1342] 3. Judgment is entered in favor of the Defendant, Rose America Corp., d/b/a BMB, a division of Rose America Corporation, and against the Plaintiff, Jeffers Vet Supply, Inc.

4. Costs are taxed against the Plaintiff.

Done this 24th day of November, 1999.

W. HAROLD ALBRITTON

CHIEF UNITED STATES DISTRICT JUDGE

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Bourns, Inc. v. Raychem Corp.

United States District Court for the Central District of California

November 30, 1999, Decided; November 30, 1999, Filed; December 2, 1999, Entered

Case No. CV 98-1765 CM (Mcx)

Reporter

1999 U.S. Dist. LEXIS 23679 *

BOURNS, INC., a California corporation, Plaintiffs, v. RAYCHEM CORPORATION, a Delaware corporation, Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part [Bourns, Inc. v. Raychem Corp., 1999 U.S. Dist. LEXIS 23676 \(C.D. Cal., Dec. 28, 1999\)](#)

Prior History: [Bourns, Inc. v. Raychem Corp., 1998 U.S. Dist. LEXIS 13361 \(C.D. Cal., June 1, 1998\)](#)

Core Terms

Phase, antitrust, summary judgment, res judicata, manufacture

Counsel: [*1] For Bourns Inc, a Calif corp, Plaintiff: Kenneth R O'Rourke, Mark Alan Samuels, LEAD ATTORNEYS, O'Melveny & Myers, Los Angeles, CA.

For Raychem Corporation, a Delaware corp, Defendant: Daniel J Kroll, Heather A Young, LEAD ATTORNEYS, Legal Strategies Group, Emeryville, CA; Gregory S Gilchrist, LEAD ATTORNEY, Kilpatrick Townsend & Stockton LLP, San Francisco, CA; Mark Alan Flagel, LEAD ATTORNEY, Latham and Watkins LLP, Los Angeles, CA; Richard J Mooney, LEAD ATTORNEY, Holme Roberts & Owen LLP, San Francisco, CA; Thomas G Scavone, LEAD ATTORNEY, Niro Scavone Haller & Niro, Chicago, IL.

For Thermacon Inc, Counter Claimant: Heather A Young, LEAD ATTORNEY, Legal Strategies Group, Emeryville, CA; Mark Alan Flagel, LEAD ATTORNEY, Latham and Watkins LLP, Los Angeles, CA; Peter Harry Goldsmith, LEAD ATTORNEY, Townsend Townsend and Crew, San Francisco, CA; Richard J Mooney, LEAD ATTORNEY, Holme Roberts & Owen LLP, San Francisco, CA.

For Raychem Corporation, Counter Claimant: Daniel J Kroll, LEAD ATTORNEY, Legal Strategies Group, Emeryville, CA; Gregory S Gilchrist, LEAD ATTORNEY, Kilpatrick Townsend & Stockton LLP, San Francisco, CA; Mark Alan Flagel, LEAD ATTORNEY, Latham and Watkins LLP, Los Angeles, CA. [*2]

For Bourns Inc, Counter Defendant: Kenneth R O'Rourke, LEAD ATTORNEY, Mark Alan Samuels, O'Melveny & Myers, Los Angeles, CA.

For Bourns Multifuse Taiwan Ltd, Defendant: Kenneth R O'Rourke, Mark Alan Samuels, LEAD ATTORNEYS, O'Melveny & Myers, Los Angeles, CA.

For Raychem Corporation, Counter Claimant: Daniel J Kroll, LEAD ATTORNEY, Legal Strategies Group, Emeryville, CA; Gregory S Gilchrist, LEAD ATTORNEY, Kilpatrick Townsend & Stockton LLP, San Francisco, CA.

For Bourns Inc, Counter Defendant: Mark Alan Samuels, O'Melveny & Myers, Los Angeles, CA.

For Steven D Hogge, doing business as New Market Consultants, Polymer Protection Technologies Inc, Counter Defendants: Albert J Tumpson, LEAD ATTORNEY, Albert J Tumpson Law Offices, Beverly Hills, CA; Allan Gabriel, LEAD ATTORNEY, Dykema Gossett, LLP, Los Angeles, CA.

For Bourns Multifse Hong Kong Ltd, Counter Defendant: Kenneth R O'Rourke, Mark Alan Samuels, LEAD ATTORNEYS, O'Melveny & Myers, Los Angeles, CA.

For Raychem Corporation, Counter Claimant: Daniel J Kroll, Heather A Young, LEAD ATTORNEYS, Legal Strategies Group, Emeryville, CA; Gregory S Gilchrist, LEAD ATTORNEY, Kilpatrick Townsend & Stockton LLP, San Francisco, CA; Richard [*3] J Mooney, LEAD ATTORNEY, Holme Roberts & Owen LLP, San Francisco, CA; Thomas G Scavone, LEAD ATTORNEY, Niro Scavone Haller & Niro, Chicago, IL.

For Bourns Inc, Counter Defendant: Mark Alan Samuels, LEAD ATTORNEY, O'Melveny & Myers, Los Angeles, CA.

Judges: Carlos R. Moreno, United States District Judge.

Opinion by: Carlos R. Moreno

Opinion

ORDER GRANTING MOTION TO EXCLUDE THE REPORT OF BOURNS' EXPERT JOHN BRIGGS

On October 25, 1999, Raychem filed a motion to exclude the expert report of John Briggs. On November 22, 1999, the Court heard oral argument on this matter. Having read and considered the moving papers, opposition, and reply, and all admissible evidence and argument offered in relation to this motion, the Court grants Raychem's motion to exclude the expert report of John Briggs.

Factual and Procedural Background

Raychem Corporation ("Raychem") is a Menlo Park, California based manufacturer of electronic and other high-technology products. During the late 1970s and early 1980s, Raychem developed a Polymeric Positive Temperature Coefficient ("PPTC") device that protects electronic circuits from excessive electric current. Beginning in the late 1970s, Raychem had applied for and received more than 80 patents relating [*4] to its PPTC technology.

Bourns, Inc. is a manufacturer of electronic components based in Riverside, California. In 1994, Bourns hired as a consultant Steve Hogge, who had been employed by Raychem from September 1986 until 1993. While at Raychem, Hogge had managed a strategic planning processing related to the manufacture and sale of PPTCs.

In June 1994, Hogge presented a business plan to Bourns' Business Development Committee regarding the manufacture and sale of PPTCs. Bourns subsequently hired Hogge in September 1994, and opened a research and development center in Hong Kong dedicated to the development of a PPTC product by January 1995. It released its first PPTC product in October 1996.

From 1988 through 1995, a Bourns' subsidiary distributed Raychem PPTCs pursuant to a private label agreement ("PLA") to certain end users in Europe and Israel. In 1994, Raychem gave Bourns notice that the PLA would terminate in August 1995. During several months in 1994, before Raychem gave notice of the termination, Raychem and Bourns negotiated the possible renewal of the PLA. During these negotiations, Bourns sought to extend the agreement to include a worldwide license that would have entitled [*5] it to sell more PPTC products.

In December 1994, Raychem brought suit against Bourns and Hogge in San Mateo Superior Court on grounds that Hogge had misappropriated trade secrets and other confidential, proprietary information concerning PPTCs. In May 1995, Bourns filed a countersuit in federal court accusing Raychem of violating anti-trust laws. The two actions subsequently were consolidated.

The Court originally planned to try the antitrust and trade secret claims together over one year ago. During the first proceeding, however, the Court bifurcated the trial into "phases" due to time constraints. In the first trial, Phase One, the Court tried the antitrust claims. In February 1998, during Phase One, Raychem moved for summary

judgment on several of Bourns' antitrust claims. The motion, summary judgment #3, was partially granted and partially denied on May 27, 1998.

During the Phase Two proceeding, the Court will adjudicate the trade secret claims and antitrust damages. The Phase Two trial on this matter is scheduled to begin on January 4, 2000.

On October 11, 1999, Bourns served on Raychem the report of expert witness, Mr. John Briggs ("Briggs"), a Howley & Simon antitrust lawyer [*6] from Washington D.C. Briggs intends to offer expert testimony at the Phase Two damages trial on issues of law. Specifically, Briggs intends to testify that if Duracell, one of four principal primary lithium battery customers, to whom Raychem sells PPTC products, had come to him and sought his advice in late 1994 he probably would have told Duracell that (1) the exclusive supply contract between Raychem and Duracell was most likely unenforceable; (2) Duracell should regard itself as free to purchase PPTCs from other vendors, like Bourns; (3) Raychem would not likely seek to enforce the contract; and (4) if Raychem did seek to enforce the contract, it likely would be held enforceable.

Briggs addresses a 10-year exclusive supply contract ("Duracell-Raychem contract"), entered into in 1994. The contract obligated Duracell to purchase from Raychem for a period of ten years, all of the PPTCs that Duracell required for the manufacture of its primary lithium batteries. In exchange, Raychem was required to (1) provide Duracell with all of its PPTC requirements; (2) pay Duracell \$700,00 for certain capital equipment that had been developed by Thermocon and paid for by Duracell; (3) provide Duracell [*7] with an immediate reduction in the prices paid for PPTCs; and (4) provide Duracell with specific further price reductions at various stages, over the life of the contract.

Discussion

A. The Briggs report is barred by *Res Judicata*

The Court, in its May 27, 1999, summary judgment order, did not hold that the Duracell-Raychem contract was legal as a matter of law. Rather, the Court held that Joyin's contract with Raychem was legal and granted summary judgment on the issue. Summary Judgment Order #3, p. 15. The Court labeled this section of the order, "Raychem's Deal with Joyin" and held that "Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." *Id.* (quoting [*Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 \(1984\)*](#) (Brennan, J., concurring)). However, the Court's ruling was plainly limited to the Joyin contract. The Court did not rule that Raychem's exclusive dealing contract with Duracell was legal.

Moreover, Bourns' complaint and its opposition papers for Summary Judgment #3 and referred to Duracell only in reference to confidentiality agreements and not exclusive dealing. Bourns alleged,

Raychem [*8] also engaged in a decade-long practice of trading valuable concessions for the silence of those who had uncovered its patent fraud, to keep this information from potential competitors who might use it to compete. Beneficiaries included . . . a customer, Duracell, which received from Raychem valuable price concessions.

Bourns Opposition to Summary Judgment #3. The Court denied Raychem's motion for summary judgment on this issue and did not address the Duracell-Raychem contract. Thus, the Court has not ruled on the legality of the Duracell-Raychem contract.

However, the trial for antitrust liability has been completed, and Bourns cannot now litigate liability issues during the trial on damages. *Res judicata* bars "relitigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits. It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to

the judgment; rather, the relevant inquiry is whether they could have been brought." [United States v. Northrop Corp., 147 F.3d 905, 909 \(9th Cir. 1998\).](#)

Here, Bourns is asserting [*9] through Briggs that the Duracell-Raychem contract was an illegal exclusive dealing contract under antitrust law. However, Bourns certainly had the opportunity to litigate this issue in the previous trial. Bourns challenged the legality of another exclusive dealing contract in Phase One, the Joyin contract, and even placed the confidentiality provisions of the Duracell-Raychem contract at issue in Phase One. Bourns could have addressed the legality of Duracell's exclusive dealing contract with Raychem with the other antitrust liability issues in Phase One.

In response, Bourns asserts that the Briggs testimony is relevant as to damages, not antitrust liability. However, the Briggs testimony is not so easily confined, even with a limiting instruction, and would require revisiting a liability issue. Bourns' failure to address this liability issue in Phase One means it is precluded by *res judicata* from entering expert testimony as the claims "could have been asserted" in the first trial. *Id.*

Normally, "For *res judicata* to apply, there must be . . . a final judgment on the merits . . ." [Cabrera v. City of Huntington Park, 159 F.3d 374, 381 \(9th Cir. 1998\)](#). However, under the peculiar circumstances [*10] of the bifurcated trials, the Court must apply *res judicata* to those issues decided in Phase One even though there is no final judgment on the merits. The parties cannot be allowed to relitigate issues that were decided or that should have been decided in Phase One.

B. The Briggs Report is Timely

The Court has not established a scheduling order for Phase Two expert reports. Although the parties agreed to exchange some expert witness reports in August 1999, there was no agreement that August 1999 would be a binding deadline. Therefore, the report is timely.

Conclusion

For the reasons set forth above, the Court grants Raychem's motion to exclude the expert report of Briggs.

IT IS SO ORDERED.

DATED: November 30, 1999

/s/ Carlos R. Moreno

Carlos R. Moreno

United States District Judge

Hewlett-Packard Co. v. Boston Sci. Corp.

United States District Court for the District of Massachusetts

November 30, 1999, Decided

CIVIL ACTION NO. 99-10244-PBS

Reporter

77 F. Supp. 2d 189 *; 1999 U.S. Dist. LEXIS 19089 **; 1999-2 Trade Cas. (CCH) P72,732

HEWLETT-PACKARD COMPANY, Plaintiff, v. BOSTON SCIENTIFIC CORPORATION, Defendant.

Disposition: [**1] Defendant's motion to dismiss state claims DENIED.

Core Terms

catheters, consoles, allegations, license agreement, market share, monopolize, Products, technology, antitrust, Licensed, patent, monopoly power, acquisition, manufacture, customers, interface, monopoly, anti trust law, competitor, acquiring, pullback, markets, exclusionary, imaging, specifications, ultrasound, consent order, introducing, probability, Discovery

LexisNexis® Headnotes

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

HN1[Motions to Dismiss, Failure to State Claim

In determining whether to dismiss a complaint for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6), the court must accept as true the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor. The complaint may not be dismissed 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.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN2[Regulated Practices, Private Actions

In antitrust cases where the proof is largely in the hands of the defendant, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted sparingly. However, sparingly does not mean never. A plaintiff must allege sufficient facts in order to state each element of the antitrust violation.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

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 > Scope > General Overview

HN3 Scope, Monopolization Offenses

The federal antitrust law, § 2 of the Sherman Act, makes it unlawful for a firm to monopolize, or attempt to monopolize, any part of the trade or commerce among the several states. 15 U.S.C.S. § 2(a). To state a claim of monopolization, a plaintiff must allege: 1) that the defendant possesses monopoly power in the relevant market; and 2) that the defendant willfully acquired, maintained or used that power by exclusionary means.

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

HN4 Monopolies & Monopolization, Actual Monopolization

Monopoly power is often defined as the power to raise prices and exclude competition. The existence of such power ordinarily may be inferred from the predominant share of the market. For pleading purposes, an allegation of market share of 70 percent has been held to be an adequate basis for an inference of power in a relevant market.

Antitrust & Trade Law > Sherman Act > Claims

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

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

HN5 Sherman Act, Claims

The second element of a § 2 of the Sherman Act claim for monopolization is the acquisition or maintenance of monopoly power by other than such legitimate means as patents, superior product, business acumen, or historic accident. The complaint must allege that the monopolist acquired or maintained that monopoly through exclusionary conduct. Exclusionary conduct is conduct, other than competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining a monopoly. Conduct is exclusionary if it exceeds the needs of ordinary business dealings and unnecessarily excludes competition from the relevant market. The First Circuit succinctly framed the question: Was defendant's conduct reasonable in light of its business needs or did it unreasonably restrict competition?

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

Trade Secrets Law > Federal Versus State Law > Antitrust Law

Trade Secrets Law > Breach of Contract > Licensing Agreements

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[**HN6**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

An agreement which purports to license trade secrets, but in reality, is no more than a sham, or device designed to restrict competition, may violate antitrust laws.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN7**](#) [down] **Monopolies & Monopolization, Attempts to Monopolize**

To state a claim for attempted monopolization, a plaintiff must allege: 1) that the defendant engaged in exclusionary conduct; 2) with the specific intent to obtain monopoly power; and 3) a dangerous probability exists that the attempt will succeed. A specific intent to monopolize or restrain competition can often be inferred from a finding of bad faith.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN8**](#) [down] **Monopolies & Monopolization, Attempts to Monopolize**

To satisfy the last element of a claim for attempted monopolization, a plaintiff must allege facts to show that there was a dangerous probability that defendant would achieve a monopoly as a result of the alleged actions. The probability of successfully monopolizing a market is usually assessed through market share. The greater share a defendant initially controls, the greater the probability of achieving monopoly status. However, proximity to monopoly status is not enough; the defendant must also have the ability to propel itself to monopolistic control over the market.

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

[**HN9**](#) [down] **Private Actions, Remedies**

Antitrust plaintiffs face an additional requirement to allege an "antitrust injury." Failure to make such a pleading is a fatal defect. The U.S. Supreme Court defined this term as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' conduct unlawful.

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

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

[**HN10**](#) [down] **Private Actions, Standing**

The presumptive "proper" plaintiff in an antitrust action is a customer who obtains services in the threatened market or a competitor who seeks to serve that market. When a defendant engages in anticompetitive acts in an attempt to gain a monopoly, the competitor who is being driven out of the market has standing.

Counsel: For HEWLETT-PACKARD COMPANY, Plaintiff: Robert M. Buchanan, Jr., Kevin P. Light, Joshua Engel, Choate, Hall & Stewart, Boston, MA.

For BOSTON SCIENTIFIC CORPORATION, Defendant: Robert F. Ruyak, P. Todd Mullins, Howrey & Simon, Washington, DC.

For BOSTON SCIENTIFIC CORPORATION, Defendant: Steven M. Bauer, Kurt W. Lockwood, Testa, Hurwitz & Thibeault, Boston, MA.

Judges: PATTI B. SARIS, United States District Judge.

Opinion by: PATTI B. SARIS

Opinion

[*191] MEMORANDUM AND ORDER

November 30, 1999

Saris, U.S.D.J.

I. INTRODUCTION

Plaintiff Hewlett-Packard Company ("HP") brings this action ¹ against defendant Boston Scientific Corporation ("BSC") alleging that BSC unlawfully monopolized, or attempted to monopolize, the intravascular ultrasound ("IVUS") catheter and console markets in the United States, in violation of [Section 2](#) of the Sherman Antitrust Act, [15 U.S.C. § 2](#), and state law. An IVUS catheter is a flexible tube-like device used in conjunction with a console to obtain sonographic images of arteries. HP also seeks a declaratory judgment that it is no longer obligated to make payments under a licensing [*2] agreement which the two companies entered into pursuant to a consent decree required by the Federal Trade Commission ("FTC") as a condition to allowing BSC's merger with two other medical technology companies.

BSC has filed a motion to dismiss all counts pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) on the grounds, *inter alia*, that the antitrust claim is facially deficient because [*3] HP failed to allege: (1) that BSC has current monopoly power in the catheter or console markets in the United States; or (2) that BSC committed predatory acts that could reasonably be interpreted as causing antitrust injury to competition. After hearing and a review of the excellent briefing by both sides, the motion is **DENIED**.

II. FACTUAL BACKGROUND

When all reasonable inferences are drawn in the non-movant's favor, HP's complaint alleges the following facts:

[*192] A. *The Products: Catheters and Consoles*

IVUS catheters are medical devices that are used to diagnose and treat cardiovascular ailments. They are flexible tube-shaped objects that are inserted into a blood vessel. A transducer, located at the forward end of the catheter, generates and transmits ultrasound waves. These waves reflect off the arterial walls, and a receiver measures the amount of returned energy. The catheter compares the transmitted and received energy and sends a signal to a

¹ The complaint (corrected) alleges that BSC has unlawfully monopolized, or attempted to monopolize, the market for IVUS catheters and consoles in the United States in violation of [Section 2](#) of the Sherman Antitrust Act, [15 U.S.C. § 2](#) (Count I); violated Mass. Gen. L. ch. 93A (Count II); breached the licensing agreement (Count III); breached the implied covenant of good faith and fair dealing (Count IV); and has been unjustly enriched (Count V). The complaint seeks a declaratory judgment that HP is no longer required to make payments under the licensing agreement (Count VI), as well as treble damages and attorneys fees.

console that displays a 360 degree image of the blood vessel. The image allows physicians to assess the amount of plaque deposits in blood vessels.

There are two types of IVUS catheters. Phased array catheters [**4] use several stationary transducers to create a 360 degree image of the blood vessel. Mechanical catheters also create a 360 degree image, but do so with a single transducer that is spun by an external motor drive unit. This case centers around mechanical catheters.

B. Market Conditions Prior to 1995

BSC, headquartered in Natick, Massachusetts, develops and manufactures medical products. HP's headquarters is in Palo Alto, California, and its Medical Products Group is located in Andover, Massachusetts. Both companies have long been participants in IVUS markets -- BSC sold catheters and HP sold consoles. Until 1995, they had a cooperative history and on occasion have engaged in joint ventures to design BSC catheters specifically to operate on HP consoles. As of mid-1994, BSC and Cardiovascular Imaging Systems, Inc. ("CVIS") were the market leaders with respect to the development, manufacture, and sale of IVUS catheters. BSC held 40% of that market, and CVIS held 50%. The market for IVUS consoles was equally concentrated -- CVIS controlled 40% and HP controlled 50%.

In August 1994, BSC dramatically shifted the balance of power by seeking to acquire CVIS. Three months later, [**5] BSC took steps to acquire SCIMED Life Systems, Inc. ("SCIMED"), which was preparing to enter the IVUS catheter market within the next two to three years.

Believing that BSC's acquisitions would lessen competition and create monopoly power in the IVUS catheter market, in January 1995 the Federal Trade Commission filed suit against BSC for violation of the Clayton Act, [15 U.S.C. § 45](#), and the Federal Trade Commission Act, [15 U.S.C. §§ 18 & 21](#). The FTC sought an injunction to prevent the CVIS acquisition.

C. The Licensing Agreement

As part of settlement negotiations with the FTC, BSC sought a suitable competitor in the IVUS catheter market. On February 21, 1995, the company entered into a licensing agreement granting HP the right to use BSC's IVUS technology ("Licensed Technology") in conjunction with the manufacture and sale of certain products ("Licensed Products").

The licensing agreement defined Licensed Technology as all BSC, SCIMED, and CVIS patents used for the "development, manufacture and sale of Licensed Products . . . and all existing know-how" relating to the manufacture, sale, and distribution of those products. [**6] Licensed Products included "ultrasound imaging catheters, imaging cores and imaging guide wires which are designed for diagnostic or therapeutic use, or both, in the human heart and/or in the human coronary and peripheral vascular system."

The Licensed Products definition also referenced Exhibit A, stating that it "includes and is no narrower than the collective claims of the patents . . . listed on Exhibit A." Among several patents listed on Exhibit A was BSC's "pullback patent." ² This technology allows physicians [*193] to retrieve an inserted catheter at a fixed rate of speed, enabling the physician to measure plaque accumulations more accurately.

The licensing agreement also included an "open interface" provision that required both parties to ensure that their consoles were able to be used with the other party's existing catheters. Each party assumed a responsibility to [**7] "cooperate . . . in furthering this open interface objective," but retained the option of upgrading its consoles. To facilitate this provision, prior to introducing a new IVUS product, the parties agreed to share technical information relating to new products.

The licensing agreement also contained an "interim supply commitment," which was designed to allow HP to compete in the catheter market while developing its own line of catheters. BSC agreed to supply HP with all BSC

² U.S. Patent No. 5,361,768. Patents for related technologies, U.S. Patent Nos. 5,485,846; 5,592,942; and 5,759,153, have since been issued.

catheters at a below market price (average manufacturing cost plus 40%) for resale by HP. The agreement also required BSC, immediately after acquiring CVIS, to introduce its new "Spy" catheter, which was specifically developed for use with HP consoles.

In exchange for the right to use BSC's technology, HP agreed to pay a substantial fee. The parties agreed that one-third of the total fee was to be paid within 30 days of the agreement's effective date. The remaining fee was to be paid in three equal installments payable in May 1998, 2000, and 2002. To date, HP has made the initial payment and the May 1998 installment.

D. The FTC Consent Order

The FTC agreed to withdraw its suit and allow the CVIS [**8] acquisition only after BSC entered into the licensing agreement with HP. On February 23, 1995, the FTC and BSC entered into a Consent Order, requiring BSC to license its IVUS technology portfolio to HP "pursuant to, and in accordance with, the February 21, 1995 agreement" between BSC and HP "which agreement is appended to this Order in Confidential Appendix II." (Pl. Exh. B at 12.) The order's stated purpose was to create an "independent competitor in the development, production and sale of IVUS catheters and to remedy the lessening of competition resulting from the CVIS acquisition and the SCIMED acquisition as alleged in the Commission's Complaint." (*Id.* at 5.) IVUS catheters were defined as "intravascular ultrasound catheters, intracardiac ultrasound catheters, removable imaging cores used in intravascular or intracardiac ultrasound imaging, and intravascular imaging guidewires." (*Id.* at 3)

The FTC's order contained four primary provisions. First, it required BSC to license its "IVUS Technology Portfolio" to HP or another suitable company. It defined IVUS technology portfolio to include: a) all rights to BSC, CVIS, and SCIMED United States and foreign IVUS catheter patents; [**9] b) all CVIS and SCIMED trade secrets, technology and know-how relating to IVUS catheters; and c) all IVUS catheter customer lists. Second, it required BSC to provide technical assistance to the licensee in manufacturing the catheters and obtaining regulatory approval. Third, BSC was required to provide HP with a supply of catheters for resale. Finally, the order prohibited BSC from entering into any arrangement that would make BSC's catheters compatible with only certain consoles.

In exchange for these commitments, the FTC withdrew its suit and request for an injunction. BSC acquired CVIS and SCIMED.

E. Alleged Unlawful Acts

HP claims that BSC "consciously and willfully thwarted the purposes of the Consent Order and the License Agreement," and by doing so secured a "monopoly over IVUS catheters and acquired or attempted to acquire a monopoly over IVUS consoles." [*194] HP alleges the following predatory conduct:

1. Refusal to Provide Complete and Accurate Interface Specifications

Prior to acquiring CVIS, BSC produced a line of catheters named "Sonicath." These catheters were designed to operate on HP consoles. At the same time, CVIS produced a line of catheters [**10] named "Microline" that were designed to operate on CVIS consoles. After the merger, BSC replaced these catheters with a new line called "Ultracross" that combined the features of the Microline and Sonicath catheters.

Customers advised HP that the Ultracross catheters did not spin properly when used with HP consoles. Similar problems were reported with BSC's Microview, Microrail, and Discovery catheters. HP claims this is a violation of the licensing agreement which required BSC to disclose "all necessary technical specifications, regulatory information and the like" for HP to ensure its consoles were compatible with BSC catheters. (Pl. Exh. C. at 8.) HP further alleges that BSC sales representatives exploited these problems to discourage customers from purchasing consoles or catheters from HP.

2. BSC Threatened to Sue HP and HP's Customers for Patent Infringement

HP marketed a catheter with an automatic pullback device that was based on the pullback patent listed in Exhibit A of the licensing agreement, which was referenced in the Licensed Products definition. The HP catheter directly competed with a BSC catheter that had a pullback device. BSC claimed that HP was not **[**11]** authorized to use the pullback patent and threatened to sue HP for patent infringement. BSC also told customers that HP's pullback device infringed on a BSC patent and threatened to sue customers who continued to use the HP automatic pullback device. HP alleges that the BSC's threats caused some potential customers to decide not to purchase HP catheters or consoles. HP claims BSC's actions violated its agreement not to assert any of its patent rights in "a way that would prevent HP from practicing any of the Licensed Technology to manufacture, use, or sell Licensed Products." (Pl. Exh. C at 2-3.)

3. BSC Refused to Create a Console Interface for the HP Scout Catheter

HP designed and developed a new catheter called "Scout" and provided its technical specifications to BSC so that BSC could ensure that the catheter would operate with BSC consoles. BSC did not create the requested interface. HP alleges that by not making a meaningful effort to do so, BSC sought to make the catheter commercially unsuccessful in furtherance of BSC's objective to monopolize the catheter and console markets. HP claims this refusal violated BSC's obligation to "provide on all its IVUS consoles . **[**12]** . . . open interfaces to the IVUS products of the other party." (Pl. Exh. C at 7.)

4. BSC Discontinued the Sonicath Catheter, Refused to Provide HP with BSC's Discovery Catheter, and Failed to Sell its Spy Catheters

In 1992, BSC and HP entered into a joint development agreement to design and market BSC's Sonicath catheters which were intended to be used exclusively with HP consoles. After the CVIS acquisition, BSC developed a new line of catheters called "Discovery" and decided to discontinue the Sonicath line. BSC did not supply HP with the Discovery catheter for resale, and decided not to introduce the Spy catheter line. HP claims this violates BSC's obligation to "make available to HP all BSC IVUS Catheters," (Pl. Exh. C. at 8), and "to begin sales of the 'Spy' catheter immediately upon consummation of the CVIS acquisition," (*Id.* at 11).

[*195] HP alleges that these decisions dramatically reduced the number of catheters that were compatible with HP consoles and discouraged customers from purchasing HP consoles.

5. BSC Failed to Provide HP With the Required Notice of Its Redesign of an IVUS Catheter Hub

A hub is the fitting that connects the catheter to the console. **[**13]** It allows the console to spin the catheter at a fixed rate of speed. After acquiring CVIS, BSC redesigned the Sonicath hub to fit its (formerly CVIS's) consoles. BSC did not provide the technical specifications of the redesigned hub to HP prior to introducing it into the market. HP claims that BSC willfully breached the licensing agreement which required a party introducing a new product to provide the product's technical specifications to the other party "no later than 180 days prior to . . . commercial introduction" of that product. (Pl. Exh. C at 8.)

III. DISCUSSION

HN1[↑] In determining whether to dismiss a complaint for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6), the Court must accept as true "the well-pleaded facts as they appear in the complaint, extending [the] plaintiff every reasonable inference in his favor." Coyne v. City of Somerville, 972 F.2d 440, 442-43 (1st Cir. 1992) (citing Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 51 (1st Cir. 1990)); see also Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 740, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976). The complaint **[**14]** may not be dismissed 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." Roeder v. Alpha Indus., Inc., 814 F.2d 22, 25 (1st Cir. 1987) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

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This standard applies to an antitrust claim. See [Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 748 \(1st Cir. 1994\)](#). [HN2](#)[↑] In antitrust cases "where the proof is largely in the hands of the defendant], dismissals prior to giving the plaintiff ample opportunity for discovery should be granted sparingly." [Hospital Bldg. Co., 425 U.S. at 746](#). However, sparingly does not mean never. A plaintiff must allege sufficient facts in order to state each element of the antitrust violation. See [C.R. Bard, Inc. v. Medical Elecs. Corp., 529 F. Supp. 1382, 1389 \(D.Mass. 1982\)](#).

A. Monopoly Power

BSC argues that the complaint fails to allege its current market power or define the market conditions during the relevant time period. [HN3](#)[↑] The [antitrust law](#) makes it unlawful for a firm [\[**15\]](#) to "monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States." Sherman Act [§ 2, 15 U.S.C. § 2\(a\)](#). To state a claim of monopolization, a plaintiff must allege: 1) that the defendant possesses monopoly power in the relevant market; and 2) that the defendant willfully acquired, maintained or used that power by exclusionary means. See [United States v. Grinnell, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#); [Town of Concord v. Boston Edison Co., 915 F.2d 17, 21 \(1st Cir. 1990\)](#). The two elements will be discussed separately.

1. Monopoly Power

[HN4](#)[↑] Monopoly power is often defined as "the power to raise prices and exclude competition." [United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 \(1956\)](#); see also [Aspen Skiing Co. v. Aspen Skiing Highlands Corp., 472 U.S. 585, 596 n.20, 86 L. Ed. 2d 467, 105 S. Ct. 2847 \(1985\)](#) (same). "The existence of such power ordinarily may be inferred from the predominant share of the market." [Grinnell, 384 U.S. at 571](#). For pleading purposes, [\[*196\]](#) an allegation of market share of 70 [\[**16\]](#) percent has been held to be an adequate basis for an inference of power in a relevant market. [International Audiotext Network, Inc. v. AT&T, 893 F. Supp. 1207, 1217 \(S.D.N.Y. 1994\)](#) (suggesting that a conclusory allegation of predominant market share, without more, would support dismissal, but dismissing on other grounds), aff'd, [62 F.3d 69 \(2d Cir. 1995\)](#).

With respect to the IVUS catheter market, HP asserts that, once BSC acquired CVIS, BSC controlled 90% of the IVUS catheter market. (Compl. at PP 2, 38.) Now that HP has left that market supposedly because of BSC's anti-competitive behavior, HP alleges that BSC currently accounts for "substantially all" of the IVUS catheters sold in the market. ([Id. P107](#)).

Defendant argues that the market share prior to the licensing agreement is irrelevant because it is outdated, and that these allegations concerning today's market shares are insufficient. It asserts that the four year old market no longer exists, that the agreement substantially changed the competitive landscape, and that a third party (EndoSonics Corporation) has developed into a stronger competitor. Because BSC's allegations that its market [\[**17\]](#) share is declining and EndoSonics' share is growing are beyond the four corners of the complaint, they cannot be considered in resolving this motion -- although they will certainly be relevant at another stage of the litigation. See [Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1184 \(1st Cir. 1994\)](#) ("[Antitrust law](#) generally seeks to punish and prevent harm to consumers in particular markets, with a focus on relatively specific time periods."); [United States v. Sargent, 785 F.2d 1123, 1127 \(3d Cir. 1986\)](#) (discussing changes in market share between an indictment and trial); and [Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 \(6th Cir. 1982\)](#) (stating that a decline in an antitrust defendant's market share during the relevant period "belies whatever inference of capacity to monopolize that may be drawn from the size of its market share").

In light of the allegations concerning the pre-agreement market share, the high barriers to entry in the marketplace posed by the patents, the regulatory clearance requirements, the need for technological expertise, and HP's precipitous withdrawal, these allegations [\[**18\]](#) that BSC controls "substantially all" the catheter market are more than ample to meet pleading requirements with respect to monopoly power in the IVUS catheter market in the United States. See [International Audiotext, 893 F. Supp. at 1217](#); [C. R. Swaney Co. v. Atlas Copco N. Am., Inc., 1987 U.S. Dist. LEXIS 12470](#), CIV.A. No. 85-587- [N, 1987 WL 33025](#), *13 (D.Mass. 1987) ("While it may have been

preferable to make more specific allegations as to market share, at this early stage of the litigation an allegation of 'market dominance' is sufficient to survive a motion to dismiss." (citation omitted)); *but cf. Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 9 (9th Cir. 1963)* (finding the allegation that defendant "was one of the largest manufacturers of beer in the west" was deficient because nothing was said about its position in the market in question).

A somewhat closer issue involves the console market. The complaint states that as of 1995, HP controlled 50% of the console market, making it the market share leader, and CVIS controlled 40%. There were no other significant competitors. (Compl. PP 33-34.) Once BSC merged with CVIS, it gained control over [**19] 40% of this market. (*Id.*) The complaint alleges that HP was prevented from competing in that console market, and that BSC now accounts for "substantially all of the IVUS consoles sold in the United States." (*Id. P 107*). Because HP was the market leader in the manufacture of IVUS consoles, it is less clear whether its withdrawal from the market now catapults BSC into the current position of having monopoly power [*197] in that market. For example, nothing is alleged with respect to BSC's current activities in manufacturing IVUS consoles. However, the Court need not determine whether the complaint edges over the low pleading barrier with respect to the monopolization claim because plaintiff also asserts a claim of attempted monopolization, which easily salvages this claim.

2. Willful Acquisition and Maintenance of Monopoly Power

HN5 [↑] The second element of a Section 2 claim is the acquisition or maintenance of monopoly power by other than such legitimate means as patents, "superior product, business acumen, or historic accident." *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983)* (citing *Grinnell, 384 U.S. at 570-71*). [**20] The complaint must allege that the monopolist acquired or maintained that monopoly through exclusionary conduct. See *id.* "Exclusionary conduct is conduct, other than competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining a monopoly." *Id.* (quoting 3 P. Areeda & D. Turner, Antitrust Law P 626, at 83 (1978)). Conduct is exclusionary if it exceeds the needs of ordinary business dealings and unnecessarily excludes competition from the relevant market. *Id.* The First Circuit succinctly framed the question: "Was [defendant's] conduct reasonable in light of its business needs or did it unreasonably restrict competition?" *Id.*

HP claims that BSC willfully acquired a monopoly by acquiring CVIS and SCIMED, and violating in bad faith the FTC's consent decree imposed as a condition of the merger. HP contends that BSC duped the FTC into allowing the acquisitions by licensing its technology to HP, and then, by systematically breaching the licensing agreement, BSC completely undercut any possible remedial effect of the consent decree. The complaint sets forth a litany of alleged breaches that HP contends were [**21] done with the calculated desire to exclude HP from the IVUS console and catheter markets. The alleged breaches are that BSC: unreasonably and in bad faith refused to provide accurate interface specifications for its catheters; threatened to sue customers who used HP's pullback device; refused to create an interface for an HP catheter; reduced the number of catheters that are compatible with HP consoles; and failed to provide notice of the re-design of a catheter hub.

Defendant argues that by entering into the licensing agreement it released its monopoly position. However, the licensing agreement is a shield only if defendant acts in good faith to comply with its terms. See *CVD, Inc. v. Raytheon Co., 769 F.2d 842, 851 (1st Cir. 1985)* ("It is well established that **HN6** [↑] an agreement which purports to license trade secrets, but in reality, is no more than a sham, or device designed to restrict competition, may violate antitrust laws.").

BSC argues that HP has presented a laundry list of minor contract skirmishes under provisions of the licensing agreement which are not specifically mandated by the consent order, and do not rise to the level of predatory contract. It relies [**22] on *Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 374-76 (7th Cir. 1986)*, which provides false consolation, although it provides a useful comparison. In *Olympia*, a federal regulatory agency (the Federal Communications Commission) had required defendant to allow competition, and defendant voluntarily undertook acts to "foster competition by subsidizing its competitors' selling costs." *Id. at 375*. The Seventh Circuit rejected an antitrust claim generated when defendant stopped these affirmative steps not required

by any antitrust obligation, stating: "A firm that voluntarily encourages new competition in a tributary market should not be penalized by being made to pay damages under the antitrust laws." *Id.*

[*198] In contrast to *Olympia*, the steps to promote competition here were not voluntary. They were contractual obligations which were incorporated into a FTC Consent Order as a remedy for the lessening of competition caused by the acquisitions. At this pleading stage, the allegation of a bad faith violation of the licensing agreement, specifically designed to promote a viable, independent competitor in the catheter market, permits an inference [**23] of exclusionary conduct.

BSC makes the fair point that the FTC's order was not designed to promote competition in the *console* market. It hints that HP's design of the Scout catheter was unreasonable because it had a new console interface that would not run on either party's installed base of consoles, and therefore, the breach of the agreement was not unreasonably restrictive. Again, BSC's argument that its refusal to provide an open interface was based on legitimate business reasoning might be a fair defense on an expanded record. The allegations of an unreasonable refusal to cooperate on the console interface are sufficient to support an inference of exclusionary conduct in the console market. See [*Aspen Skiing*, 472 U.S. at 603](#) (affirming the jury finding that defendant's refusal to cooperate, where some cooperation was indispensable to effective competition, was not based on legitimate business reasons and supported an "inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival.").

B. Attempted Monopolization

HN7 To state a claim for attempted monopolization, a plaintiff must allege: [**24] 1) that the defendant engaged in exclusionary conduct; 2) with the specific intent to obtain monopoly power; and 3) a dangerous probability exists that the attempt will succeed. See [*Spectrum Sports v. McQuillan*, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 \(1993\); CVD, Inc., 769 F.2d at 851](#) ("[A] specific intent to monopolize or restrain competition can often be inferred from a finding of bad faith."). As shown above, allegations concerning the first two elements are sufficient.

HN8 To satisfy the last element of this claim, plaintiff must allege facts to show that there was a dangerous probability that BSC would achieve a monopoly as a result of the alleged actions. See [*Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 885 F.2d 683, 693 \(10th Cir. 1989\)](#). The probability of successfully monopolizing a market is usually assessed through market share. See *id. at 694*. The greater share a defendant initially controls, the greater the probability of achieving monopoly status. See *id.* ("[A] 41% market share typically indicates that a firm has substantial economic power in the market, and, therefore, [**25] has the tools at its disposal to elevate its market share to monopolistic levels."). However, "proximity to monopoly status is not enough; the defendant must also have the ability to propel itself to monopolistic control over the market." *Id. at 694*.

HP alleges that after acquiring CVIS, BSC purposely leveraged its IVUS catheter monopoly and engaged in anti-competitive conduct to monopolize or attempt to monopolize the IVUS console business as well. BSC's alleged 90 percent market share of catheters and 40 percent market share of consoles, together with the other allegations, are sufficient to demonstrate a dangerous probability that an attempted monopolization would succeed in either the catheter or console markets.

C. Antitrust Injury

HN9 Antitrust plaintiffs face an additional requirement to allege an "antitrust injury." See [*SAS of Puerto Rico v. Puerto Rico Tel. Co.*, 48 F.3d 39, 43-44 \(1st Cir. 1995\); *Caribe BMW v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 752 \(1st Cir. 1994\)](#). Failure to make such a pleading is a fatal defect. See SAS [*199] [*Puerto Rico*, 48 F.3d at 46](#) (affirming the dismissal [**26] of a complaint that failed to allege an antitrust injury). The Supreme Court defined this term as an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' conduct unlawful." [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#).

Antitrust laws were designed to protect the "competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods." *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988). Based on this objective, the [HN10](#) [↑] "presumptive[] 'proper' plaintiff is a customer who obtains services in the threatened market or a competitor who seeks to serve that market." *SAS Puerto Rico*, 48 F.3d at 44. When a defendant engages in anticompetitive acts in an attempt to gain a monopoly, the competitor who is being driven out of the market has standing. See *Wojcieszek v. New England Tel. & Tel. Co.*, 977 F. Supp. 527, 535 (D.Mass. 1997).

HP claims that BSC injured the competitive process by engaging in predatory acts which drove [**27] HP out of the market for both consoles and catheters, depriving consumers of a meaningful choice of competing innovative products. If proven, these allegations are sufficient to show that BSC injured competition, which is exactly the type of injury the antitrust laws were designed to prevent.

D. State Claims

The motion to dismiss the state claims is **DENIED**.

IV. ORDER

For the reasons discussed herein, the Court **DENIES** the motion to dismiss (Docket No. 10).

PATTI B. SARIS

United States District Judge

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Access Telecom, Inc. v. MCI Telecomms. Corp.

United States Court of Appeals for the Fifth Circuit

December 1, 1999, Decided

No. 98-50881

Reporter

197 F.3d 694 *; 1999 U.S. App. LEXIS 31538 **; 1999-2 Trade Cas. (CCH) P72,735; 45 Fed. R. Serv. 3d (Callaghan) 1089

ACCESS TELECOM, INC., Plaintiff-Appellant versus MCI TELECOMMUNICATIONS CORPORATION; MCI INTERNATIONAL, INC.; SBC COMMUNICATIONS, INC.; SBC INTERNATIONAL, INC.; SBC INTERNATIONAL LATIN AMERICA; TELEFONOS DE MEXICO, Defendants-Appellees

Subsequent History: [\[**1\]](#) As Amended December 23, 1999. Rehearing and Rehearing En Banc Denied February 15, 2000, Reported at: [2000 U.S. App. LEXIS 4356](#). Certiorari Denied October 2, 2000, Reported at: [2000 U.S. LEXIS 6512](#), [2000 U.S. LEXIS 6511](#), [2000 U.S. LEXIS 6510](#).

Prior History: Appeal from the United States District Court for the Western District of Texas. SA-96-CV-1064. D W Suttle, US District Judge.

Disposition: REVERSED AND REMANDED.

Core Terms

contracts, customers, tortious interference, foreign law, provider, reseller, lines, contacts, summary judgment, parties, numbers, resale, district court, monopoly, personal jurisdiction, telecommunications, export, choice of law, discovery, domestic, import, leg, telecommunications service, phone service, provisions, antitrust claim, call-back, shipping, comity, do business

LexisNexis® Headnotes

Business & Corporate Law > Foreign Corporations > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

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

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

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

Torts > Procedural Matters > Conflict of Law > General Overview

HN1 Business & Corporate Law, Foreign Corporations

To properly decide tortious interference issues, courts must make three choice of law decisions: first, which law governs plaintiff's tort cause of action; second, which law governs the validity of the contracts and prospective business relations which form the basis of the tortious interference claims; and third, whether any foreign law invalidates the contracts for other reasons. A federal district court must follow the choice-of-law rules of the state in which it sits.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Torts > Procedural Matters > Conflict of Law > Significant Relationships

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > Appeals > Standards of Review

Torts > Procedural Matters > Conflict of Law > General Overview

HN2 Choice of Law, Significant Relationships

Texas follows the most significant relationship test for deciding which law governs a plaintiff's tort cause of action. Under the modern most significant relationship test, courts consider: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties, if any, is centered.

Contracts Law > Defenses > Illegal Bargains

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

HN3 Defenses, Illegal Bargains

Under Texas law, the existence of a valid contract (or the potential for one in claims for interference with prospective contracts) is an element of a claim for tortious interference. There is no remedy for interference with illegal contracts.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

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

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > Appeals > Standards of Review

[**HN4**](#) [down] **Choice of Law, Significant Relationships**

Validity of a contract is determined by the law which governs the contract. Texas adopts the most significant relationship test as applied to contracts.

Civil Procedure > Appeals > Standards of Review

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

[**HN5**](#) [down] **Appeals, Standards of Review**

In Texas, contractual choice-of-law provisions are ordinarily enforced if the chosen forum has a substantial relationship to the parties and the transaction. However, a choice-of-law provision will not be applied if another jurisdiction has a more significant relationship with the parties and their transaction than the state they choose, that jurisdiction has a materially greater interest than the chosen state, and the jurisdiction's fundamental policy would be contravened by the application of the law of the chosen state.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Contracts Law > Contract Interpretation > General Overview

Civil Procedure > Appeals > Standards of Review

[**HN6**](#) [down] **Preliminary Considerations, Federal & State Interrelationships**

Contractual choice of law clauses are construed narrowly.

Civil Procedure > Appeals > Standards of Review

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

[**HN7**](#) [down] **Appeals, Standards of Review**

In the absence of an effective choice of law by the parties the contacts to be taken into account to determine the law applicable to an issue include: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

[**HN8**](#) [down] **Regulated Industries, Communications**

The U.S. favors competition in telecommunications.

Contracts Law > Defenses > Illegal Bargains

[**HN9**](#) [blue download icon] **Defenses, Illegal Bargains**

Under Texas contract law, it is well settled that a contract made with a view of violating the laws of another country, though not otherwise obnoxious to the laws either of the forum or of the place where the contract is made, is illegal and will not be enforced.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

[**HN10**](#) [blue download icon] **Federal & State Interrelationships, Choice of Law**

To determine state substantive law, courts look to final decisions of the state's highest court. When there is no ruling by the state's highest court, it is the duty of the federal court to determine as best it can, what the highest court of the state would decide. Thus, Texas courts must make a guess as to how the Texas Supreme Court would interpret a rule.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Choice of Law

Governments > Courts > Judicial Comity

International Law > Dispute Resolution > Comity Doctrine > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Contracts Law > Contract Interpretation > General Overview

[**HN11**](#) [blue download icon] **Conflict of Law, Choice of Law**

Under modern choice of law analysis, place of performance or place of contract formation is not always determinative.

Governments > Courts > Judicial Comity

International Law > Dispute Resolution > Comity Doctrine > General Overview

Governments > State & Territorial Governments > Relations With Governments

[**HN12**](#) [blue download icon] **Courts, Judicial Comity**

Comity must yield to domestic policy and cannot compel a domestic court to uphold foreign interests at the expense of the public policies of the forum state.

Antitrust & Trade Law > Regulated Industries > Communications

[**HN13**](#) [blue download icon] **Regulated Industries, Communications**

[47 U.S.C.S. § 214](#) requires authorization before a carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line.

Antitrust & Trade Law > Regulated Industries > Communications

[HN14](#) [] **Regulated Industries, Communications**

[47 U.S.C.S. § 214](#) applies only to the construction of facilities and does not prevent telecommunications carriers from offering new services.

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

Torts > Intentional Torts > Defenses > Necessity

[HN15](#) [] **Commercial Interference, Contracts**

Under the defense of legal justification or excuse, one is privileged to interfere with another's contractual relations (1) if it is done in a bona fide exercise of his own rights, or (2) if he has an equal or superior right in the subject matter to that of the other party. One may be privileged to assert a claim even though that claim may be doubtful, so long as it asserted a colorable legal right. However, the defense of legal justification or excuse only protects good faith assertions of legal rights.

Torts > Intentional Torts > Defenses > Necessity

[HN16](#) [] **Defenses, Necessity**

The defense of legal justification or excuse protects the actor only when (1) he has a legally protected interest, and (2) in good faith asserts or threatens to protect it, and (3) the threat is to protect it by appropriate means.

Evidence > Privileges > General Overview

Torts > ... > Settlements > Releases From Liability > General Overview

Torts > Intentional Torts > Defenses > Necessity

[HN17](#) [] **Evidence, Privileges**

Release of nonconfidential information may be a basis for privilege. The release of confidential information, however, is not an appropriate means to protect other interests.

Communications Law > ... > Telephone Services > Long Distance Telephone Services > Tariffs

Torts > Procedural Matters > Preemption > General Overview

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

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

HN18 [] Long Distance Telephone Services, Tariffs

Under the filed-rate doctrine, federal law preempts claims concerning the price at which service is to be offered, and the United States Supreme Court ruled that it also preempts claims concerning the services that are offered.

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

HN19 [] Commercial Interference, Contracts

The right to halt one contract does not grant the right to interfere with another by any conceivable means.

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > Breach > General Overview

Torts > Remedies > Damages > General Overview

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

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

HN20 [] Damages, Punitive Damages

Under Texas law, the general law is that where a defendant's conduct breaches an agreement between the parties and does not breach an affirmative duty imposed outside the contract, the plaintiff ordinarily may not recover on a tort claim if the damages are economic losses to the subject matter of the contract. However, this does not mean tort damages cannot be measured by economic losses from the contract.

Antitrust & Trade Law > Regulated Industries > Communications

HN21 [] Regulated Industries, Communications

In order to support an antitrust claim, there must be actions which have a reasonably foreseeable effect in a defined United States market.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Trade Law > General Overview

HN22 [] International Aspects, International Application of US Law

See [15 U.S.C.S. § 6a](#).

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

[**HN23**](#) [blue icon] International Aspects, International Application of US Law

American antitrust laws do not regulate the competitive conditions of other nations' economies. In other words, foreign countries may make laws or create monopolies that effectively and completely exclude United States (U.S.) import competition. That does not then mean that U.S. companies can enter the market anyway and make antitrust claims when things do not work out. Even in the U.S., the existence of a legitimate government granted monopoly precludes claims of antitrust violation when a plaintiff wants to compete in the regulated market.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

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

[**HN24**](#) [blue icon] International Aspects, International Application of US Law

The content of foreign law is a question of law and is subject to de novo review. [Fed. R. Civ. P. 44.1](#).

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Civil Procedure > Appeals > Standards of Review

Evidence > Admissibility > Expert Witnesses

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

[**HN25**](#) [blue icon] International Aspects, International Application of US Law

The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under [Fed. R. Civ. P. 43](#). [Fed. R. Civ. P. 44.1](#). Under this rule, expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is determined. It is not, however, an invariable necessity in establishing foreign law, and indeed, federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities.

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

[**HN26**](#) [blue icon] Entitlement as Matter of Law, Genuine Disputes

Differences of opinion among experts on the content, applicability, or interpretation of foreign law do not create a genuine issue as to any material fact under [Fed. R. Civ. P. 56](#). In general, summary judgment is appropriate to determine the content of foreign law.

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Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Civil Procedure > Appeals > Standards of Review

HN27 [] **International Aspects, International Application of US Law**

Recognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations.

Antitrust & Trade Law > Regulated Industries > Communications

HN28 [] **Regulated Industries, Communications**

Article 75 of the Telecommunications Rulings of Mexico reads that the exploitation of the telecommunications network given in concession must be carried out directly by its holder and its commercialization may be made through agents in accordance with the provisions approved by the Ministry.

Antitrust & Trade Law > Regulated Industries > Communications

HN29 [] **Regulated Industries, Communications**

Courts read Article 75 of the Telecommunications Rulings of Mexico to mean that the direct operation of the network must be accomplished by the actual provider, and that the provider may designate others to commercialize the network. It does not say commercialization must be made through those channels, however.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Rem Actions > True In Rem Actions

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN30 [] **In Personam Actions, Minimum Contacts**

A federal district court has personal jurisdiction over a nonresident defendant to the same extent as a state court in the state in which the district court is located. The Texas long-arm statute extends to the limits of the Due Process Clause of the Constitution. [Tex. Civ. Prac. & Rem. Code Ann. § 17.042](#). The exercise of personal jurisdiction thus can be maintained if the nonresident defendant has purposefully availed itself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state, and if the exercise of jurisdiction over the nonresident defendant does not offend traditional notions of fair play and substantial justice.

Antitrust & Trade Law > Clayton Act > Jurisdiction

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Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN31 [blue download icon] **Clayton Act, Jurisdiction**

Minimum contacts can be established either through contacts giving rise to general jurisdiction, or those giving rise to specific jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN32 [blue download icon] **In Rem & Personal Jurisdiction, In Personam Actions**

Conflicting evidence must be resolved in favor of the plaintiff in determining personal jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN33 [blue download icon] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

General jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN34 [blue download icon] **Jurisdiction Over Actions, General Jurisdiction**

Even if a number of different contacts are independent of one another, if they occur with such frequency that the contacts in general are continuous and systematic, there is general jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

[**HN35**](#) [blue icon] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

To demonstrate a business presence sufficient to confer general jurisdiction, the mere renting or ownership of property in a forum is not enough when that property is not used to conduct business in the forum.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Jurisdiction

[**HN36**](#) [blue icon] **Clayton Act, Claims**

[15 U.S.C.S. § 22](#) of the Clayton Act allows for jurisdiction over any federal antitrust suit in any district in which a defendant transacts business, and provides that all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. When jurisdiction is invoked under the Clayton Act, the court examines the defendant's contacts with the United States as a whole to determine whether the requirements of due process have been met.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

[**HN37**](#) [blue icon] **Antitrust & Trade Law, Clayton Act**

Specific jurisdiction over a nonresident exists when the defendant purposefully avails itself of the privilege of conducting activities in the forum, and the plaintiff's cause of action arises out of or relates to that act.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN38**](#) [blue icon] **Regulated Practices, Market Definition**

The issue of relevant market is a fact question.

Civil Procedure > Pretrial Matters > Continuances

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

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

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

[**HN39**](#) [blue icon] **Pretrial Matters, Continuances**

Under Fed. R. Civ. P. 56(f), the appropriate way to raise the issue of inadequate discovery is for the party opposing the motion for summary judgment to file a motion for a continuance with an attached affidavit stating why the party cannot present by affidavit facts essential to justify the party's opposition.

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

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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 > Pretrial Matters > Continuances

HN40 [] **Summary Judgment, Opposing Materials**

To obtain a continuance of a motion for summary judgment, a party must specifically explain both why it is currently unable to present evidence creating a genuine issue of fact and how a continuance would enable the party to present such evidence. The non-moving party may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts in opposition to summary judgment. If it appears that further discovery will not provide evidence creating a genuine issue of material fact, the district court may grant summary judgment.

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

Civil Procedure > Discovery & Disclosure > General Overview

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

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN41 [] **Summary Judgment, Opposing Materials**

When a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error.

Counsel: For ACCESS TELECOMMUNICATIONS INC, Plaintiff - Appellant: Luther H Soules, III, Elizabeth Joan Lindell, Soules & Wallace, San Antonio, TX. Clyde Reece McCormick, Law Office of Clyde R McCormick, San Antonio, TX.

For MCI TELECOMMUNICATIONS CORP, MCI INTERNATIONAL, Defendant - Appellee: Judith R Blakeway, Charles J Fitzpatrick, Strasburger & Price, San Antonio, TX.

For SBC COMMUNICATIONS INCORPORATED, SBC INTERNATIONAL INC, SBC INTERNATIONAL LATIN AMERICA, Defendants - Appellees: Javier Aguilar, SBC Communications, San Antonio, TX. Hubert W Green, Daniel Webb Lanfear, The Kleberg Law Firm, San Antonio, TX.

For TELEFONOS DE MEXICO, Defendant - Appellee: Jeffrey I Kavy, George H Spencer, Jr, Clemens & Spencer, San Antonio, TX.

Judges: Before REYNALDO G. GARZA, HIGGINBOTHAM, and DAVIS, Circuit Judges.

Opinion by: HIGGINBOTHAM

Opinion

[*701] HIGGINBOTHAM, Circuit Judge:

I.

During 1993 and 1994, Access Telecom, Inc. (ATI), a corporation based in Texas, exported U.S. phone services to customers in Mexico. These services allowed Mexican customers to place U.S.-based phone calls directly from Mexico. Customers first called ATI in Texas and then entered the new phone number they wanted to call. ATI dialed that new number from the U.S. and effectively spliced the customer's first call to the new call, enabling the customer to communicate with the new destination. As a result, each call had two legs: the Mexican leg from Mexico to Texas and the U.S. leg from Texas to the final destination.¹

The benefit to ATI's customers from this arrangement was that the cost of the two-legged [*2] call was less than the cost of a normal call from Mexico through Telefonos de Mexico (Telmex). The price discrepancy existed because Telmex had a government granted monopoly until 1996. Thus, the rate on a typical call from Mexico to California was controlled by Telmex for its entire length. Under ATI's setup, Telmex controlled only the rate for the Mexican leg of the call. The applicable rate for the U.S. leg of the call was a U.S. rate.

The Mexican leg of each call was carried on toll free numbers that ATI received from MCI. MCI in turn leased the lines for these numbers from Telmex. In other words, MCI leased the Telmex lines that connected Mexico to Texas. Telmex's lines crossed the border into Texas where they interconnected with U.S. lines. Telmex's contracts with MCI apparently neither foresaw nor forbid the subsequent "reorigination" as practiced by ATI or other companies, and in fact, MCI offered similar reorigination services of its own.

ATI's contracts with MCI incorporated the terms and conditions of MCI's U.S. "filed tariff" which provided that MCI calls may not be acquired and used for resale in foreign jurisdictions once MCI's foreign partners have blocked or interrupted [*3] MCI or have threatened to do so for such reasons. The tariff also stated that MCI was not liable for acts or omissions of other companies who furnished a portion of MCI's 800 service. Finally, the tariff prohibited the use of MCI services for unlawful purposes.

[*702] Mexican law required a permit to be a provider of telecommunications services in Mexico. ATI never obtained such a permit, maintaining it did not need to do so because it was not a provider. Under ATI's interpretation of Mexican law, a provider was an entity that both owned and operated telecommunications infrastructure within Mexico, which ATI did not do (as opposed to reselling service directly or indirectly, which ATI perhaps did do). Subsequent to the time period relevant in this lawsuit, Mexico revamped its telecommunications laws and now explicitly requires a permit to engage in resale activity.

In October 1993, Jose Rivas Moncayo of the office of the Mexican Secretary of Communications and Transportation (SCT), sent MCI a letter requesting that MCI halt the services of companies offering "call-back

¹ At some point, ATI also employed switching services in New York.

services." Call-back involved a procedure whereby a customer called a U.S. company, and the U.S. company did not answer [**4] the call. Instead, the company would use a form of caller-id to locate the customer and then call the customer back. Under call-back services, Telmex received no revenue for the initial outbound call because that call was never "answered." Such services used Telmex phone lines to communicate location information without paying Telmex anything for that privilege. ATI's service, however, paid Telmex exactly what Telmex had contracted with MCI to receive for outbound calls using the lines from Mexico to Texas. ATI's service did not operate through call-back, and MCI did not terminate ATI's service. Subsequent to the time period relevant in this lawsuit, the SCT issued further communications condemning practices that achieve similar results as "call-back" services.

On April 19, 1994, Telmex notified MCI of its intention to disconnect customers who were using its service for resale. The list of 85 customers that it provided, however, did not include ATI. On April 29, 1994, MCI received another letter, requesting a list of customers in the resale business, but MCI refused to provide such a list. The letter requesting customers was written on Telmex letterhead by an employee of SBC International, [**5] a subsidiary of Southwestern Bell. Southwestern Bell is part of a consortium that owns a controlling stake in Telmex.

Telmex allegedly began disconnecting 800 numbers on July 21, 1994, without warning. Previously it had assured MCI that it would give notice of disconnection so MCI could warn MCI's customers. On September 28, 1994, Telmex sent MCI a list of prohibitions on the use of MCI's numbers, threatening to terminate all of MCI's Mexican business without notice if MCI did not cooperate. ATI's numbers, save three, were disconnected on October 19, 1994; the rest were disconnected soon thereafter. At this time, ATI was earning approximately \$ 3 million a year.

There is disagreement whether MCI provided Telmex with ATI's numbers. According to the deposition of Carol Ansley, an SBC employee, Ansley sent Rafael Perez Aguilar of Telmex a list of ATI's numbers, and Ansley testified that as far as she knew, MCI had not provided SBC with ATI's numbers. ATI, however, discovered a cover memo written by Ansley, stating that "attached you will find a list of I-800 numbers MCI has identified as being with Access Telecom." ATI also notes that John Bachman, an MCI manager, sent an e-mail on [**6] October 18, to an MCI employee, Laura Alvarado, instructing her to "take down" ATI's numbers. In Alvarado's deposition, however, she insists that she did not provide the numbers to Telmex. Even MCI has stated that the provision of ATI's numbers to third parties without permission would be in violation of U.S. law.

In an effort to continue providing service to its customers, ATI sought alternative service from AT&T. According to ATI, MCI immediately informed SBC and Telmex of ATI's attempt to obtain service from AT&T. Telmex allegedly assured MCI that ATI would not be able to reestablish [*703] the numbers through AT&T. ATI ultimately could not obtain alternate service through AT&T. ATI's business collapsed, along with approximately 80 other similar U.S. companies.

II.

In June 1995, MCI commenced arbitration proceedings seeking to recover payment of ATI's phone bill, ultimately receiving an award for nearly \$ 1.2 million. In July 1995, ATI sued Telmex, SBC, and MCI in Texas state court, alleging claims of breach of contract, tortious interference with contract, negligent misrepresentation, promissory estoppel and federal and state antitrust violations. The case was removed and transferred [**7] to the Western District of Texas. The federal court granted Telmex's motion to dismiss all claims against it for lack of personal jurisdiction.

ATI moved for partial summary judgment on the issue of the lawfulness of its activities, which the district court denied. MCI and SBC moved for summary judgment on all of ATI's claims, which the district court granted. The court held that the filed tariff doctrine barred ATI's claims for negligent misrepresentation and breach of contract. The district court granted summary judgment on a promissory estoppel claim, holding that ATI could not justifiably rely on representations by MCI as to Mexican law.

The district court also held that ATI could not recover on its claim alleging that MCI tortiously interfered with ATI's customer contracts because this was essentially a breach of contract claim and was barred by limitation of liability provisions in MCI's tariff. In addition, the court rejected ATI's claim that MCI conspired with Telmex and SBC to block ATI from contracting with AT&T for service because ATI never sought or obtained a permit from the SCT and

thus ATI's prospective relations with AT&T would have been illegal. Finally, the district [**8] court rejected ATI's antitrust claims on the ground that the conduct of which ATI complained did not have a direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce or export business.

On appeal, ATI challenges the dismissal of its tortious interference and antitrust claims, the denial of summary judgment in ATI's favor with respect to the lawfulness of ATI's activities, and the dismissal of Telmex on personal jurisdiction grounds. ATI separately complains that merits discovery was improperly limited.

III.

A. Characterization of ATI's Business

The proper resolution of many issues in this case depends on the characterization of ATI's business. ATI characterizes its business as exporting U.S. reorigination services to Mexican customers. The defendants characterize ATI's business as providing a Mexican telecommunications service in Mexico. At first glance, the defendant's characterization has appeal. No matter how ATI's business is described, the end result enabled Mexican customers to make long distance phone calls in Mexico for prices less than those generally charged by the Telmex monopoly. This characterization, however, confuses the ends with [**9] the means.

In the past, phone calls may have been seen as indivisible commodities. Today, that is too simple a view. Admittedly, by selling the "U.S. leg" of a call to Mexican customers, ATI enabled cheaper long distance communication. That is not the same as being a Mexican telecommunications provider. A distinction exists between "provider" and "reseller," which is easier to see in a more familiar context.

If ATI and Telmex were shipping companies, ATI might transport goods solely between U.S. cities. If Mexican customers shipped their goods to ATI in Texas, ATI could then transport them to another destination in the U.S. Alternatively, Mexican customers could ship directly to their final [*704] destination using Telmex alone. Shipping to New York via ATI might be cheaper, however, than shipping via Telmex. To say that ATI is a Mexican shipping provider would be imprecise. No matter which company the customer uses, Telmex, as a monopoly, is the only provider of shipping service from Mexico to Texas, and in every instance Telmex receives the previously agreed rate for its services. Thus, in Mexico, ATI is at most a reseller of Telmex's shipping service, although even the label of "reseller" [**10] is debatable.

To equate resale with provision, however, entails that every business is a provider if that business ships goods to its customers via Telmex and charges the customer for the shipping cost. In our case it would entail that every business which has a toll free number, yet which charges the cost of the phone service back to the customers, is a telecommunications provider because it technically is "reselling" phone service. This ignores the crucial difference between resellers and providers, which is that a reseller cannot compete with a monopoly provider because the provider is the reseller's only supplier. The reseller can only undersell the provider if the provider sells its services to the reseller for less than they are worth. That is not the same kind of competition a provider faces against another provider. Competition between the provider and the reseller is at the mercy of the provider and the provider's knowledge or ignorance of the market.

Because of this difference, it is more appropriate to characterize ATI as an exporter of U.S. phone services who incidentally and indirectly resold Mexican telecommunications services. In a real sense, ATI was not even the [**11] primary reseller of Mexican telecommunications services. MCI was the reseller, under contract from Telmex. ATI purchased MCI's services and MCI billed ATI for the calls made to ATI's numbers by ATI's customers who were purchasing U.S. service. ATI may have recouped the cost of the Mexican leg of the call from its customers just as any other business may recoup the cost of toll free phone service through its service fees. ATI's setup is thus the same as any American business which contracted to offer toll free 800 numbers to Mexican customers in order to provide service across the phones, such as touch tone brokerage service or even \$ 3.95/minute astrological advice. The only difference is that ATI offered U.S. phone service rather than another service delivered by phone. While this may make ATI appear to be a Mexican "provider," this ignores the foregoing distinctions. To not distinguish between direct providers, direct resellers, and indirect resellers ignores the competitive reality that it is the providers who determine whether subsequent resales are profitable; it also leads to

the illogical result that all businesses are telecommunications providers. This characterization of ATI's [**12] business is compatible with one interpretation of the laws which were in place in Mexico at the time, requiring permits only for the joint installation, operation, *and* exploitation of infrastructure. ATI's claim that the "and" has its normal conjunctive meaning agrees with these distinctions, because this reading separates true providers from mere resellers. With these distinctions in mind, we now address the tortious interference issues.

B. Tortious Interference

1. Choice of Law

HN1[] To properly decide the tortious interference issues, we must make three choice of law decisions: first, which law governs ATI's tort cause of action; second, which law governs the validity of the contracts and prospective business relations which form the basis of the tortious interference claims; and third, whether any foreign law invalidates the contracts for other reasons. A federal district court must follow the choice-of-law rules of the state in which it sits. See, e.g., *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 205 (5th Cir. 1996).

[*705] (a) Tort Choice of Law

The first choice is which law governs ATI's tort cause of action. **HN2**[] Texas follows the most significant [**13] relationship test of the *Restatement (Second) of Conflict of Laws* § 145, for these decisions. See *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). Under the modern "most significant relationship" test, courts consider: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties, if any, is centered. See *SnyderGeneral Corp. v. Great Am. Ins.*, 928 F. Supp. 674, 677 (N.D. Tex. 1996), aff'd, 133 F.3d 373 (5th Cir. 1998). Since Texas was the site of injury, home to the injured business, and place of export of the U.S. portion of the business, it would be reasonable to apply Texas law; however, the parties appear to assume without argument that Texas law governs, and so, without deciding, shall we.

Thus, we examine Texas law to determine the requirements for a tortious interference claim. **HN3**[] Under Texas law, the existence of a valid contract (or the potential for one in claims for interference with prospective contracts) is an element [**14] of a claim for tortious interference. See *Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*, 793 S.W.2d 660, 665 (Tex. 1990). There is no remedy for interference with illegal contracts, see *Ben E. Keith Co. v. Lisle Todd Leasing, Inc.*, 734 S.W.2d 725, 727 (Tex. App.-Dallas 1987, writ ref'd n.r.e.).

(b) Contract Choice of Law

The ATI contracts at issue in this case include ATI's contracts with its Mexican customers, ATI's contracts with MCI, and ATI's attempted contracts with AT&T. The second choice of law question arises because we must determine whether these contracts were valid. **HN4**[] Validity of a contract, however, is determined by the law which governs the contract, which calls for another choice of law analysis, this time using the modern "most significant relationship" test of the Restatement (Second) of Conflict of Laws as applied to contracts, which Texas has adopted. See *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984).

ATI, based in Texas, exported Texas reorigination services to Mexican customers and resold Mexican telecommunications service. These customer contracts had choice of law provisions identifying [**15] Texas as the applicable law and place of formation. **HN5**[] In Texas, contractual choice-of-law provisions are ordinarily enforced if the chosen forum has a substantial relationship to the parties and the transaction. See *De Santis v. Wackenhet*, 793 S.W.2d 670, 677-78 (Tex. 1990). However, a choice-of-law provision will not be applied if another jurisdiction has a more significant relationship with the parties and their transaction than the state they choose, that jurisdiction has a materially greater interest than the chosen state, and the jurisdiction's fundamental policy would be contravened by the application of the law of the chosen state. See *Restatement (Second) of Conflict of Laws* § 187.

The defendants argue that the choice of law clauses in the ATI customer contracts are not determinative, because these contracts concerned issues of payment and formation, mostly stating that the contracts were formed in Texas and would be payable in Texas in U.S. dollars. The contracts did not concern the terms of ATI's actual provision of service. It is true that [HN6](#)¹⁵ contractual choice of law clauses are construed narrowly. See [*Thompson and Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429 \(5th Cir. 1996\)](#). [**16](#) However, the defendants' argument cuts both ways. To the degree that these contracts do not concern the services allegedly illegal in Mexico, it becomes harder to argue illegality of those contracts under [\[*706\]](#) Mexican or Texas law; furthermore, so long as these contracts were interfered with, the fact that a separate service agreement was not interfered with does not matter, since the interference claim only needs one contract as its basis.

Without deciding how determinative the choice of law clauses are, however, it appears that there is no demand to choose Mexican over Texas law under a most significant relationship test. The Restatement § 188 states that

[HN7](#)¹⁶ in the absence of an effective choice of law by the parties . . . the contacts to be taken into account . . . to determine the law applicable to an issue include: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

In this case, we have a very symmetric relationship between the parties and the services provided. [**17](#) Each forum is home to one of the parties, one forum's business is exporting services, the other forum's resident is receiving services, [HN8](#)¹⁷ the U.S. favors competition in telecommunications, Mexico at the time did not. ATI's indirect resale of the Mexican leg of the service may center in Mexico, but even a portion of that service occurs in Texas, since Telmex's lines cross into Texas and interconnect at the border. Further, that service was provided by MCI under agreements with Telmex and ATI, and the ATI-MCI agreements were entered into in Texas. Even assuming the Mexican leg of the calls implicates Mexican interests more than Texas interests, the remaining contacts that ATI's contracts had with Texas, including the choice of law clause which is of some weight, is at least a deciding factor in such a close case.

This makes sense if one looks at the fundamental policies involved, which include Mexico's interest in a domestic telephone monopoly. Mexico would not have a fundamental policy contravened by the application of Texas law in this case. The export of U.S. telecommunication services and even the resale of Mexican services does not contravene Mexico's legitimate monopoly over its [**18](#) domestic lines. Telmex can charge whatever it likes for incoming and outgoing calls on its lines. The resale of the Mexican leg either directly by MCI or indirectly by ATI is only profitable if Telmex allows it to be. If Telmex sets a monopoly price for its initial service, Telmex recoups all potential monopoly revenues from that fee. Telmex may wish to use its monopoly as leverage in order to gain higher revenues from the U.S. leg of calls, but attempts to tie domestic monopoly power into the international market is not within the scope of the domestic monopoly. As such, it is not a Mexican interest which tips the scale in Mexico's favor.

Texas, on the other hand, would have a fundamental policy contravened by the choice of Mexican law (assuming Mexican law is different on the question of contract validity), namely the ability of Texas companies to make valid export contracts in Texas for the sale of U.S. services.

The remaining contracts and prospective contracts are more obviously governed by Texas law. ATI's contracts with MCI were negotiated and entered into in Texas, between Texas businesses. ATI's potential contracts with AT&T presumably would have been similar. In this case, [**19](#) Mexico's only connection with these contracts is the fact that the contracts involve the use of Mexican lines for a portion of the calls. Given the fact that the parties are in the U.S., the contracts were made in the U.S., and that there is no claim that these contracts were illegal under Mexican law, there seems to be no reason to choose Mexican law to determine the validity of these contracts, despite the fact that part of their subject matter existed in Mexico.

We hold, then that Texas law determines the validity of the contracts and prospective contracts at issue in this case. [\[*707\]](#) However, this is still not the end of the analysis.

(c) Foreign Law Which Invalidates Contract Under Texas Law

HN9[] Under Texas contract law, it is "well settled" that "[a] contract made 'with a view of violating the laws of another country, though not otherwise obnoxious to the laws either of the forum or of the place where the contract is made,' is illegal and 'will not be enforced.'" See *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 639 (Tex. App. - San Antonio 1993, writ denied) (quoting *San Benito Bank & Trust Co. v. Rio Grande Music Co.*, 686 S.W.2d 635, 638 [****20**] (Tex. App. -- Corpus Christi 1984, writ ref'd n.r.e.)).

This rule has not been analyzed by the Texas appellate courts which have relied on it, and the Texas Supreme Court has not adopted this rule expressly.² **HN10**[] "To determine state substantive law, we look to final decisions of the state's highest court." *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 993 (5th Cir. 1999) (*citing Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992))). "When there is no ruling by the state's highest court, it is the duty of the federal court to determine as best it can, what the highest court of the state would decide." See *id.* (quoting *Transcontinental*, 953 F.2d at 988). Thus, we must make a guess as to how the Texas Supreme Court would interpret this rule. Because the Texas Supreme Court has chosen to follow modern choice of analysis, we proceed with that background assumption. As such, there are two aspects to this rule that must be discussed before it can be applied.

[21]** The first aspect is the rule's tacit assumption that foreign law is relevant to the contract in question. For example, there is no reason to suspect Texas courts would deem void a contract between Texans for the sale of cheese in Texas, even if Mexican law purported to make all sales of cheese illegal, even those occurring in Texas. Mexican law would be inapplicable to the contract in question because Mexico has no legitimate interest in the contract. The second aspect to consider is the meaning of "with a view." First, we discuss the rule's assumption that foreign law is relevant.

Historically, the assumption that the laws of a foreign country were relevant or applicable to a contract was justified if the contract was to be performed in the other country because place of performance or place of contract decided the choice of law question. See 6 Williston on Contracts § 1749 (1938). Moreover, "good morals and the obligations of international comity demand denial of judicial sanction to the intentional breach of . . . the general laws of a friendly state." *Id.* **HN11**[] Under modern choice of law analysis, however, place of performance or place of contract formation is not always determinative. **[**22]** Furthermore, principles of comity only extend so far. See *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994) (noting that **HN12**[] comity "must yield to domestic policy" and "cannot compel a domestic court to uphold foreign interests at the expense of the public policies of the forum state").

As stated, modern choice of law analysis in Texas applies the law of the forum with the "most significant relationship" to the contract in question. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984). Thus, a contract legal in the U.S. may be illegal in Mexico, yet under choice of law analysis, Mexican law might not be chosen to apply. If Mexican law does not apply to determine validity, then to say the contract is illegal in Texas because it violates Mexican law reverts too quickly back to a discarded conclusion, a conclusion [***708**] rooted in the traditional assumption that Mexican law always has an interest in the contract if some aspect of the contract is illegal under Mexican law.

There are at least two reasons to defer to foreign law, however, even if that law would not be chosen to govern the contract. First, a contract legal [****23**] in the U.S. and illegal in Mexico may places parties in a dilemma. They can either perform the contract and face Mexican liability (Mexico, after all, may have personal jurisdiction over the parties). On the other hand, the parties can breach the contract, but then face U.S. liability for contract damages. This dilemma, however, is not implicated in tortious interference claims, because by definition, the defendant is not a party to the original contract and thus need not choose between breaking foreign law or facing U.S. liability. A

² "Writ refused, n.r.e." is not the same as "writ refused," in the writ history of Texas appellate cases. Only an unqualified "writ refused" must be treated as on equal footing with other Texas Supreme Court precedent. See Texas Jurisprudence, 3d [§ 145](#).

dilemma only exists to the third party if foreign law gives the third party a duty or right to interfere. No duty is alleged in this case with respect to MCI and SBC and the right to interfere (privilege) is addressed below.

A second, but more important, reason to defer to foreign law even if it does not apply to the contract is the mentioned principle of comity, which suggests that the U.S. should respect Mexican law on a kind of "golden rule" basis. The leading Texas case demonstrates this situation although without this explicit reasoning. See [Ralston Purina Co. v. McKendrick](#), [850 S.W.2d 629](#) (Tex.App.-San Antonio, 1993). In *Purina*, [**24](#) a contract to export goods into Mexico was found illegal in Texas because the parties were smugglers who did not have the necessary Mexican licenses. [Id. at 639](#). Even if Texas law applied to that contract under a most significant relationship test, the principle of comity would be a strong basis to hold the Texas contract illegal under Texas law, and thus not a basis for a tortious interference claim. If there is no dilemma and there is no basis for comity, however, the old rule makes no sense under modern choice of law analysis which already takes into account the interests of the various fora. To allow foreign law to jump back in and change the conclusion circumvents the principles behind the original choice of law.

The second aspect of the rule that must be analyzed is what "with a view" means. The language implies the existence of an intention on the part of at least one of the parties to violate foreign law. It is unclear whether the rule requires both parties to have illegal intentions, as it has been remarked that one party's mere knowledge of the other's illegal intentions is insufficient to void a contract. See [International Aircraft Sales, Inc. v. Betancourt](#), [582 S.W.2d 632, 635](#) [**25](#) (Tex.Civ.App.-Corpus Christi May 31, 1979, writ refused n.r.e.). If intention did not matter, the rule could merely state that contracts which violate foreign law are illegal. The policy behind this part of the rule appears to be that it is against the public policy of the domestic forum to encourage willful attempts to break foreign law. Given these considerations, however, it makes no sense to apply the rule if there is no intention of either party to violate foreign law. More importantly, however, if foreign law is sufficiently unclear as to the legality of certain actions, then it is unreasonable to say the parties entered the contract with a view to violate anything.

Because the Texas Supreme Court has not addressed these issues, we consider how the court might decide the first issue, and we decide that when a contract governed by Texas law violates the laws of a foreign country, that violation does not void the contract for purposes of tortious interference claims if the foreign policies at issue do not demand comity. In this case, if Mexican law banned the import of U.S. switching services or the incidental resale of Mexican capacity by a non-provider, it would be a policy [**26](#) designed to increase the monopoly power of a domestic company outside the territorial boundaries of that country. Such policies do not demand comity. It would not be the case of a country banning an import which is arguably [*709](#) injurious to the health or morals of its citizens, such as toxic waste or pornography. Instead, if ATI's activities were illegal in Mexico, then it would be an example of a country banning the import of a competitive service for which no legitimate monopoly exists. While it is fine for a country to take a protectionist position, the legality of U.S. contracts need not turn on it.

Because there is no "dilemma" alleged in the current case with respect to third parties being forced to choose between U.S. contract damages and Mexican liability, we do not decide the effect of such a dilemma on the rule.

Thus, even if Mexican law prohibited the resale of already resold telecommunications services or prohibited the importing of U.S. telecommunications services, these facts do not serve as a defense to a claim of tortious interference with such contracts in situations when the alleged tortfeasor is not forced to choose between violating foreign law or suffering U.S. liability, [**27](#) when Texas law otherwise governs the underlying contracts and torts.³

An alternative basis to decide this issue, of course, would be that contracts entered "with a view" to violate foreign law are not void for the purposes of tortious interference claim if neither party to the contract had illegal intentions. An illegal intention is not shown in this case, at least for the purposes of summary judgment. As shown below, Mexican law at the time was sufficiently unclear and capable of multiple interpretations as to what was or was not

³ For the purposes of this analysis, it is assumed that the SCT's refusal of a permit to ATI suffices to show exclusion from the Mexican market. This assumption is made without deciding that such a refusal shows a permit was legally required, but only that one was not readily available. Had one been easily available and a mere "formality," then it would not make sense to characterize Mexican law as protectionist.

legal. Such difficulty in interpreting foreign law makes it unreasonable [**28] to conclude any contract was entered with a view to violate foreign law. The fact that ATI attempted to get a permit "just in case," does not prevent them from successfully arguing that their service was legal and they believed it was legal. While the content of foreign law is a legal question, the question of ATI's intention is not, and there is sufficient evidence to permit a jury to conclude ATI was acting with the view that their services were legal; as such, summary judgment against ATI on the tortious interference claims would be improper unless ATI's activities were illegal under U.S. law or subject to another defense, as discussed below.

2. Validity Under U.S. Law

It remains to determine whether ATI's contracts and services were illegal with respect to U.S. law. The defendants assert that ATI's activities were contrary to [HN13](#) [↑] [47 U.S.C. § 214](#), which requires authorization before a carrier "shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line." ATI, however, merely provided a service that [**29] connected different lines and did not itself construct any new lines. [HN14](#) [↑] [Section 214](#) applies only to the construction of facilities and does not prevent carriers from offering new services. See [MCI Telecommunications Corp. v. FCC, 182 U.S. App. D.C. 367, 561 F.2d 365 \(D.C. Cir. 1977\)](#).

Furthermore, even with respect to call-back, a practice truly hostile to a legitimate domestic monopoly, the FCC decided in 1995 that even call-back did not violate U.S. or international telecommunications law and only prohibited the service on comity grounds where "expressly prohibited" in the foreign country. [In re VIA USA, Ltd., 10 FCC Rcd 9540 PP 50-51 \(1995\)](#). Thus, during 1993 and 1994, there was no basis to deem call-back, let alone reorigination, illegal under U.S. law.

[*710] 3. Other Tortious Interference Defenses

The defendants also support the entry of summary judgment in their favor on a number of alternative legal grounds, including federal preemption, the terms of MCI's tariff, Texas tortious interference doctrine, and privilege.

(a) Privilege

First, the defendants assert that they are protected by the common law defense of privilege. The Texas Supreme Court [**30] has explained this defense thus:

[HN15](#) [↑] Under the defense of legal justification or excuse, one is privileged to interfere with another's contractual relations (1) if it is done in a bona fide exercise of his own rights, or (2) if he has an equal or superior right in the subject matter to that of the other party. One may be privileged to assert a claim even though that claim may be doubtful, so long as it asserted a colorable legal right. However, the defense of legal justification or excuse only protects good faith assertions of legal rights.

[Victoria Bank & Trust v. Brady, 811 S.W.2d 931, 939-40 \(Tex. 1991\)](#).

The Restatement, cited as authority in Victoria Bank, explains that [HN16](#) [↑] the defense "protects the actor only when (1) he has a legally protected interest, and (2) in good faith asserts or threatens to protect it, and (3) the threat is to protect it by appropriate means." [Restatement \(Second\) of Torts § 773](#).

MCI did have a legal right to halt MCI's service with ATI if Telmex threatened to cut off MCI's service. That right was based on the MCI's contract with ATI. But ATI's tortious interference claim is not based on MCI halting ATI's service; it is based [**31] on MCI giving away ATI's confidential information. As such, ATI's claims concern actions which cannot be traced to legal rights stemming from a contract or domestic or foreign law. If MCI "disclosed the business or application(s) of [its] customers," it was in violation of U.S. law, according to MCI's correspondence with

Telmex.⁴ MCI maintains that it was trying to protect its interest in its contract with Telmex, and to ensure that AT&T was not receiving illegal preferential treatment from Telmex. The problem with MCI's argument is that the tortious interference was allegedly accomplished through improper release of confidential information. [HN17](#)[] Release of nonconfidential information may be a basis for privilege. See [Restatement \(Second\) of Torts § 773 illus. 1](#). The release of confidential information, however, is not an "appropriate means" to protect other interests.

[**32] If *Telmex* cut off ATI's service as alleged, it might have been against Mexican law, but whether or not it was, Telmex's privilege is not before us, except insofar as SBC attempts to claim it by virtue of SBC's part ownership of Telmex. SBC maintains that it was protecting the interests of its affiliated company Telmex. However, SBC is only a 10% owner of Telmex and there is evidence which a factfinder could find that SBC's actions in helping Telmex and MCI shut down ATI were as much for SBC's benefit as its own entity rather than as an agent of Telmex, given that SBC intended to independently enter ATI's market. Because there is not a completely obvious "unity of interest" between SBC and Telmex, summary judgment on SBC's privilege defense is inappropriate. Thus, there is no basis on which to rest a defense of privilege for SBC and MCI at the summary judgment stage.

(b) Preemption

MCI argues that its filed tariff preempts ATI's Texas tort claims because of the federal "filed-rate doctrine." Many cases speak about federal preemption of state [*711] claims when there are filed tariffs. See, e.g., [Marcus v. AT & T Corp.](#), 938 F. Supp. 1158 (S.D.N.Y. Aug 21, 1996), [**33] aff'd, [138 F.3d 46 \(2d Cir. 1998\)](#) (holding the following claims preempted: deceptive acts and practices, false advertising, fraud and deceit, negligent misrepresentation, breach of warranty, and unjust enrichment by failing to disclose that customers were billed per minute rounded up to the next higher full minute for long distance services). The leading and controlling case in this area for our purposes is [AT&T v. Central Office Telephone, Inc.](#), 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998), in which the Supreme Court expounded on the filed-rate doctrine.

Central Telephone, a bulk reseller of long distance services purchased from AT&T, sued AT&T, alleging breach-of-contract and tortious interference claims. [HN18](#)[] Under the filed-rate doctrine, federal law preempts claims concerning the price at which service is to be offered, and the Supreme Court ruled that it also preempts claims concerning the services that are offered. See [118 S. Ct. at 1962-64](#). The Court thus found the breach-of-contract claims preempted. The Court also found the tortious interference claim preempted, but only because that claim was "wholly derivative of the contract claim [**34] for additional and better services." [Id. at 1964](#). The tortious interference claim alleged that AT&T's refusal to provide certain types of service led to interference of Central Telephone's contracts with its customers. See [id. at 1964-65](#). It was thus not protected by the saving clause of the Communications Act. See [id. at 1965](#) ("A claim for services that constitute unlawful preferences or that directly conflict with the tariff--the basis for both the tort and contract claims here--cannot be 'saved' under § 414.").

ATI's tortious interference claims are different. It does not allege that MCI stopped providing service, resulting in ATI being unable to meet customer demand. Rather, ATI alleges that MCI released confidential information, first to Telmex and then to AT&T. This information ultimately led those parties to deny service to ATI. This claim is not derivative of a contract claim. It does not concern the provision of services which are covered by the filed tariff, but rather it concerns illegal actions outside the scope of the tariff and not derivative of any phone services. Therefore, the filed rate doctrine does not preempt ATI's tortious interference claims.

(c) [**35] Filed Tariff

MCI argues that its filed tariff precludes liability because there is a contractual provision stating that MCI may halt service if a situation arose involving threats from the third party partner. This only goes to whether MCI breached its contract with ATI, not whether MCI breached duties imposed outside of the contract, as alleged by ATI, and thus this argument fails as a defense to tortious interference. [HN19](#)[] The right to halt one contract does not grant the

⁴ Neither side cites the regulation that such disclosure violates; however, no party disputes that such disclosure is illegal without permission.

right to interfere with another by any conceivable means. MCI may well have been entitled to cut off service to ATI once Telmex threatened it with cutting off international 800 service. But the provision did not authorize MCI to respond to such threats by helping Telmex cut off ATI, or by preventing ATI from having a contractual relationship with AT&T.

(d) Breach of Contract

MCI argues that ATI's tortious interference claims are nothing more than claims that MCI breached its contract with ATI, and as such are precluded from serving as the basis of tortious interference claims. [HN20](#)⁵ Under Texas law, "the general law is that where a defendant's conduct breaches an agreement between the parties and does not breach an [**36](#) affirmative duty imposed outside the contract, the plaintiff ordinarily may not recover on a tort claim if the damages are economic losses to the subject matter of the contract." [\[*712\] National Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc., 18 F.3d 323, 327 \(5th Cir. 1994\)](#). However, this does not mean tort damages cannot be measured by economic losses from the contract. See [American National Petroleum Co. v. Transcontinental Gas Pipeline Corp., 798 S.W.2d 274 \(Tex. 1990\)](#) (allowing recovery for exemplary damages for tortious interference claim when damages from the tort were the same as economic damages from breach of contract). Furthermore, it is obvious that ATI's claims are not breach of contract claims, but rather are allegations that MCI breached duties imposed affirmatively outside the context of the ATI-MCI contracts. Thus, this defense fails as well.

(e) No Issue of Material Fact

Finally, MCI argues that there is no evidence that MCI actually gave ATI's numbers to Telmex. There is at least a material issue as to this fact, however, and summary judgment is inappropriate. The fact that MCI and MCI's employees say they did not give [**37](#) away the numbers flies square in the face of the memoranda and communications discovered by ATI which suggest that MCI planned to and did do just that.

C. Federal and State Antitrust Claims

1. Prima Facie Showing

The district court dismissed ATI's federal and state antitrust claims because the court failed to find a relevant U.S. market. [HN21](#)⁵ In order to support an antitrust claim, there must be actions which have a reasonably foreseeable effect in a defined U.S. market. See [15 U.S.C. § 6a; Hartford Fire Insurance Co. v. California, 509 U.S. 764, 796, 125 L. Ed. 2d 612, 113 S. Ct. 2891 \(1993\)](#) (allowing Sherman act recovery for foreign conduct that produces "some substantial effect in the United States").

ATI asserts that there was a direct and substantial effect on trade or commerce, and second that it was engaged in export trade. The substantial effect that ATI identifies is that its own business, as well as that of other companies, failed, "resulting in an inability to sell its U.S. telephone switching services to all Mexican customers." The alleged actions by Telmex and the other defendants were aimed at shutting down this market. It is [**38](#) clear that the U.S. export market for reorigination services was a definite and sizable export market, and the failure of these 80 businesses is clearly an effect on export trade from the United States. The market is significant, with ATI's annual revenues alone reaching \$ 3 million/year at the time the events occurred. [HN22](#)⁵ Under [15 U.S.C. § 6a](#), the antitrust laws do "not apply 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 . . . on trade or commerce which is not trade or commerce with foreign nations, or on import trade or . . . export trade . . . with foreign nations." By showing a significant effect on a U.S. export market, ATI meets the export trade exception.

⁵ This is not to say that the factfinder could not ultimately conclude that the relevant market for antitrust liability is the Mexican long-distance market. Our characterization of Telmex's business and our determination that the actions of Telmex and the other defendants had a "direct, substantial, and reasonably foreseeable effect" on the U.S. export market for switching services does

[**39] For the purposes of the antitrust inquiry, however, it matters whether the importation of these U.S. services was legal under Mexican law. If the importation of these services was illegal, there is no legal export market to Mexico. If there is no legal U.S. export market to Mexico and the only U.S. export market [*713] affected is the Mexican market, then there is no antitrust injury. Cf. [Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 582, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#) ("American [HN23](#)[↑]] antitrust laws do not regulate the competitive conditions of other nations' economies."). In other words, foreign countries may make laws or create monopolies that effectively and completely exclude U.S. import competition. That does not then mean that U.S. companies can enter the market anyway and make antitrust claims when things do not work out. Even in the U.S., the existence of a legitimate government granted monopoly precludes claims of antitrust violation when a plaintiff wants to compete in the regulated market. See [Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343 \(5th Cir. 1980\)](#).

This is not inconsistent with our holding that contracts [**40] for reorigination services may still serve as the basis for tortious interference claims. For the purposes of antitrust law, the threshold choice of law determination always validates a foreign government's right to determine whether outsiders can compete. As we have held, however, this choice of law is not mandated by the law of tortious interference. Admittedly, this is a "conflict" within U.S. law, but not one we need to resolve.

ATI challenges the district court's award of summary judgment against it on its antitrust claims against SBC and MCI. Because we find that ATI's services were legal under the law of Mexico at the relevant time, anticompetitive means of stopping such service may violate U.S. antitrust laws.

2. Legality of ATI's Operations Under Mexican Law

[HN24](#)[↑]] The content of foreign law is a question of law and is subject to de novo review. See [Fed. R. Civ. P. 44.1](#); [HN25](#)[↑]] *Perez & Compania v. M/V Mexico I*, 826 F.2d 1449 (5th Cir. 1997). "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under [Rule 43](#)." [Fed. R. Civ. P. 44.1](#). Under this rule, expert testimony [**41] accompanied by extracts from foreign legal material is the basic method by which foreign law is determined. [Republic of Turkey v. OKS Partners, 146 F.R.D. 24, 27 \(D. Mass. 1993\)](#). It is not, however, "an invariable necessity in establishing foreign law, and indeed, federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." [Curtis v. Beatrice Foods Co., 481 F. Supp. 1275, 1285 \(S.D.N.Y.\), aff'd mem., HN26](#)[↑]] 633 F.2d 203 (2d Cir. 1980). Likewise, differences of opinion among experts on the content, applicability, or interpretation of foreign law do not create a genuine issue as to any material fact under [Rule 56](#). *Banco de Credito Indus., S.A. v. Tesoreria General*, 990 F.2d 827, 838 (5th Cir. 1993). In general, summary judgment is appropriate to determine the content of foreign law. See 9 Wright & Miller, Federal Practice and Procedure Civ.2d § 2444.

At issue is the legality of ATI's business under Mexico law. Under Mexican law at the time in question, a government concession or permit was required [**42] in order to provide telecommunications services in Mexico. It is undisputed that ATI had no permit or concession from the Mexican government. What is disputed is whether ATI's business was within the scope of this law. ATI makes the argument that at the time in question, the relevant regulatory provisions envisioned the concession requirement to only apply to entities who were providers of telecommunications services in that they owned, installed, operated, and exploited telecommunications infrastructure in Mexico, with emphasis on the "and." The defendants argue that a permit is required to install, operate, "or" exploit telecommunications infrastructure in Mexico, with emphasis on the "or," and because ATI exploited the infrastructure, they needed a permit. The defendants [*714] also argue that all "resellers" needed permits.

ATI rests primarily on the deposition of Miguel Orrico Alarcon, who was head of SCT legal counsel for 33 years. Orrico, who is said to have drafted, applied, interpreted and enforced the provisions at issue, explained that Mexico's statutory definitions of a "provider" of telecommunications service is limited to those that install, operate,

and exploit the network. **[**43]** Because ATI did not install a network, and because special significance is attached to the conjunctive language of the statute, ATI was not a provider and therefore was not regulated under these provisions. Mexican law changed subsequent to the time at issue in this case, and now resellers explicitly are required to obtain permits.

The defendants focus on Moncayo's letter and on the Secretary of Communications and Transportation's Official Circular Letter 119-1900. Moncayo's letter is of little value, because it directly discusses only "call-back" services, which ATI's was not. The Official Circular, however, condemns such services in addition to "other similar or equivalent procedures with the same purpose." The Circular concludes that such services are "rendered outside the legal provisions established by the Federal Law on Telecommunications, in view of the exclusive nature of the right granted to Telefonos de Mexico until August 1996 for rendering basic national and international long distance service."

The defendants maintain that the Official Circular is entitled to deference by this court as an agency's interpretation of the laws which it administers and enforces, citing **[**44]** [*Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 \(1984\)*](#). ATI counters that the official circulars in fact have no legal effect, and that in Mexico, only federal courts have the power to issue resolutions determining the legality or illegality of acts. Moreover, ATI emphasizes, only the General Bureau of Judicial Matters has the sole power to "establish and systematize" the legal criteria concerning the application of legal and regulatory provisions, not Mr. Moncayo's office.

HN27 Recognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations. The Seventh Circuit reached this conclusion in deferring to an administrative agency in France, a civil law country. See [*In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1312 \(7th Cir. 1992\)*](#) ("A court of the United States owes deference to the construction France places upon its domestic law Giving the conclusions of a sovereign nation less respect than those of [a U.S.] administrative agency is unacceptable.").)

In *Amoco Cadiz*, the court was faced with conflicting interpretations of French law. **[**45]** The court noted that had the litigants been private parties, it would have had to resolve the conflicts. See *id. at 1312*. Because the Republic of France was before the court, however, the Seventh Circuit accepted its interpretation of the law. See *id.* The Republic of Mexico is not a litigant before this court and neither is the SCT. And while the evidence shows that the SCT was empowered to enforce Mexican law, it does not persuasively show that the SCT was empowered to interpret Mexican law. The fact that U.S. courts routinely give deference to U.S. agencies empowered to interpret U.S. law and U.S. courts may give deference to foreign governments before the court does not entail that U.S. courts must give deference to all agency determinations made by all foreign agencies not before the court. More importantly, the most relevant official circular at issue is dated 1996, after the new laws went into effect; thus, it is unclear whether the SCT position was that such activities were currently illegal or had always been illegal. For these reasons, we do not feel compelled to credit the SCT's determinations without analysis.

The defendants also argue that the relevant **[**46]** regulations required a permit to be a **[*715]** reseller. The statute in question, however is not without question. Our English translation of Article 75 of the Telecommunications Rulings of Mexico reads as follows:

HN28 The exploitation of the telecommunications network given in concession must be carried out directly by its holder and its commercialization may be made through agents in accordance with the provisions approved by the Ministry.

HN29 We read this to mean that the direct operation of the network must be accomplished by the actual provider, and that the provider may designate others to commercialize the network. It does not say commercialization "must" be made through those channels, however. Furthermore, this court has not been apprised of the content of any "Ministry provisions," and the defendants have not identified any regulation in place at the time which defines or regulates "resale" or explicitly requires a permit for anything except provision, which we have already decided ATI was not doing. Instead, we find convincing the argument that before the new laws took effect,

only the direct provision of telecommunications services required a concession from the Mexican government, **[**47]** for several reasons.

First, because ATI's method was novel, it is unrealistic to read the older Mexican law as covering the service. The new laws explicitly regulate resale and pointedly are not retroactive; this is at least some evidence supporting the notion that permits were not previously envisioned.

Second, Mexico's concession to Telmex specifically authorized Telmex to resell any excess capacity, even before 1996, although it did not require it to do so. Thus, what appears to be the case is that Telmex resold capacity to MCI not realizing the boon it would be for others to use that capacity with additional U.S. services attached.

Third, a conclusion that any Mexican resale is covered by the older, vague provisions would entail that every U.S. or Mexican business with a toll free number would have been required to have a permit because they "resell" Mexican phone service as much as ATI did whenever they charge the cost of call-back to the caller through their service fees. The fact that laws could try to distinguish between resellers "primarily" engaged in resale versus those "incidentally" engaged in resale does not change the fact that the relevant laws are not so explicit.

[48]** Fourth, to say that any Mexican resale required a permit would have invalidated MCI's contracts with Telmex insofar as neither MCI nor Telmex has indicated that MCI had a permit. While it is not necessary for either defendant to show its own conformity with Mexican law, it adds skepticism to their argument that a permit was required or even envisioned and lends credibility to the view that what happened in this case is that Telmex made a bad bargain with MCI and wanted to get out of it. Telmex's contract with MCI might have purported to restrict MCI's subsequent use of the lines, but ostensibly did not. Our view is further supported by the fact that the SCT did nothing to instigate enforcement proceedings against any business during the relevant time period. The evidence indicates that by law the SCT was required to institute such enforcement if there was evidence of illegality. Instead, the precatory language of even the 1993 SCT letters, stating that the SCT would be "grateful" if MCI suspended the service of its customers, suggests that even to the SCT the services in question were not clearly illegal.

Fifth, because Telmex has no legitimate interest in tying a monopoly over domestic **[**49]** lines to the use of lines outside of Mexico, we will not construe Mexican law as requiring a permit for the importing of U.S. switching service unless explicitly authorized. No one contends that the relevant laws are this explicit, however. Furthermore, this interpretation conforms with **[*716]** the FCC's extension of comity to foreign law when foreign law is unambiguous.

For all of these reasons, we find ATI's activity in Mexico to be legal during the time in question. Thus it was improper to dismiss ATI's state and federal antitrust claims against SBC and MCI. It is argued that this application of the export exception circumvents the principle that antitrust laws do not extend to other nations' competitive rules. See *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 582, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). This would only be true if the legality of the export-import business were not taken into consideration, which it has been. The fact that we find ATI's business to be legal in Mexico is not irreconcilable with Mexican policy designed to protect Telmex from domestic competition, since such a policy is not furthered by banning the import of U.S. reorigination **[**50]** services. Furthermore, Mexican law could have explicitly protected Telmex from even international competition by making it illegal to import U.S. services, which would have been a basis to defeat these antitrust claims.

D. Personal Jurisdiction over Telmex

HN30  A federal district court has personal jurisdiction over a nonresident defendant to the same extent as a state court in the state in which the district court is located. See, e.g., *Bullion v. Gillespie*, 895 F.2d 213, 215 (5th Cir. 1990). The Texas long-arm statute extends to the limits of the Due Process Clause of the Constitution. See *Tex. Civ. Prac. & Rem. Code Ann. § 17.042*. The exercise of personal jurisdiction thus can be maintained if the nonresident defendant has purposefully availed itself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state, see, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945), and if the exercise of jurisdiction over the nonresident defendant does not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987). **[**51]**

Telmex claims both that it did not have sufficient contacts with the forum state, and that the exercise of jurisdiction over it would be improper because the procedural and substantive policies of Mexico would be affected. *Asahi* noted that "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id. at 115* (internal quotation marks omitted). *Asahi*, however, was concerned with "the unique burdens placed upon one who must defend oneself in a foreign legal system." *Id. at 114*. For Telmex, a company that indisputably has engaged in numerous business dealings in the United States, these concerns are de minimis, and even if Mexican policy is relevant on the merits, it is not relevant to the initial determination of personal jurisdiction. If Telmex has broken U.S. law, then requiring Telmex to answer for that would be "fair play."

Thus, there was no personal jurisdiction over Telmex only if Telmex did not have sufficient contacts with Texas and the United States. [HN31](#)[] Minimum contacts can be established either through contacts giving rise to general jurisdiction, or those giving rise [**52] to specific jurisdiction. We shall consider these as well as ATI's alternative claim that jurisdiction is authorized under a special provision of the Clayton Act.

1. General Jurisdiction

The lower court dismissed the claims against Telmex on personal jurisdiction without an evidentiary hearing. In such instances, the plaintiff satisfies his burden by presenting a *prima facie* showing of jurisdiction. See [HN32](#)[] *Felch v. Transportes Lar-Mex, S.A. de C.V.*, 92 F.3d 320, 326 (5th Cir. 1996). Conflicting evidence must be resolved in favor of the plaintiff. See *id.* (quoting [HN33](#)[] *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990)).

[*717] General jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed. See *Metropolitan Life Insurance Co. v. Robertson CECO Corp.*, 84 F.3d 560, 569 (2d Cir. 1996). Telmex's contacts with Texas over the time period from 1990 to 1996 were numerous; the major ones are highlighted here. Up until 1990, Telmex leased telephone circuits between Arizona and Texas. Telmex's current lines interconnect with Texas at the border in McAllen [**53] and El Paso. Telmex leased real property in Texas in 1995 and paid taxes to Texas that same year. Telmex contracted to warehouse 75,000 telephone poles in Laredo around 1990-1991. Telmex had correspondent agreements with a number of US carriers. Settlement revenues from these agreements totaled approximately \$ 1 billion a year in 1994-1995. The total revenues derived from Texas residents totaled millions of dollars a month. Telmex also solicited ads for yellow page ads in border cities of U.S., although it is unclear exactly where. Additionally, SBC is alleged to be a Texas contact of Telmex, since SBC owns a portion of a controlling interest in Telmex and thus exerts some control over Telmex.⁶

[**54] The district court examined each Telmex contact and in isolation from the others, rather than examining the contacts "in toto" as required. See *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 779 (5th Cir. 1986). In other words, [HN34](#)[] even if a number of different contacts are independent of one another, if they occur with such frequency that the contacts in general are "continuous and systematic," there is general jurisdiction.

The question, then, is whether Telmex's contacts with Texas demonstrate a business presence in Texas sufficient to confer general jurisdiction. [HN35](#)[] The mere renting or ownership of property in a forum is not enough when that property is not used to conduct business in the forum. Cf. *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977). And while Telmex's other contacts may be continuous and systematic contacts which constitute doing business *with* Texas, Telmex has virtually no contacts which constitute doing business *in* Texas. Primarily, Telmex interconnects its Mexican lines with American lines, enabling long distance communication. The money U.S. companies pay Telmex is for service on the Mexican leg of [**55] the call; the money the U.S. carriers receive is for the U.S. leg of a call. As such, Mexican and U.S. telecommunications companies do business *with* each other in these situations, but neither is doing business *in* the other country for jurisdictional purposes.

⁶A number of other contacts are also put forward, mostly involving Telmex paying for services that were provided by corporations in Texas or the U.S. Such services included consulting and finance services. To the degree these contacts involve Texas, they add little to the issue; to the degree they are with other states, they are irrelevant at this juncture. Other contacts, such as Telmex being listed on the NYSE, or designating a NY agent for service of process are also not very informative.

The lines Telmex leased from Texas to Arizona also were for the purpose of connecting two points in Mexico and do not constitute doing business in Texas. The fact that SBC owns a portion of a controlling interest in Telmex also adds little to the mix. SBC's 10% interest is not a controlling interest, and typically, the corporate independence of companies defeats the assertion of jurisdiction over one by using contacts with the other. See *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983) ("Generally, our cases demand proof of control by the parent over the internal business operations and affairs of the subsidiary in order to fuse the two for jurisdictional purposes.").

The one contact that could constitute doing business in Texas would be the yellow page ads. However, the evidence on the yellow page ads consists of nothing more than a comment that Telmex solicited [*718] yellow page ads in [**56] border cities in the U.S. without naming which cities, when this occurred, whether such ads actually were actually placed, or for how long. Without more, such evidence does not help establish continuous and systematic contacts.

It is alleged that MCI sells regular phone service, international 800 service, and private line service for Telmex in Texas. This would imply a principal/agent relationship from which jurisdiction might arise. There is no evidence, however, that the provision of service by MCI was on behalf of Telmex but instead it appears to be in the nature of the resale of capacity in Mexico by MCI and the independent provision of capacity in the U.S. by MCI, as explained above with respect to the general interconnection agreements.

The strongest argument for general jurisdiction is that Telmex had arrangements with American carriers to accept telephone signals from Texas, and in order to serve this purpose, Telmex's telecommunications lines crossed into Texas, terminating across the border. The termination of Telmex's telephone lines in Texas allows for continuous and systematic transfer of calls. However, despite the apparent force of the argument that such a contact [**57] demonstrates a presence in Texas for business purposes, we are bound by *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491 (5th Cir. 1989), in which such interconnections, even though crossing the border into a forum, were held insufficient to confer general jurisdiction under the Due Process Clause.

In sum, the totality of the contacts suggests that Telmex conducted a great deal of business with Texas, but virtually none in Texas, as such general jurisdiction cannot be shown, even on a *prima facie* basis.

2. Clayton Act Jurisdiction

Because we find that ATI has shown potential U.S. antitrust injury, jurisdiction over Telmex may be obtainable based on nationwide contacts rather than just Texas contacts under the jurisdictional provision of the Clayton Act, [HN36](#) [↑] 15 U.S.C. § 22. This provision allows for jurisdiction over any federal antitrust suit in any district in which a defendant transacts business, and provides that "all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." When jurisdiction is invoked under the Clayton Act, the court examines the defendant's contacts with the United States [**58] as a whole to determine whether the requirements of due process have been met. See *Go Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406 (9th Cir. 1989).

However, while there may be some additional evidence of Telmex doing business *with* the U.S., there is no evidence qualitatively difference on the subject of doing business *in* the U.S. for what we deem to be a relevant time period from 1990 to 1996. Thus, Clayton Act personal jurisdiction over the antitrust claims is also unavailable.

3. Specific Jurisdiction

ATI maintains that specific jurisdiction over Telmex arises because Telmex "purposefully directed its activities to residents of Texas (ATI and over 80 other resellers)." As ATI recognizes, [HN37](#) [↑] specific jurisdiction over a nonresident exists when the defendant "purposefully avails" itself of the privilege of conducting activities in the forum, and the plaintiff's cause of action arises out of or relates to that act. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). By working through SBC and MCI to obtain the numbers of resellers, ATI maintains, Telmex purposefully availed itself of the [**59] forum.

While Telmex did not conduct much business in Texas, it conducted a high volume of business with Texas and Texas corporations. It was this business with which Telmex was concerned when Telmex allegedly canceled ATI's numbers. [*719] Such actions, if done without a legal right, may amount to violation of U.S. law. The issue of whether they were legally privileged, however, is not before us, and such a defense would not defeat personal jurisdiction. Thus, if the allegations against Telmex are true, then Telmex may have violated U.S. antitrust law by harming a Texas business through the willful cancellation of a necessary portion of that business's service. Such actions would have reasonably foreseeable consequences in Texas.

It is no use to say that ATI's location in Texas was "fortuitous." ATI had to be located somewhere and Telmex knew where that was and directed its actions toward Texas by canceling phone service linked to Texas. Telmex's lines ran right up and into Texas for the express purpose of serving Texas residents with Mexican phone service, a service which it received millions of dollars a month in revenue. The allegation that Telmex shut down these lines in order to harm [**60] a Texas business whose services were legal in Mexico suffices to confer personal jurisdiction over Telmex for the injuries suffered in Texas. The equivalent result would hold if an electric company sent an electric spike through its lines, damaging computers on the other end, even if that company's lines did not carry the spike all of the way to its destination.

By conducting a large volume of business with Texas through contracts carefully drafted to avoid subjecting Telmex to general personal jurisdiction in Texas, Telmex may have avoided doing business in Texas, but it made sufficient contacts with Texas and received sufficient benefits that personal jurisdiction in Texas is proper to answer for the consequences of the actions it allegedly took, directed toward Texas, to protect its business with Texas.

E. Discovery

ATI complains discovery was improperly limited. The district court stayed discovery on everything except jurisdictional issues and never lifted the stay. ATI contends that it was reversible error for the district court to grant summary judgment for SBC and MCI on all of ATI's causes of action without allowing discovery on substantive issues.

ATI points to SBC's assertion [**61] of the *Copperweld* doctrine, which requires a factual determination as to whether a monopolistic conspiracy occurred between economic competitors. This doctrine was asserted for the first time in SBC's motion for summary judgment. ATI complains that it was unable to investigate the relationship between SBC and Telmex for the purpose of this doctrine. ATI also complains it was unable to investigate the anticompetitive effect in the United States of the defendants' conduct. In particular, ATI points to the fact that the district court ruled against ATI on the issue of relevant market, without affording ATI the opportunity to pursue the issue through discovery. [HN38](#)↑ The issue of relevant market is a fact question. See, e.g., [*C.G. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241 \(5th Cir. 1985\)](#); [*Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 \(5th Cir. 1984\)](#).

ATI has waived the issue of inadequate discovery with respect to SBC. [HN39](#)↑ Under [*Federal Rule of Civil Procedure 56\(f\)*](#), the appropriate way to raise the issue is for the party opposing the motion for summary judgment to file a motion for a continuance with an attached affidavit stating [**62] why the party cannot present by affidavit facts essential to justify the party's opposition. ATI did not do this with respect to SBC.

MCI made such a motion, but the district court denied it. [HN40](#)↑ To obtain a continuance of a motion for summary judgment, a party must "specifically explain both why it is currently unable to present evidence creating a genuine issue of fact and how a continuance would enable the party to present such evidence." [*Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc.*, 48 F.3d 927, 930 \(5th Cir. 1995\)](#). The non-moving party may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts in opposition to summary judgment. See [*Daboub v. Gibbons*, 42 F.3d 285, 288 \(5th Cir. 1995\)](#). If it appears that further discovery will not provide evidence creating a genuine issue of material fact, the district court may grant summary judgment. See [*Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 278 \(5th Cir. 1991\)](#).

ATI failed to specify its intended discovery or how such discovery would assist it in opposing summary judgment in favor of MCI. ATI failed to identify who could provide [**63] information relevant to the issues other than witnesses who had already been deposed one or more times before.

HN41[] When a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error. See *Anderson v. Liberty Lobby, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. ATI, however, has not persuasively indicated that it was deprived of any relevant information with respect to MCI. Cf. *RTC v. Marshall, 939 F.2d 274, 278 (5th Cir. 1991)* (requiring the nonmovant to show how additional discovery would lead to unresolved issues of fact). For these reasons, it was proper for the district court to deny additional discovery.

IV.

For the forgoing reasons, we REVERSE the district court's grant of summary judgment to MCI and SBC on the substantive issues in this case, we REVERSE the dismissal of Telmex on personal jurisdiction, and we REVERSE the denial of partial summary judgment to ATI on the issue of the lawfulness of its activities in Mexico. We REMAND this case to the district court for additional proceedings consistent with this opinion.

REVERSED [**64] AND REMANDED.

End of Document



Roniger v. McCall

United States District Court for the Southern District of New York

December 1, 1999, Decided ; December 3, 1999, Filed

97 Civ. 8009 (RWS)

Reporter

72 F. Supp. 2d 433 *; 1999 U.S. Dist. LEXIS 18702 **

GEORGE P. RONIGER, Plaintiff, - against - H. CARL McCALL, individually and as Comptroller of the State of New York, and ROSEMARY SCANLON, individually and as State Deputy Comptroller for the City of New York, Defendants.

Disposition: [**1] Defendants' motion for partial summary judgment denied.

Core Terms

conspiracy, personal interest, intraenterprise, terminated, entity, employees, intracorporate conspiracy doctrine, reelection, summary judgment, Defendants', conspire, Lawsuit, reasons, retaliate, courts, deposition, budget, fired, bias

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

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

HN1 [down arrow] Entitlement as Matter of Law, Appropriateness

Under [Fed. R. Civ. P. 56\(b\)](#), a party against whom a claim, counterclaim, or cross-claim is asserted may, at any time, move for a summary judgment in the party's favor as to all or any part thereof. Summary judgment is appropriate, however, only where the evidence is such that a reasonable jury could not return a verdict in favor of the non-moving party.

Civil Procedure > ... > Discovery > Methods of Discovery > 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 > Legal Entitlement

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

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

HN2 Discovery, Methods of Discovery

Under [Fed. R. Civ. P. 56\(c\)](#), summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits 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.

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 > Genuine Disputes

HN3 Summary Judgment, Opposing Materials

As a general rule, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion for summary judgment, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party. However, where the nonmoving party will bear the burden of proof at trial, [Fed. R. Civ. P. 56](#) permits the moving party to point to an absence of evidence to support an essential element of the nonmoving party's claim.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN4 Inchoate Crimes, Conspiracy

See [42 U.S.C.S. § 1985\(2\)](#).

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN5 Antitrust & Trade Law, Sherman Act

The intraenterprise conspiracy doctrine is drawn from [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), which prohibits contracts, combinations, and conspiracies in restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN6 Antitrust & Trade Law, Sherman Act

The statutory requirement under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), of a plurality of actors is not satisfied by joint action of wholly owned subsidiaries of a single entity, unincorporated divisions of a company, or employees of a single entity acting within the scope of their employment.

Counsel: JOHN A. BERANBAUM, ESQ., Of Counsel, BERANBAUM MENKEN BEN-ASHER & FISHEL, New York, NY, for Plaintiff.

DEBO P. ADEGBILE, ESQ., ROBERT S. SMITH, ESQ., MARIA H. KEANE, ESQ., Of Counsel, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, New York, NY, for Defendants.

Judges: ROBERT W. SWEET, U.S.D.J.

Opinion by: ROBERT W. SWEET

Opinion

[*434] Sweet, D.J.

Defendants H. Carl McCall ("McCall"), Comptroller of the State of New York, and Rosemary Scanlon ("Scanlon") (collectively the "Defendants") have moved, pursuant to [Rule 56\(b\), Fed. R. Civ. P.](#), for partial summary judgment dismissing the conspiracy claim brought by plaintiff George P. Roniger ("Roniger") under [42 U.S.C. § 1985\(2\)](#). For the reasons set forth below, the motion is denied.

Facts and Prior Proceedings

The facts, parties, and prior proceedings in this case have been set forth more fully in a prior opinion of the Court, familiarity with which is assumed. See [Roniger v. McCall, 22 F. Supp. 2d 156 \(S.D.N.Y. 1998\) \(Roniger I\)](#).

On October 29, 1997, Roniger filed his original complaint in this action, asserting causes of action [*2] under [42 U.S.C. § 1983](#) and [§ 1985\(2\)](#). Roniger's First Amended Complaint (the "Complaint") was filed on May 8, 1998.

From May of 1993 until approximately December 1, 1994, Roniger was employed in the Office of the State Deputy Comptroller for the City of New York ("OSDC") -- a division of the Office of the State Comptroller ("OSC"). As was set forth in more detail in *Roniger I*, Roniger has alleged in this action that he was terminated from his position at the OSDC as a result of his politically embarrassing statements in deposition testimony concerning a June 29, 1993 letter (the "June 1993 letter") that Comptroller McCall sent to then-Mayor Dinkins in connection with the City's efforts to prevent a downgrading of its bond rating. In that letter, McCall made a variety of representations to Dinkins concerning the state of the City's budget. The City ultimately utilized the Comptroller's positive statements in that letter in remonstrating for the maintenance of its "A-" bond rating by Standard & Poors.

The lawsuit in which Roniger had been called to testify involved accusations by former OSDC personnel that they had been improperly fired because of McCall's [*3] alleged politicization of the OSC, and because of their pointed criticism of the City's budget in a draft OSC report. Several fired employees filed suit against McCall in federal court for wrongful termination and retaliation, claiming that they had been discharged for truthfully assessing the fiscal position of New York City at a time when McCall had political reasons to downplay the City's financial difficulties.

[*435] See *Westmeyer v. McCall*, No. 93 Civ. 8226 (JSM) (hereinafter the "Westmeyer Lawsuit"); see also *Fry v. McCall*, No. 95 Civ. 1915 (JFK). The plaintiffs in the Westmeyer Lawsuit claimed that they had been discharged for political reasons, and that McCall had sought to influence their reports in order to help Dinkins' reelection chances.

On August 12, 1994, approximately three months before McCall faced reelection for Comptroller, the plaintiffs in the Westmeyer Lawsuit deposed Roniger. Roniger was questioned at length about the June 1993 Letter, and it was during this questioning that his only criticism of McCall was voiced. As the deposition transcript reveals, Roniger expressed the view that the Comptroller's June 1993 letter was too soft on the City:

Q: [**4] Do you know whether the portions of the letter that you saw conformed to the statements contained in the various reports sent out by the Comptroller's office concerning the City financial plan?

A: As I recall from a distance, it was my view that the letter took too soft a position vis-a-vis the City.

Q: In what respect?

A: I can't answer that question because I don't remember the language. It's been too long.

Q: I don't want to put words in your mouth. You are here to testify, not me. But do you mean it was not critical enough of the City's financial plan?

A: In my view, the City's position was somewhat more difficult than what I recall the letter suggested.

Shortly thereafter, on September 14, 1994, the *Bond Buyer*, a newspaper serving the New York financial community, published an article headlined, "State Comptroller Downplayed Plight of N.Y.C. Budget Woes, Top Aide Says." The *Bond Buyer* story stated, in relevant part:

George Roniger ... recently said he had misgivings about the letter's content, and specifically, its description of the city's fiscal situation Several fiscal analysts interviewed for this article said the letter is [**5] unusual because it soft-pedals many of the city's fiscal woes, and because it was written with the assistance of city officials. Parts of the letter even run counter to the tone and substance of reports produced by McCall's New York City Budget Office In his testimony, McCall said Roniger was responsible for "validity of any document that we produced that he was involved in."

The *Bond Buyer* story was picked up by other newspapers, and the New York Post severely criticized both the substance of the June 1993 letter and the process by which the letter was allegedly produced -- the submission of a draft letter by the City. The June 1993 Letter became the source of criticism of McCall in his successful 1994 campaign for Comptroller.

According to Roniger, in the wake of the negative publicity surrounding his testimony in the Westmeyer Lawsuit, McCall and Scanlon -- who was then head of the OSDC -- conspired to humiliate Roniger and to remove him from the Comptroller's Office. Though the record appears somewhat unclear concerning the specifics of Roniger's discharge, it is not disputed that he was notified of his dismissal from his position on December 1, 1994. The "effective [**6] date" of his termination was February 10, 1995. Both Scanlon and McCall were employees of the OSC at the time Roniger was terminated, though Scanlon has since left her position at that office.

In *Roniger I*, it was held that Roniger's § 1983 claims against both McCall and Scanlon in their individual capacities would be dismissed under the doctrine of "qualified immunity," given that, as a policymaker, Roniger's asserted *First Amendment* right was not clearly established in 1994. [22 F. Supp. 2d at 166](#). *Roniger I* also held, [*436] however, that Roniger had stated a claim against McCall under § 1983 in his official capacity, though the official-capacity claim against Scanlon was dismissed since she had ceased to be employed by the OSC in 1997. See [id. at 161](#).

More importantly for the purposes of the instant motion, *Roniger I* left open the question of whether Roniger could maintain his § 1985(2) claim against McCall and Scanlon, given that both were employed by OSC at the time Roniger suffered an adverse employment action. See [id. at 169](#).

The Defendants filed their motion for partial summary judgment on June 21, 1999. Oral argument [**7] was heard on September 15, at which time the motion was deemed fully submitted.

Discussion

I. Rule 56(b)

HN1 Under Rule 56(b), Fed. R. Civ. P., a "party against whom a claim, counterclaim, or cross-claim is asserted . . . may, at any time, move . . . for a summary judgment in the party's favor as to all or any part thereof." Summary judgment is appropriate, however, only where the evidence is such that a reasonable jury could not return a verdict in favor of the non-moving party. See [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51, 91 L. Ed. 2d 202, 106](#)

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S. Ct. 2505 (1986). HN2[] Under Rule 56(c), Fed. R. Civ. P., it shall be rendered "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . 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." As the Second Circuit has explained:

HN3[] "As a general rule, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should [**8] be resolved against the moving party." However, where the nonmoving party will bear the burden of proof at trial, Rule 56 permits the moving party to point to an absence of evidence to support an essential element of the nonmoving party's claim.

Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991) (quoting Brady v. Town of Colchester, 863 F.2d 205, 210 (2d Cir. 1988) (internal citations omitted).

II. Summary Judgment Shall Not Be Granted In Favor of Defendants Concerning Roniger's § 1985(2) Claim

At the outset, it is important to emphasize the discrete nature of the matter under consideration in connection with Defendants' present motion. Roniger's remaining § 1983 claim against McCall in his official capacity is not at issue. The only matter presently before the Court is Roniger's § 1985 claim. Thus, while the parties have submitted a significant amount of material that would appear to refer to the vitality of Roniger's underlying § 1983 claims, it is the question of conspiracy that is addressed herein.

HN4[] 42 U.S.C. § 1985(2) provides in pertinent part:

If two or more persons in [**9] any State or territory conspire to deter, by force, intimidation or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators.

[*437] As was discussed in detail in *Roniger I*, the Defendants contend that Roniger's claim under this section must be dismissed pursuant to the "intraenterprise" or "intracorporate" conspiracy doctrine, as the conduct complained of was really that of a single entity -- the OSC.

As was stated by the court in Johnson v. Nyack Hospital, 954 F. Supp. 717 (S.D.N.Y. 1997):

HN5[] the intraenterprise conspiracy doctrine is drawn from Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits contracts, combinations and conspiracies in restraint of trade. The evil to which that statute is directed is concerted decisions of two or more [**10] business entities to take action "that, in a competitive world, each would take separately." In consequence, HN6[] the statutory requirement of a plurality of actors is not satisfied by joint action of wholly owned subsidiaries of a single entity, unincorporated divisions of a company, or employees of a single entity acting within the scope of their employment.

Id. at 722 (quoting Stathos v. Bowden, 728 F.2d 15, 21 (1st Cir. 1984)). Though this doctrine had its genesis in antitrust law, and in lawsuits concerning anticompetitive conspiracies between and among corporate actors, it has since been imported into § 1985 jurisprudence. See Herrmann v. Moore, 576 F.2d 453, 458 (2d Cir. 1978) (holding that plaintiff could not maintain § 1985(2) claim, despite the fact that one of the reasons for his discharge was that he had attended and testified in court, because "every one of the defendants who was involved in the so-called conspiracy was either a trustee or faculty member of the Brooklyn Law School which is admittedly an educational corporation and was acting in that capacity in connection with the discharge."); Girard v. 94th Street & Fifth Avenue Corp., 530 F.2d 66, 71 (2d Cir. 1976) [**11] (finding that plaintiff's § 1985(3) claim must be dismissed, given that "conspiracy" alleged involved actions by individual defendants in corporate capacities); Gatling v. The Fashion Ass'n, 1999 U.S. Dist. LEXIS 12967, No. 98 Civ. 2251 (LMM), 1999 WL 637232, at **2-3 (S.D.N.Y. Aug. 20, 1999) (finding plaintiff's proposed § 1985 claim to be futile based on intracorporate conspiracy doctrine). The doctrine has

been extended to apply to public entities, and to alleged conspiracies involving public employees. See *Rini v. Zwirn*, 886 F. Supp. 270, 292 (E.D.N.Y. 1995) (collecting cases); see also *Allen v. City of Chicago*, 828 F. Supp. 543, 564 (N.D. Ill. 1993) (holding, in context of § 1985(3) suit against City of Chicago and various officials, that "while we believe that plaintiffs have alleged facts indicating that these individuals came to a meeting of the minds concerning unconstitutional conduct, we agree with defendants that the 'intra-corporate conspiracy' theory bars this claim").

The Defendants claim, as they did in connection with *Roniger I*, that Roniger's § 1985 claim cannot lie because, for the purposes of § 1985, both McCall and Scanlon were employees [**12] of OSC and therefore one-in-the-same. Just as it takes two to tango, they press, it takes at least two distinct individuals or entities to conspire, and given the context in which Roniger was discharged the intraenterprise conspiracy doctrine does not allow one to consider McCall and Scanlon separately.

As in *Roniger I*, Roniger seizes on the so-called "personal interest" exception to the intraenterprise conspiracy doctrine to ward off dismissal. See *Bond v. Board of Education*, 1999 U.S. Dist. LEXIS 3164, No. 97 CV 1337, 1999 WL 151702, at *2 (E.D.N.Y. Mar. 17, 1999); *Quinn v. Nassau Cty. Police Dep't*, 53 F. Supp. 2d 347, 360 (E.D.N.Y. 1999); *Geiger v. E.I. DuPont Nemours & Co.*, 1997 U.S. Dist. LEXIS 2049, No. 96 Civ. 2757, 1997 WL 83291, at *10 (S.D.N.Y. Feb. 14, 1997); *Rini*, 886 F. Supp. at 293; see also *Perkins v. Gregg County*, 1995 U.S. Dist. LEXIS 22125, No. 6:94 CV 328, 1995 WL 836051, at *6 (E.D. Tex. Dec. 6, 1995) (finding that intracorporate conspiracy doctrine does not apply, given plaintiff's pleadings in action against County, its commissioners and other defendants, where Gregg County Commissioner was alleged to have been motivated to retaliate against plaintiff [**13] because of plaintiff's cooperation with federal investigators and implication of Commissioner in criminal activity); *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1127 (10th Cir. 1994) (noting, in case where former Rocky [*438] Flats worker sued employer and former coworkers for engaging in conspiracy to deter her from testifying and to retaliate for her testimony, that personal interest exception would apply where whistleblower plaintiff implicated defendants in criminal activity and statements allegedly made by defendants indicated that "they feared plaintiffs' testimony would lead to the plant's closing and the loss of defendants' jobs"). According to Roniger, his discharge was motivated by personal reasons, not reasons connected to OSC official business. McCall's interest in being reelected Comptroller, in downplaying his allegedly compromised political independence, in vindicating his reputation, and in punishing Roniger for his testimony are asserted to be personal interests distinct from the interests of either Scanlon or the "corporate" objectives of the Comptroller's Office. According to Roniger, the OSC was intended to be non-partisan, and therefore any politically-motivated [**14] termination would reflect distinctly personal interests belonging to McCall alone.

By contrast, according to Defendants, even if Roniger's discharge was attributable to the fallout surrounding Roniger's testimony,¹ McCall simply had a personal stake in keeping his job, and in appearing in a favorable light -- the same "interest" every employee of every entity has. Moreover, to the extent that any of the evidence submitted by Roniger could allow one to conclude that McCall approved of his discharge because of McCall's personal interest in reelection, Defendants suggest that the intraenterprise conspiracy doctrine could never apply to elected officials if Roniger's position were correct -- as all officials facing reelection make decisions, in some way or another, to satisfy the voting public and to increase their chances of reelection.

[**15] In *Roniger I*, resolution of this issue was put off to another day, as it was "not clear that Roniger could prove no set of facts supporting the notion that McCall acted upon some personal motive or in furtherance of a personal -- maybe even economic -- interest outside of the objectives of the Comptroller's Office in terminating Roniger." 22 F. Supp. 2d at 169.

¹ It is worth noting that the Defendants do not concede this point, and have submitted a significant amount of evidence from which it could be concluded that Roniger's situation at OSDC had become precarious well before he was ever deposed -- as the result of deterioration of the working relationship between him and Scanlon. Indeed, "vent" notes dutifully recorded by Roniger detail his growing dissatisfaction with Scanlon's managerial tactics and travails, and with the marginalization of his own role at OSDC, many months before he testified in the Westmeyer Lawsuit.

Based on the record presently before the Court, disputed issues of material fact exist concerning the extent to which McCall was motivated by exclusively personal interests when he authorized Roniger's dismissal. While Roniger has not supplied evidence concerning any independent economic interest that McCall might have had in terminating Roniger, the record contains evidence from which a reasonable jury might conclude that Roniger was terminated based on personal interests unconnected with the official interests of the OSC.

A review of the decisions applying the intracorporate conspiracy doctrine reveals a degree of uncertainty in the law. Some courts have appeared to apply the doctrine in strict fashion, whenever the defendants' activities were undertaken within the scope of their official duties. Other courts [**16] have either sought to parse the true scope of a defendant's official duties, or determined that a defendant's acts were undertaken for essentially personal reasons -- such that the acts about which a plaintiff complains should not be considered merely the acts of a corporate entity acting through its agents or officers. A few other courts have, like this Court, forestalled a decision about the applicability of the doctrine. See [*Northen v. City of Chicago, 1999 U.S. Dist. LEXIS 7897*](#), No. 93 C 7013, [1999 WL 342441](#), at *3 [[*439](#)] (N.D. Ill. May 17, 1999) (denying defendants' motion to dismiss premised upon intracorporate conspiracy doctrine, as plaintiff had alleged that he was falsely arrested in retaliation for criticizing Chicago Police Department; noting that "based on [plaintiff's] allegations, this court cannot determine whether the officers were pursuing lawful police business"); [*Yeadon v. New York City Transit Auth., 719 F. Supp. 204, 211-12 \(S.D.N.Y. 1989\)*](#) (holding that plaintiffs' § 1985 and § 1986 claims could not be dismissed upon 12(b)(6) motion, as they had adequately alleged "independent, personal conspiratorial purposes."). Whether the applicability of the intracorporate [**17] conspiracy doctrine is a question of fact or of law is an issue that continues to divide the circuits, and one that also does not appear to have been conclusively resolved within this Circuit. See [*Broadway Delivery Corp. v. United Parcel Serv., 651 F.2d 122, 126 \(2d Cir. 1981\)*](#); [*Geiger, 1997 WL 83291*](#), at *10 n.3.; [*Martin Process Co. v. Lee Co., 1983 U.S. Dist. LEXIS 13785*](#), No. 81 Civ. 3775 (HEW), 1983 WL 1907, at *5 (S.D.N.Y. Sept. 14, 1983); see also [*Nanavati v. Burdette Tomlin Memorial Inst., 645 F. Supp. 1217, 1231 \(D.N.J. 1986\)*](#) (discussing trial court's instructions to jury concerning intracorporate conspiracy doctrine, including instruction that a conspiracy may properly be found where alleged conspirator had "private economic motives").

In *Herrmann v. Moore*, the Second Circuit applied the "familiar doctrine" that "there is no conspiracy if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment." [576 F.2d at 459](#). In pressing his claims, Roniger asserts that, to apply the [**18] intraenterprise conspiracy doctrine whenever a particular set of defendants acted within the scope of their official duties would be to graft an "ill-advised" exception upon the "personal stake" exception that already exists to the doctrine. While this assertion mischaracterizes the specifics of Defendants' position, there is some truth to Roniger's general position that whether or not a particular individual was operating in the scope of his employment is not the only determinative question to be raised when considering the application of the intraenterprise conspiracy doctrine. After all, a wide range of conspiracies may result in adverse employment actions -- demotions, terminations, pay reductions, and the like -- that are properly within the power of a set of defendants to take. Moreover, if the scope of a Defendant's employment were the only relevant criterion, it is doubtful that the courts would have ever fashioned the so-called "personal interest" exception to the doctrine.²

[**19] By the same token, however, it should be observed that a promiscuous use of the "personal interest" exception to the doctrine would eviscerate the doctrine as a whole. In *Johnson v. Nyack*, the court responded as follows to a plaintiff's claim that personal racial bias constitutes a personal interest sufficient to block application of the doctrine:

If personal racial bias were sufficient to defeat the intraenterprise conspiracy doctrine, the exception would swallow the rule, and Girard and Herrmann would be meaningless. Accordingly, this Court holds that personal bias is not the sort of individual interest that takes a defendant out of the intraenterprise conspiracy doctrine where, as here, the action complained of arguably served a legitimate interest of Nyack Hospital.

² Of course, it might be observed that application of such an "exception" is merely another way of finding that the employee or officer of a corporate entity was not truly operating in the "scope" of his or her employment, but rather went beyond the scope of his or her employment by making decisions based on exclusively personal interests.

954 F. Supp. at 723; see Bond, 1999 WL 151702, at *2 ("Although the complaint includes an allegation that Rodriguez-Torres wanted to 'get rid of' plaintiff, personal bias does not constitute personal interest [*440] and is not sufficient to defeat the intracorporate conspiracy doctrine."). In the context of § 1985(3) claims based on racial or other discrimination, other courts [**20] have observed that the necessity of demonstrating discriminatory animus would render the doctrine meaningless unless the personal stake exception is applied carefully. See Hartman v. Board of Trustees, 4 F.3d 465, 470 (7th Cir. 1993); Markham v. White, 1995 U.S. Dist. LEXIS 16656, No 95 C 2065, 1995 WL 669643, at *5 (N.D. Ill. Nov. 8, 1995). By definition, for example, racial discrimination or other types of unconstitutional activity are seldom within a conspiracy defendant's job description.³ Similarly, an officer or agent's personal financial interests in a matter, distinct from the financial interests of the corporate entity, may constitute a sufficient personal stake in a matter to merit suspension of the doctrine. To some degree or another, however, all individuals have a financial stake in the positions they occupy or the sinecures they hope to obtain. It is for this reason, perhaps, that courts have at times held that an employee must have been motivated "solely" by personal bias or exclusively personal interests in order for the personal interest exception to apply. See Hartman, 4 F.3d at 470.

[**21] In his submissions, Roniger asserts that, because a New York State agency such as the OSC is proscribed from engaging in partisan politics, and because the State Comptroller is "obliged by the State Constitution to function as [an] independent auditing official for the affairs of the State," any interests McCall might have had in "protecting his political image and settling a political score" were not only distinct from, but inimical to, the business of the Comptroller's office. However, this begs the very question presented, and Roniger's efforts to resolve a complex matter by way of mere definition are unhelpful -- given that the Comptroller, however independent and "nonpartisan," occupies an elected position, and given that even non-elected officials and non-partisan governmental entities can reasonably be expected to react to public criticism based on "corporate" interests. One might just as easily say that the interests of a law school's trustees or faculty members are in running the law school and teaching, not in punishing a fellow faculty member for attending and testifying in court, *but see Herrmann, 576 F.2d at 458*, that the interests of employees of the [**22] Department of Children and Family Services (DCFS) are properly in protecting the welfare of children, but not in retaliating against a DCFS caseworker for retaining a lawyer and filing a federal lawsuit, *but see Wright v. Illinois Dep't of Children & Family Services, 40 F.3d 1492, 1508-09 (7th Cir. 1994)* (holding that conspiracy alleged "had a rather limited object -- stifling [plaintiff's] efforts to air her personal and professional grievances," and finding that doctrine therefore applied), or that the interests of municipal employees do not lie in conspiring to eliminate other employees' positions based on their political affiliation, but rather in doing their assigned tasks with singleminded determination. *But see Rini, 886 F. Supp. at 291* ("Here it is alleged that the Municipal defendants conspired to develop and approve a budget reduction plan which eliminated plaintiffs' positions [because they were registered Republicans]. Regardless [*441] of the motive or intent supporting the legislation, these are acts within the scope of their official duties. Therefore, the § 1985 claims against the Municipal defendants in their individual capacities must [**23] be dismissed, as a matter of law, as the allegation that their acts in furtherance of the conspiracy were solely within the scope of their duties as officials or employees of the Town."). Thorny questions about the application of the intraenterprise conspiracy doctrine are not so easily dispatched.

Nevertheless, there is truth to Roniger's observation that McCall may, on certain occasions, act as Comptroller McCall, and on other occasions act as either private citizen McCall or candidate McCall. The Comptroller's personal interests in his reelection and in his reputation, for example, may be distinct from his official interests in managing

³Indeed, many of the cases in which the intraenterprise conspiracy doctrine has been found *not* to apply are cases involving claims of racial or other invidious discrimination. See Quinn, 53 F. Supp. 2d at 360 (finding that police officer who abused plaintiff officer based on his sexual orientation pursued "personal interests wholly separate and apart from the entity," and that "personal interest" exception to doctrine therefore applied); McCraven v. City of Chicago, 18 F. Supp. 2d 877, 884 (N.D. Ill. 1998) (holding that police department's race-based treatment of plaintiff was "sufficient to take this case outside the intracorporate immunity doctrine"); Salto v. Mercado, 1997 U.S. Dist. LEXIS 5796, *6, No. 96 C 7168, 1997 WL 222874, at *2 (N.D. Ill. Apr. 24, 1997) ("Here, Salto alleges that defendants conspired to physically abuse and falsely arrest him in retaliation for complaining of police misconduct and for filing a civil lawsuit. These allegations, if true . . . would demonstrate that the defendants were motivated solely by personal bias.").

OSDC's personnel, defending the institutional integrity of the OSC, or even in retaliating for public criticism of that Office. In practice, it may be rather difficult to determine whether an elected official was acting as an official or as a candidate, pursuant to personal or public interests. However, this does not mean that the inquiry should be abandoned, and the intracorporate conspiracy doctrine applied automatically.

Given the record before the Court, it cannot be said that no material issues of fact exist as to whether the Comptroller's **[**24]** decision to fire Roniger was motivated solely by personal interests distinct from those of the OSC. To the extent that Roniger has contended that McCall had a distinctly personal interest in firing Roniger because of the "damage done to his reputation as a trustworthy person," the lion's share of evidence Roniger has offered in support of this proposition concerns alleged discrepancies in deposition testimony that would only have become apparent well after the decision to terminate Roniger had been made. Furthermore, much of the evidence submitted would be consistent with a determination that McCall was not motivated by personal interests, but rather by the interests of the OSC itself. Nevertheless, the record contains enough evidence concerning the political fallout following Roniger's deposition testimony, the timing of Roniger's firing, and McCall's handling of Roniger's discharge from which it could be inferred that Roniger was ultimately fired because of McCall's own personal interests in his reelection and reputation, and to obtain retribution against Roniger as a result of personal embarrassment over the publicity surrounding Roniger's testimony. Such disputed factual issues **[**25]** do not lend themselves to easy resolution by a court upon a motion for summary judgment, but rather are best left to a jury.

Conclusion

For the reasons stated above, the Defendants' motion for partial summary judgment shall be denied.

It is so ordered.

New York, N. Y.

December 1, 1999

ROBERT W. SWEET

U.S.D.J.

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Massachusetts Food Ass'n v. Massachusetts Alcoholic Bevs. Control Comm'n

United States Court of Appeals for the First Circuit

December 2, 1999, Decided

No. 99-1277, No. 99-1280

Reporter

197 F.3d 560 *; 1999 U.S. App. LEXIS 31966 **; 1999-2 Trade Cas. (CCH) P72,723; 45 Fed. R. Serv. 3d (Callaghan) 1270

MASSACHUSETTS FOOD ASSOCIATION, ET AL., Plaintiffs, Appellants, v. MASSACHUSETTS ALCOHOLIC BEVERAGES CONTROL COMMISSION, ET AL., Defendants, Appellees. MASSACHUSETTS FOOD ASSOCIATION, ET AL., Plaintiffs, Appellees, v. MASSACHUSETTS ALCOHOLIC BEVERAGES CONTROL COMMISSION, ET AL., Defendants, Appellees, and WINE & SPIRIT WHOLESALERS OF MASSACHUSETTS, INC., ET AL., Appellants.

Subsequent History: [**1] As Modified December 27, 1999.

Certiorari Denied May 1, 2000, Reported at: [2000 U.S. LEXIS 3128](#).

Prior History: APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Douglas P. Woodlock, U.S. District Judge.

Disposition: Affirmed.

Core Terms

regulation, district court, private party, intervenors, licenses, anti trust law, supervision, intervene, retail, Sherman Act, would-be, Wholesalers, trade association, amicus brief, anticompetitive, authorize, liquor

LexisNexis® Headnotes

Governments > Legislation > Types of Statutes

[**HN1**](#) **Legislation, Types of Statutes**

Massachusetts, like many other states, extensively regulates the sale of alcoholic beverages. Among other restrictions, retail outlets must be licensed, each license embraces only a single location, and no firm or person is allowed "more than three such licenses in the commonwealth." [*Mass. Gen. Laws ch. 138, § 15*](#) (1998).

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

[**HN2**](#) **Standards of Review, De Novo Review**

The court of appeals' review of a judgment of dismissal is de novo.

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > Prohibition

[HN3](#) [+] Antitrust & Trade Law, Sherman Act

Putting aside the special status of state liquor regulation under the U.S. Const. amend. XXI, § 2, one of the best settled rules in antitrust law is that the Sherman Act, 15 U.S.C.S. § 1 et seq., was not intended to "apply" to the states so as to foreclose otherwise valid state regulation.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN4](#) [+] Scope, Exemptions

The immunity from the Sherman Act, 15 U.S.C.S. § 1, et seq., afforded to "state action" has been hedged by a concern with state laws deemed merely to authorize or direct conduct by private parties that, absent such state legislation, would violate the antitrust laws. It is one thing to say that a state may itself regulate in an "anticompetitive" fashion; it is quite another to say that the state can effectively exempt private parties from obeying the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

[HN5](#) [+] Antitrust & Trade Law, Sherman Act

Under certain conditions, the states have been allowed to authorize or direct private conduct otherwise inconsistent with the Sherman Act, 15 U.S.C.S. § 1 et seq. The main conditions are that the state do so as part of a deliberate policy to displace competition and that the state provide an alternative regime that provides "active supervision" of the conduct.

Antitrust & Trade Law > Sherman Act > General Overview

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

[HN6](#) [+] Antitrust & Trade Law, Sherman Act

It is evident that one must be careful in parsing general statements to the effect that states may not compel "private parties to engage in anticompetitive behavior." What is centrally forbidden is state licensing of arrangements

between private parties that suppress competition, not state directives that by themselves limit or reduce competition.

Antitrust & Trade Law > Sherman Act > General Overview

HN7 [down] **Antitrust & Trade Law, Sherman Act**

A restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Parties > General Overview

Civil Procedure > Parties > Intervention > General Overview

HN8 [down] **Intervention, Intervention of Right**

The standard for intervention as of right is set forth in [*Fed. R. Civ. P. 24\(a\)\(2\)*](#) as follows: Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. In such cases, the timeliness of intervention and the practical impact on the would-be intervenor are rarely in dispute: it is the "interest" and "adequately represented" criteria that are usually decisive.

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Parties > Intervention > General Overview

HN9 [down] **Intervention, Intervention of Right**

[*Fed. R. Civ. P. 24\(a\)\(2\)*](#)'s reference to "an interest relating to the property or transaction" suggests that the drafters had in mind something narrower and more akin to property or contract interests in conventional private litigation as the necessary stake; but this narrow reading has not been accepted in practice.

Civil Procedure > Parties > Intervention > General Overview

HN10 [down] **Parties, Intervention**

Courts have been quite ready to presume that a government defendant will "adequately represent" the interests of all private defenders of the statute or regulation unless there is a showing to the contrary. While there are various ways to show that state representation is not adequate, the burden of overcoming the presumption is upon the would-be intervenor. The trial court, in applying a general rule to specific facts, is usually accorded a measure of deference in making the adequate-representation determination, so long as the court applies the proper legal standards.

Counsel: J. Mark Gidley with whom Robert D. Paul, J. Christian Word, White & Case LLP, Alan L. Kovacs, Howard J. Wayne, Eugene R. Richard and Wayne, Richard, Hurwitz & McAloon were on brief for plaintiffs.

Jane L. Willoughby, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, and Thomas A. Barnico, Assistant Attorney General, were on brief for defendants.

Bruce A. Singal with whom William C. Athanas, Donoghue, Barrett & Singal, P.C., Louis A. Cassis, Cassis, Arena & Cayer and Ernest Gellhorn were on brief for intervenor, appellants Wine & Spirit Wholesalers of Massachusetts, Inc., et al.

Bruce A. Singal, William C. Athanas, Donoghue, Barrett & Singal, P.C., Louis A. Cassis, Cassis, Arena & Cayer and Ernest Gellhorn on brief for Massachusetts Package Stores Association, Inc., Wine & Spirits Wholesalers of Massachusetts, and Massachusetts Wholesalers of Malt Beverages, Inc., Amici Curiae.

Judges: Before Boudin, Circuit Judge, Bownes, Senior Circuit Judge, and Lipez, Circuit Judge.

Opinion by: BOUDIN

Opinion

[*562] BOUDIN, *Circuit* [*2] *Judge.* [HN1](#) Massachusetts, like many other states, extensively regulates the sale of alcoholic beverages. Among other restrictions, retail outlets must be licensed, each license embraces only a single location, and no firm or person is allowed "more than three such licenses in the commonwealth . . ." [Mass. Gen. Laws ch. 138, § 15](#) (1998). Thus, no one can own more than three retail liquor stores in the Commonwealth. Although some state regulations also impinge on retail prices, e.g., [Mass. Gen. Laws ch. 138, § 25C](#), they are not at issue here.

The plaintiffs in this case--who include several supermarket chains--brought this action in the district court to enjoin enforcement [*563] of the three-store limit. The complaint charged that this statutory restriction conflicted with the Sherman Act, [15 U.S.C. § 1, et seq.](#), because it would be a *per se* violation of the Sherman Act for private competitors to agree with each other to impose such a limitation. The complaint further alleged that the defendants, the members of the Massachusetts Alcoholic Beverages Control Commission, lacked power to supervise, and did not in fact supervise, the anticompetitive consequences [*3] of this limitation (*i.e.*, less competition and higher prices).¹

Several organizations moved to intervene to defend the statute. One of them, the Massachusetts Package Stores Association ("MPSA"), is a trade association primarily representing retail liquor stores. The other two organizations--The Wine & Spirits Wholesalers of Massachusetts and the Massachusetts Wholesalers of Malt Beverages--are trade associations for alcoholic beverage wholesalers in Massachusetts. All three entities sought to intervene as of right or, in the alternative, as permissive intervenors. [Fed. R. Civ. P. 24\(a\)\(2\), \(b\)\(2\)](#). The Commission and its members moved to dismiss the complaint for failure to state a claim. [Fed. R. Civ. P. 12\(b\)\(6\)](#). After briefing and argument, the district court, on January 6, 1999, denied intervention to the trade associations but granted [*4] the defendants' motion to dismiss. [Massachusetts Food Ass'n v. Sullivan, 184 F.R.D. 217, 228 \(D. Mass 1999\)](#).

The plaintiffs in the district court now appeal from the dismissal of their complaint. The trade associations that sought to intervene appeal from the denial of intervention (but in an amicus brief support the dismissal of the complaint). [HN2](#) Our review of the judgment of dismissal is *de novo*. [Rogan v. Menino, 175 F.3d 75, 77 \(1st Cir. 1999\)](#), cert. denied, 120 S. Ct. 616, 145 L. Ed. 2d 511 (U.S. 1999). Since we affirm the judgment of dismissal, the intervention issue is largely (although not entirely) academic, and we return to it only after addressing the merits.

¹ The complaint originally named the Commission itself as a defendant but, in response to an [Eleventh Amendment](#) objection, the members were substituted as defendants.

At first blush, one might think this a strange complaint. The state statute limiting retail liquor outlets looks like a garden-variety act of local legislation limiting the number of licenses that the state will grant, and the statute neither authorizes nor directs private parties to engage in anticompetitive agreements among themselves. [HN3](#)¹ Putting aside the special status of state liquor regulation under the [Twenty-First Amendment](#), U.S. Const. amend. [**5] XXI, § 2, one of the best settled rules in [antitrust law](#) is that the Sherman Act was not intended to "apply" to the states so as to foreclose otherwise valid state regulation. [Parker v. Brown, 317 U.S. 341, 350-52, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#); see also [Neo Gen Screening, Inc. v. New England Newborn Screening Program, 187 F.3d 24, 28 \(1st Cir. 1999\)](#), cert. denied, 120 S. Ct. 615, 145 L. Ed. 2d 510 (U.S. 1999); [Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073, 1076 \(1st Cir. 1993\)](#). But, as we shall see, there are qualifications on this general rule, and the case law is not entirely coherent. See generally I Areeda & Hovenkamp, [Antitrust Law](#) P 221 (1997). With some ingenuity, the plaintiffs in this case have sought to make the most of the resulting ambiguities.

Almost from the outset, [HN4](#)¹ the immunity from the Sherman Act afforded to "state action" has been hedged by a concern with state laws deemed merely to authorize or direct conduct by private parties that--absent such state legislation--would violate the antitrust laws. Cf. [Parker, 317 U.S. at 351-52](#). [**6] It is one thing to say that a state may itself regulate in an "anticompetitive" fashion; it is quite another to say that the state can effectively exempt private parties from obeying the antitrust laws. Thus, a state [*564] cannot shield private parties from the federal antitrust laws by enacting a statute saying no more than that competing grocery stores may agree to fix prices; through the [Supremacy Clause](#), the Sherman Act would preempt such a law.

This qualification is *itself* qualified. [HN5](#)¹ Under certain conditions, the states have been allowed to authorize or direct private conduct otherwise inconsistent with the Sherman Act. The main conditions are that the state do so as part of a deliberate policy to displace competition *and* that the state provide an alternative regime that provides "active supervision" of the conduct, [Patrick v. Burget, 486 U.S. 94, 100, 100 L. Ed. 2d 83, 108 S. Ct. 1658 \(1988\)](#); an example would be a specific authorization for joint ratemaking by intrastate carriers coupled with state agency authority to require that the resulting rates be just and reasonable. [Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 \(1985\)](#); [**7] see I Areeda, *supra*, P 226.

What state entities can adopt such a policy (state executives? local municipalities?), how clearly the policy must be articulated, and (above all) what kind of supervision will suffice are among the issues that have provoked endless litigation. See I Areeda, *supra*, P 226. For example, supervision may be a proxy for competition, designed to protect consumers (e.g., utility regulation); but supervision is not clearly limited to cases of this character. See, e.g., [Patrick, 486 U.S. at 100-01](#) (suggesting that state supervision reinforces requirement that anticompetitive behavior at issue be consistent with the state's deliberate policy).

But our facts do not require an examination of clear articulation, active supervision or other conditions for immunity. It is only where state legislation "would otherwise" be preempted by the Sherman Act that these further inquiries are required. [Fisher v. City of Berkeley, California, 475 U.S. 260, 265, 89 L. Ed. 2d 206, 106 S. Ct. 1045 \(1986\)](#). In this case, the state has not ordered or authorized private parties to engage in conduct that, absent immunity, would [**8] even arguably violate the antitrust laws; there is no private agreement or arrangement between retailers as to the number of retail outlets and therefore no violation to be shielded. The state simply insists upon licensing retail liquor stores--as it does for many businesses or professions--and limits the number of licenses to three per owner.

Despite disclaimers, the plaintiffs' case rests in the end on the implicit proposition that the Massachusetts statute is preempted because it produces an effect that could not be produced by agreement of private parties without violating the antitrust laws. Admittedly, private parties could not agree that each of them would operate only three such outlets. [United States v. Topco Associates, Inc., 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 \(1972\)](#); [Addamax Corp. v. Open Software Found., Inc., 152 F.3d 48, 51 \(1st Cir. 1998\)](#).² This resemblance in effects is the

² *Topco* may no longer be good law for its broader proposition that such a restraint is condemned *per se* even where it is ancillary to a productive joint venture. Cf. [Broadcast Music, Inc. v. CBS, 441 U.S. 1, 20-24, 60 L. Ed. 2d 1, 99 S. Ct. 1551 \(1979\)](#); [Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 253 U.S. App. D.C. 142, 792 F.2d 210, 224-29 \(D.C. Cir. 1986\)](#),

gist of the plaintiffs' position, although it is narrowed by the suggestion that preemption may be confined to statutes that produce the same effect as a *per se* violation (rather than a non-*per se* one); and, of course, plaintiffs concede [**9] that even a *per se* violation would be all right if the requisite state policy and active supervision existed.

The difficulty with this "similar effects" argument is that much direct government regulation prohibiting one form of economic activity or requiring another involves [**10] [*565] directives that private parties could not themselves implement without violating the antitrust laws. For example, competing shoe stores could not agree on closing hours or holidays without committing *per se* violations of the antitrust laws; nor could competing taxi companies agree on the number of taxicabs to be operated; nor could cable companies agree that only one or two of them should serve a locality. Yet all of these results are examples of commonplace state or local regulation, sometimes accompanied by local price regulation but sometimes not.

To allow federal judges to decide which of these legislative enactments should survive and which should be condemned comes close to reintroducing the kind of judgments that got the Supreme Court into so much trouble in the *Lochner* era. The result might well be more competition and greater consumer welfare. But it would come at the cost of second-guessing the democratically elected legislature's decisions about the proper balance between competition and other social policies that are commonly reflected in such legislation. The Sherman Act is a "charter of economic liberty," [*Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#), [**11] but only as against *private* restraints.

From these examples, [**HN6**](#) it is evident that one must be careful in parsing general statements to the effect that states may not compel "private parties to engage in anticompetitive behavior." [*324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345-46 n.8, 93 L. Ed. 2d 667, 107 S. Ct. 720 \(1987\)](#). What is centrally forbidden is state licensing of arrangements between private parties that suppress competition--not state directives that *by themselves* limit or reduce competition. This is the very distinction stressed by the Supreme Court in *Fisher* where it sustained the City of Berkeley's rent control ordinance (rent control being a classic constraint on competitive pricing). As the Court there explained,

[**\[HN7\]**](#) a] restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.

[*Fisher*, 475 U.S. at 267.](#)

The only fact patterns [**12] that give the plaintiffs any purchase is a set of Supreme Court decisions that struck down state statutes that were deemed to direct and implement private conduct replicating resale price maintenance schemes.³ The schemes were structured to allow one party (manufacturer or wholesaler) to set the resale price to be charged by purchasers at the next level. The resemblance in form and function to traditional private resale price maintenance, see [*Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 \(1911\)](#), was so close that the Supreme Court treated the arrangements as if they were nothing other than private resale price maintenance schemes licensed and abetted by the state.

[**13] There are no private restraints in this case, whether operating alone or in conjunction with state action. Cf. [*Duffy*, 479 U.S. at 345 n.8](#). The Massachusetts statute limiting licenses to three per company does not authorize or

^{cert. denied, 479 U.S. 1033, 93 L. Ed. 2d 834, 107 S. Ct. 880 (1987)}. But no one doubts that an independent agreement between private parties to limit output or divide markets is to be condemned *per se*. See [*Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 112 L. Ed. 2d 349, 111 S. Ct. 401 \(1990\)](#).

³ [*Duffy*, 479 U.S. 335, 93 L. Ed. 2d 667, 107 S. Ct. 720; California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.](#), 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980); [*Schwegmann Bros. v. Calvert Distillers Corp.*](#), 341 U.S. 384, 95 L. Ed. 1035, 71 S. Ct. 745 (1951).

direct any private agreements or permit any competitor to determine the price or location of another. The three-store limit is no more an agreement among competitors, or subordination of one competitor to the dictates of another, than a state electrical code that prescribes safety standards for [*566] contractors who wire buildings for electricity. As in *Fisher*, the restrictions have been "unilaterally imposed by government . . . to the exclusion of private control." [*Fisher, 475 U.S. at 266.*](#)

Our conclusion in no way depends on the premise that the Massachusetts three-store limit serves the public interest or on the amici's dubious suggestion that the limit has no effect on price or output.⁴ Whatever its purported or actual purpose, cf. [*Johnson v. Martignetti, 374 Mass. 784, 375 N.E.2d 290, 297 \(Mass. 1978\)*](#), it is common knowledge that many statutes regulate private activities to protect the narrow economic [**14] interests of other companies, often to the detriment of the public. See Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 23-24 (1983). But unless such a statute licenses or commands a *private restraint*, this is a matter for the voters and not for the federal courts--at least so far as the Sherman Act is concerned. Of course, such state statutes remain subject to the constraints of the [*Commerce Clause*](#) and other constitutional provisions.

This brings us to the separate question whether MPSA and the two wholesaler trade associations [**15] should have been allowed to intervene. The district court held that the wholesalers' interests were too general and contingent to justify intervention; in the case of MPSA, whose members were subject to the very three-store regulation challenged by plaintiffs, the court said that its members did have a direct and concrete interest in defending the statute but that they were adequately represented by the Commonwealth. As for permissive intervention, the court found that all three trade associations could adequately express their views through amicus briefs.

The problem presented in this case is a common one: a private party attacks a regulatory statute or administrative rule; the state or its regulators are its defendants; and other parties having an economic interest in the validity or invalidity of the statute or regulation seek to intervene. [HN8](#)[[↑]] The standard for intervention as of right is set forth in [*Rule 24\(a\)\(2\)*](#) as follows:

Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition [**16] of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In such cases, the timeliness of intervention and the practical impact on the would-be intervenor are rarely in dispute: it is the "interest" and "adequately represented" criteria that are usually decisive.

[HN9](#)[[↑]] [*Rule 24\(a\)\(2\)*](#)'s reference to "an interest relating to the property or transaction" suggests that the drafters had in mind something narrower and more akin to property or contract interests in conventional private litigation as the necessary stake; but this narrow reading has not been accepted in practice. See [*Daggett v. Commission on Governmental Ethics and Election Practices, 172 F.3d 104, 110 \(1st Cir. 1999\)*](#). We will therefore assume that the district court was right in holding that MPSA satisfied the "interest" requirement and assume *arguendo* (and solely to shorten the opinion) that the district court was wrong in holding that the wholesalers lacked such an interest.

But, perhaps as a counterweight to the broad reading of "interest," [*567] the [HN10](#)[[↑]] courts have been quite ready [**17] to presume that a government defendant will "adequately represent" the interests of all private defenders of the statute or regulation unless there is a showing to the contrary. See [*Public Serv. Co. v. Patch, 136 F.3d 197, 207 \(1st Cir. 1998\)*](#). And while there are various ways to show that state representation is not adequate, the burden of overcoming the presumption is upon the would-be intervenor, [*Daggett, 172 F.3d at 111*](#). The trial

⁴ In theory, the three-store limit might or might not affect price, depending on the extent of existing competition in specific local retail markets where (absent the limit) those who have three stores elsewhere in the Commonwealth might choose to operate. But energetic defense of the statute by MPSA is some indication that its members fear that more competition from larger chains would drive down price, improve service, or both.

court, in applying a general rule to specific facts, is usually accorded a measure of deference in making the adequate-representation determination, so long as the court applies the proper legal standards.⁵ *Id. at 111-12.*

[**18] The would-be intervenors argue that the Commonwealth cannot be an adequate representative of their interests while it also regulates them. In support of this position, they point to *Conservation Law Found. v. Mosbacher*, 966 F.2d 39 (1st Cir. 1992), and the district court opinion in *Patch*, 173 F.R.D. 17 (D.N.H. 1997). In *Mosbacher*, we held that commercial fishing groups could intervene as of right to oppose a challenge to a state agency's approval of a fishery plan, noting that the fishing groups were regulated by the agency. *Mosbacher*, 966 F.2d at 44. In *Patch*, the district court allowed intervention by several electric utilities who were largely aligned with state regulators in defending a major state reform plan that restructured retail power regulation in the state. *Patch*, 173 F.R.D. at 27-28. From these decisions, MPSA infers a general rule that the state defendant's representation is inadequate as a matter of course whenever it is also the *regulator* of the entity that seeks to intervene.

The cases do not support such a *per se* rule. We certainly did not adopt such a rule in *Mosbacher*, where [**19] the intervenors overcame the presumption of adequate representation by the government defendant because, *inter alia*, the agency had not filed an answer to the complaint but had instead accepted a consent decree providing for virtually all the relief sought and subjecting the fishing groups to more stringent rules than had previously been in effect. 966 F.2d at 44. It is not clear whether the district court was applying a *per se* rule in *Patch*; but in any event that part of its decision was not appealed to us.

Here, there is no doubt that the Commonwealth was zealously interested in upholding the validity of the statute. The only difference between it and the would-be intervenors was their interest in offering *other* legal arguments (for example, based on the *Twenty-First Amendment*) to sustain the statute. But these arguments were easily presented in amicus briefs. This is not a case where the complaint was framed so as to require an evidentiary determination and where the would-be intervenors had information that could only be presented by their participation as parties. See generally *Daggett*, 172 F.3d at 112.

The would-be intervenors point [**20] out that an amicus does not enjoy the same opportunities as a full-fledged litigant even to offer legal argument; for example, in this court, amicus briefs are shorter than regular briefs and oral argument is at the court's discretion. *Fed. R. App. P.* 29(d),(g). But a court is usually delighted to hear additional arguments from able amici that will help the court toward right answers, and the amici can easily seek a larger allotment of pages or time to participate in oral argument. See *id.*

[*568] The more interesting claim is that the Commonwealth might refuse to appeal if it lost; or—if it won and plaintiffs sought *certiorari*—the Supreme Court might limit the questions to be considered to those set forth in the *certiorari* petition. But amici, like respondents, can advise the Supreme Court of missing arguments. *Davis v. United States*, 512 U.S. 452, 457, 129 L. Ed. 2d 362, 114 S. Ct. 2350, n. * (1994) (citing *Teague v. Lane*, 489 U.S. 288, 300, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) (plurality opinion)). And if the Commonwealth refused to appeal from a defeat, a would-be intervenor could then seek to intervene. 7C Wright, Miller & Kane, [**21] *Federal Practice and Procedure* § 1909, at 345 & n.38 (1986); see also *Daggett*, 172 F.3d at 112.

As for permissive intervention, the would-be intervenors likely met the low threshold set by *Rule 24(b)*—that their defenses included questions of law common to the defenses offered by the state. *Fed. R. Civ. P.* 24(b). But even where this necessary condition is present, the rule merely permits intervention at the discretion of the district court. *Daggett*, 172 F.3d at 112-13. The district court reasonably concluded that the Commonwealth was adequately representing the interests of everyone concerned to defend the statute and that any variations of legal argument could adequately be presented in amicus briefs. We see no abuse of discretion in this ruling.

⁵ In *Daggett* we were concerned that the district court might possibly have been misled by our own language in *Moosehead Sanitary Dist. v. S.G. Phillips Corp.* 610 F.2d 49, 54 (1st Cir. 1979), suggesting that only a limited number of "cubbyholes" existed for claims of inadequate representation. See *Daggett*, 172 F.3d at 113. In the present case, while the district court's decision cites *Moosehead*, it also makes clear that the court did not impose any artificial limitation on the way in which parties may show inadequate representation. *Massachusetts Food Ass'n*, 184 F.R.D. at 222-23.

197 F.3d 560, *568LÁ999 U.S. App. LEXIS 31966, **21

Affirmed.

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Serpa Corp. v. McWane, Inc.

United States Court of Appeals for the First Circuit

December 8, 1999, Decided

No. 99-1256

Reporter

199 F.3d 6 *; 1999 U.S. App. LEXIS 32109 **; 1999-2 Trade Cas. (CCH) P72,724

THE SERPA CORPORATION, Plaintiff, Appellant, v. MCWANE, INC., ANACO, f/k/a ANAHEIM FOUNDRY COMPANY AND TYLER PIPE INDUSTRIES, Defendants, Appellees.

Prior History: [\[**1\]](#) APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Nancy J. Gertner, U.S. District Judge.

Disposition: Affirmed.

Core Terms

termination, antitrust, distributors, notice, competitor, anti trust law, antitrust claim, acquisition, couplings, summary judgment, district court, consumers, fair dealing, good faith, manufactured, defendants', regional, pricing, monopoly, antitrust violation, anticompetitive, Airlines, covenant, plumbing, products, damages, complaint alleges, cause of action, no evidence, Clayton Act

LexisNexis® Headnotes

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

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

[HN1](#) [\[down arrow\]](#) Standards of Review, De Novo Review

The court of appeals reviews a dismissal for failure to state a claim pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) de novo, accepting all well-pleaded facts as true and drawing all reasonable inferences in favor of the party dismissed. The court does not, however, accept a plaintiff's unsupported conclusions or interpretations of law.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

199 F.3d 6, *6L^A 1999 U.S. App. LEXIS 32109, **1

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN2 [down] Standing, Clayton Act

Section 4 of the Clayton Act, which provides a private cause of action for violations of the federal antitrust laws, states any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN3 [down] Clayton Act, Claims

Despite its broad language, the Supreme Court has held that § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), does not 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. Instead, the Supreme Court has created a comprehensive antitrust standing doctrine to determine which persons are entitled to bring suit under the federal antitrust statutes.

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

HN4 [down] Private Actions, Standing

The Supreme Court set forth six factors that must be evaluated on a case-by-case basis to determine whether a plaintiff has standing to bring an antitrust action. These factors are: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's 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 or complex apportionment of damages.

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

HN5 [down] Private Actions, Standing

The Supreme Court has defined "antitrust injury" as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The harm 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. Consequently, a proper plaintiff must prove more than injury causally linked to an illegal presence in the market.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN6 **Private Actions, Standing**

Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury. In contrast, a commercial intermediary, such as a distributor or sales representative, generally lacks standing because its antitrust injury is too remote.

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

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN7 **Private Actions, Standing**

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

HN8 **Private Actions, Standing**

There may be some instances where presumptively disfavored plaintiffs do have standing to bring an antitrust action. Although competitors and consumers are presumptively favored, "presumptively" does not mean always; there can be exceptions, for good cause shown.

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

HN9 **Private Actions, Standing**

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 to sue.

199 F.3d 6, *6L^A 1999 U.S. App. LEXIS 32109, **1

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

HN10 [] Standards of Performance, Discharge & Termination

Under Massachusetts law, a contract without a durational term is terminable at will by either party upon reasonable notice.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

Civil Procedure > Judgments > Summary Judgment > General Overview

HN11 [] Standards of Performance, Discharge & Termination

A breach of contract claim for inadequate notice of termination may be disposed of by motion for summary judgment.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

HN12 [] Standards of Performance, Discharge & Termination

Reasonableness of notice is measured in terms of the ability of the party affected by the termination to obtain a substitute arrangement. If that party is able to obtain another supplier before the performance of the party effecting termination becomes due, then it necessarily follows that the terminating party has furnished reasonable notice and will not be responsible for damages. Put another way, 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.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

Contracts Law > Contract Conditions & Provisions > General Overview

HN13 [] Standards of Performance, Discharge & Termination

Every contract implies good faith and fair dealing between the parties to it.

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

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

HN14 [] Commercial Interference, Business Relationships

Under Massachusetts law, to state a cause of action for intentional interference with an advantageous business relationship, plaintiff must plead and prove that the defendants (1) engaged in intentional and willful acts (2) calculated to cause damage to the plaintiff's lawful business (3) with an unlawful purpose and without right or justification, (4) thereby causing actual damage or loss.

Torts > Business Torts > Unfair Business Practices > General Overview

HN15[] Business Torts, Unfair Business Practices

For conduct to violate Mass. Gen. Laws ch. 93(A) it must (1) fall within the penumbra of some common-law, statutory, or other established concept of unfairness; (2) be immoral, unethical, oppressive, or unscrupulous; and (3) cause substantial injury to other businessman.

Counsel: Mitchell A. Kramer, with whom Kramer & Friedman was on brief, for appellant.

Margaret A. Lange, with whom Lawrence G. Green, and Perkins, Smith & Cohen, LLP were on brief, for appellees.

Judges: Before Torruella, Chief Judge, Lynch and Lipez, Circuit Judges.

Opinion by: TORRUELLA

Opinion

[*8] **TORRUELLA, Chief Judge.** Plaintiff The Serpa Corporation brings this suit against defendant corporations McWane, Inc., Anaco, and Tyler Pipe Industries, alleging violations of the federal antitrust laws and various state law causes of action. The district court dismissed plaintiff's antitrust claims on June 10, 1998, and granted summary judgment for defendants on the remaining state law claims on January 12, 1999. This appeal followed. After carefully examining the record and the law, we affirm.

BACKGROUND

The Serpa Corporation is a distributor of plumbing supplies. Between 1976 and 1996, Serpa was the exclusive sales representative in New England for certain plumbing supply products manufactured by defendant Anaco.

Anaco manufactures cast iron soil [**2] pipes ("CISPs") and stainless steel no-hub joints known as fittings and couplings. CISPs, fittings, and couplings are used to transport human waste from buildings to sewer lines. Because the products are manufactured in accordance with industry standards, they are virtually identical across [*9] companies. Historically, the products were sold through exclusive sales representatives, like Serpa, who sold the products to plumbing supply wholesalers on the basis of price. In this case, Serpa sold couplings and fittings manufactured by Anaco and used its position as a regional sales representative to offer price discounts to wholesalers within guidelines set by Anaco.

Serpa's complaint alleges that between November 1995 and August 1996, defendant McWane acquired both Tyler and Anaco. Prior to being acquired by McWane, Tyler was a competitor of Anaco's. Plaintiff further alleges that the acquisitions of Tyler and Anaco gave McWane control of more than eighty-five percent (85%) of the couplings and fittings market in New England.

After acquiring Anaco, McWane placed the marketing of Anaco products under the direction of Tyler and subsequently terminated Serpa as a sales representative for Anaco [**3] products. The November 19, 1996

termination letter stated that Anaco would pay Serpa a duplicate commission for all orders received and invoiced for one month, rather than have Serpa serve as a "lame duck" sales representative for that time.

Serpa filed this suit on July 7, 1997, alleging that defendants' consolidation lessened competition and constituted an attempt to monopolize the New England market for CISPs, fittings, and couplings in violation of the federal antitrust statutes. Serpa also alleged state law causes of action for breach of contract, interference with advantageous business relations, breach of the implied covenant of good faith and fair dealing, and violation of the Massachusetts Consumer Protection Act, M.G.L.A. c. 93A.

The district court dismissed plaintiff's antitrust claims on June 10, 1998, and granted summary judgment for defendants on the remaining state law claims on January 12, 1999.

DISCUSSION

I. Plaintiff's Antitrust Claims

Plaintiff argues that the district court erred in dismissing its antitrust claims for lack of standing. [HN1](#)[] We review a dismissal for failure to state a claim pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) *de novo*, accepting [[**4](#)] all well-pleaded facts as true and drawing all reasonable inferences in favor of the party dismissed. See [Carreiro v. Rhodes Gill and Co., Ltd.](#), 68 F.3d 1443, 1446 (1st Cir. 1995); [Washington Legal Found. v. Massachusetts Bar Found.](#), 993 F.2d 962, 971 (1st Cir. 1993). We do not, however, accept a plaintiff's unsupported conclusions or interpretations of law. *Id.* For the reasons stated below, we affirm the ruling of the district court.

Plaintiff's complaint alleges that McWane's acquisition of Anaco and Tyler has had and will have the effect of substantially lessening competition or tending to create a monopoly in the New England market for CISPs, fittings, and couplings in violation of [§ 2](#) of the Sherman Act, [15 U.S.C. § 2](#), and [§ 7](#) of the Clayton Act, [15 U.S.C. § 18](#). Before reaching the merits of the federal antitrust claim, defendants moved the district court to dismiss on the grounds that the plaintiff lacks standing under § 4 of the Clayton Act.

[HN2](#)[] Section 4 of the Clayton Act provides a private cause of action for violations of the federal antitrust laws. The statute states:

Any person who shall [[**5](#)] be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . 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](#). [HN3](#)[] Despite the broad language of § 4, the Supreme Court has held that § 4 of the Clayton Act does not "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." [Blue Shield](#) [[*10](#)] of [Va. v. McCready](#), 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982); see also [Hawaii v. Standard Oil Co.](#), 405 U.S. 251, 263, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972) ("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."). Instead, the Court has created a comprehensive antitrust standing doctrine to determine which persons are entitled to bring suit under the federal antitrust statutes. See [Associated General Contractors of Cal., Inc., v. California State Council of Carpenters](#), 459 U.S. 519, 529-35, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); [[**6](#)] [Sullivan v. Tagliabue](#), 25 F.3d 43, 45 (1st Cir. 1994).

Standing is restricted in antitrust cases to avoid over deterrence. By limiting the availability of private antitrust actions to certain parties, federal courts "ensure that suits inappropriate to the goals of the antitrust laws are not litigated and that persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability." [Todorov v. DCH Healthcare Auth.](#), 921 F.2d 1438, 1449 (11th Cir. 1991); see also [Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.](#), 998 F.2d 391, 394 (7th Cir. 1993) ("Given the potential scope of antitrust violations and the availability of treble damages, an overbroad reading of § 4 could result in 'overdeterrence,' imposing ruinous costs on antitrust defendants, severely burdening the judicial system, and

possibly chilling economically efficient behavior."). The result is that standing in an antitrust case is "not simply a search for an injury in fact; it involves an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." [Todorov, 921 F.2d at 1448](#) [**7] (citing [Associated General, 459 U.S. at 535](#)).

In [Associated General, HN4](#) [↑] the Supreme Court set forth six factors that must be evaluated on a case-by-case basis to determine whether a plaintiff has standing to bring an antitrust action. See [Sullivan, 25 F.3d at 46](#) (citing [Associated General, 459 U.S. at 537-45](#)). These factors are: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's 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 or complex apportionment of damages. See *id.*

Although courts must "consider the balance of factors in each case in an effort to guard against 'engrafting artificial limitations on the § 4 remedy,'" [Sullivan, 25 F.3d at 46](#) (quoting [McCready, 457 U.S. at 472](#)), we can dispose of this case on the antitrust injury factor since [**8] distributors, like Serpa, presumptively lack antitrust standing. Cf. [SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39, 44-45 \(1st Cir. 1995\)](#).

[HN5](#) [↑] The Supreme Court has defined "antitrust injury" as an "injury of the type the antitrust laws were intended to prevent and that 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 \(1977\)](#). The harm "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.'" *Id.* (quoting [Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 \(1969\)](#)). Consequently, a proper plaintiff "must prove more than injury causally linked to an illegal presence in the market." *Id.*

[HN6](#) [↑] Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury. See [*11] [SAS, 48 F.3d at 44-45](#). ("The presumptively 'proper' plaintiff [**9] is a customer who obtains services in the threatened market or a competitor who seeks to serve that market."). In contrast, a commercial intermediary, such as a distributor or sales representative, generally lacks standing because its antitrust injury is too remote. See, e.g., [G.K.A. Beverage Corp., 55 F.3d 762 at 767](#); [SAS, 48 F.3d at 44](#); [Fischer v. NWA, Inc., 883 F.2d 594, 600 \(8th Cir. 1989\)](#); [John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 500 \(9th Cir. 1977\)](#); [Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30, 33 \(5th Cir. 1977\)](#). A leading antitrust treatise explains:

[HN7](#) [↑] 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. [**10]

Areeda & Hovenkamp, [Antitrust Law](#) P 381'c, at 114 (Supp. 1999).

Fischer is indicative of the case law concerning antitrust injury. In *Fischer*, former stockholders of a regional airline, Fischer Bros. Aviation, filed an antitrust suit against Northwest Airlines. The complaint stated that on December 23, 1995 Northwest and Fischer signed an exclusive regional airline service agreement for all flights originating in Detroit. On January 23, 1986, one month after the Northwest/Fischer agreement was signed, Northwest announced that it was acquiring Republic Airlines. At that time, Republic had an ongoing, exclusive service contract for the Detroit market with Simmons Airlines. Unlike the Northwest/Fischer agreement, however, the Republic/Simmons agreement had no subsidization arrangement and was not terminable at will with six months notice.

On August 12, 1986, the Department of Transportation approved Northwest's acquisition of Republic. Although the acquisition created a conflict between the Fischer and Simmons regional service agreements, Northwest believed that a compromise could be reached, accommodating the contractual rights of both regional carriers and

permitting [**11] them to share the Detroit market. However, all attempts to resolve the Fischer/Simmons conflict failed, and Northwest was forced to terminate the Fischer contract.

Fischer subsequently filed suit in federal court, asserting antitrust claims against both Northwest and Simmons. Defendants moved for summary judgment, and the district court granted the motion. The Eighth Circuit concluded that Fischer had not suffered antitrust injury and therefore lacked antitrust standing. The court reasoned:

Our review of the record convinces us that Fischer failed to prove that it has suffered an antitrust injury. Fischer does not contend that it was a customer of Northwest forced to pay increased prices. Nor was Fischer a competitor injured by Northwest's acquisition of monopoly power (roughly 75% of the Detroit market). Rather, Fischer asserts that it suffered damage when it was terminated as Northwest's exclusive regional carrier in Detroit. We conclude that Fischer's termination was not caused by anticompetitive conduct or an anticompetitive effect of such conduct; rather, it was caused by Northwest's need to avoid employing two regional airlines where only one was required. We are convinced [**12] that even in a city in which Northwest had far less than monopoly power, it would have been reluctant to waste resources on overlapping contractual agreements providing twice [*12] the regional connecting flight service required.

Fischer, 883 F.2d at 600.

Olympia Brewing Co. is also illustrative. The defendant, Olympia, acquired Hamm's Brewing Co. and terminated Hamm's distributors, including the plaintiff, John Lenore & Co. Lenore sued Olympia, alleging that the acquisition violated § 7 of the Clayton Act because it substantially lessened competition. The district court granted summary judgment in favor of Olympia, and the Ninth Circuit affirmed.

Citing *Brunswick*, the Ninth Circuit held that Lenore did not have standing to sue because it had not suffered antitrust injury. See *Olympia Brewing Co.*, 550 F.2d at 500. The court reasoned that the acquisition of Hamm's violated the antitrust laws, if at all, because competition was reduced in the manufacture of beer, a market in which Lenore was neither a competitor nor a consumer.

Even though Lenore's injury may have ". . . occurred 'by reason of' the unlawful acquisitions, it did not occur [**13] 'by reason of' that which made the acquisition unlawful." The terminations were an incidental matter which the merger may have made possible, but certainly did not cause. All Lenore really alleges is that because Olympia purchased the Hamm's brand, Lenore was replaced in favor of other distributors. This is insufficient to make out a case under § 7 which is concerned with competition, not competitors.

Id. (internal citations omitted).

Here, Serpa does not bring its claim as either a competitor or a consumer but as a distributor whose injuries resulted from the loss of its position as Anaco's exclusive sales representative in the New England market. This loss is neither connected with, nor resulted from, defendant's market power in the CISPs, fittings, and couplings industry. Therefore, plaintiff's injuries do not flow "from that which makes the defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. Because Serpa's injuries flow from the termination of its distributorship, and not from any anticompetitive effects of defendants' acquisition of Anaco, we find that Serpa has not suffered an antitrust injury. See *G.K.A. Beverage Corp.*, 55 F.3d at 767; [**14] *SAS*, 48 F.3d at 44; *Fischer*, 883 F.2d at 600; *Olympia Brewing Co.*, 550 F.2d at 500.

In reaching this conclusion, we recognize that [HN8](#) there may be some instances where presumptively disfavored plaintiffs do have standing to bring an antitrust action. See [SAS](#), 48 F.3d at 45. In *SAS*, this court stated that although competitors and consumers are presumptively favored, "presumptively" does not mean always; there can be exceptions, for good cause shown." *Id.* Here, Serpa alleges that it is the "only truly viable plaintiff" because (1) "there is no real competitor on the manufacturing level," and (2) plumbing wholesalers, contractors, and home buyers have no incentive to file an antitrust suit because monopoly pricing in this market increases the costs to individual consumers by a relatively small margin. This Court has stated that [HN9](#) 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 to sue." *Id.* (citing *Associated General*, 459 U.S. at 542). In this case, however, we are satisfied that [**15] at least some consumers, as well as defendants' competitors, have ample incentive to bring an antitrust claim.

The complaint alleges:

Shortly after the termination of Serpa as the representative for Anaco Couplings and Fittings, Anaco began to increase its prices for Couplings by announcing a wholesale list price increase of approximately seven percent (7%) and reducing the amount of discounts commonly provided to wholesalers.

A seven-plus percent increase in the cost of major plumbing components is not de minimus. Although the individual home [*13] buyer may be hindered by imperfect information, there is ample reason to believe that large contractors and commercial entities involved in the construction of "multi-unit residential and commercial buildings" have the necessary information, incentive, and resources to resist monopoly pricing by defendants.

As for defendants' competitors, the complaint indicates that they account for approximately fifteen percent (15%) of the New England market. We need look no further to rebut plaintiff's assertion that "there is no real competitor on the manufacturing level." The complaint, however, contains two additional allegations that we [**16] believe are significant. First, the complaint states that in 1992 Anaco instituted an antitrust action in federal court against Tyler for engaging in predatory pricing. Second, the complaint alleges that defendants have acted in concert to "eliminate competition in the sale of Couplings and Fittings in the New England market." Although competitors are not necessarily injured by monopoly pricing, they are clearly injured by an abuse of monopoly power such as predatory pricing. Where, as here, the complaint alleges that defendants have an intent to eliminate competition in the New England market and have been sued for engaging in anticompetitive conduct in the recent past, there is every reason to believe that defendants' competitors have ample incentive to bring an antitrust claim. Accordingly, there is no reason to extend antitrust standing to Serpa, a distributor incidentally connected to the alleged antitrust violation in this case.

Finally, plaintiff's 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 court held that a consumer of health services could sue under the antitrust [**17] laws to redress an alleged conspiracy between her insurance plan and Virginia psychiatrists. The terms of the plan precluded participants from receiving reimbursements for treatment given by psychologists. Although *McCready* was not the immediate target of the alleged boycott, she was a plan beneficiary who had used a psychologist and had been denied reimbursement. The Supreme Court granted *McCready* standing, stating that her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id. at 484*. The Court further stated that *McCready* was the "necessary step in effecting the ends of the alleged illegal conspiracy." *Id. at 479*.

Serpa urges the Court to apply the "inextricably intertwined" language of *McCready* to this case. We decline. First, this Court has already stated that "it is doubtful that this language -- if taken as a physical image -- was ever intended as a legal test of standing." *SAS*, 48 F.3d at 46. Second, while standing in *McCready* was conferred to a plaintiff who was only derivatively injured, the plaintiff was a consumer in the market [**18] directly affected by the antitrust violation. Accordingly, subsequent Supreme Court jurisprudence has interpreted the *McCready* language as a legal conclusion; i.e., applying the "inextricably intertwined" standard to consumers and competitors. See *Atlantic Richfield v. USA Petroleum Co.*, 495 U.S. 328, 345, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990); *Associated General*, 459 U.S. at 539; *SAS*, 48 F.3d at 46. Moreover, even if we thought "inextricably intertwined" was a proper test for standing, the facts do not support its application in this case. Specifically, Serpa's marginal pricing discretion belies plaintiff's assertion that defendants necessarily had to terminate Serpa to eliminate competition in the New England plumbing supply market. Therefore, under the circumstances of this case, we decline to interpret *McCready* broadly, believing that such an approach would needlessly expand the limits of antitrust standing currently in place in this Circuit.

[*14] II. Plaintiff's State Law Causes of Action

Following the district court's dismissal of the antitrust claims, the parties commenced discovery on plaintiff's remaining [**19] state law claims. The complaint alleged (1) breach of contract; (2) interference with advantageous business relations; (3) breach of the implied covenant of good faith and fair dealing; and (4) violation of the Massachusetts Consumer Protection Act, M.G.L.A. c. 93A. At the conclusion of the scheduled discovery period, defendants moved for summary judgment on these remaining counts, and the district court granted the motion on January 12, 1999.

A. Breach of Contract

Anaco informed Serpa of its intent to terminate Serpa as its exclusive sales representative by letter dated November 19, 1996. The letter indicated that Serpa's termination was effective immediately, but stated that Anaco would pay Serpa a duplicate commission for all orders received and invoiced for one month, rather than have Serpa serve as a "lame duck" sales representative for that time.

HN10[] Under Massachusetts law, a contract without a durational term is terminable at will by either party upon reasonable notice. See *Teitelbaum v. Hallmark Cards Inc.*, 25 Mass. App. Ct. 555, 520 N.E.2d 1333, 1336 (Mass. App. Ct. 1988). Plaintiff argues that whether Anaco provided reasonable notice of termination [**20] is a question of fact, and therefore summary judgment was inappropriate. We disagree.

In *Teitelbaum*, the court determined that **HN11**[] a breach of contract claim for inadequate notice of termination may be disposed of by motion for summary judgment. See *520 N.E.2d at 1336*. In reaching this conclusion, the court stated that **HN12**[] reasonableness of notice "is measured in terms of the ability of the party affected by the termination to obtain a substitute arrangement." *Id.*

If that party is able to obtain another supplier before the performance of the party effecting termination becomes due, then it necessarily follows that the terminating party has furnished reasonable notice and will not be responsible for damages. Put another way, 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.

Id. Here, there is no evidence in the record that Serpa's injuries resulted from inadequate notice of termination. Serpa merely states that following its termination by Anaco it was deprived of its commissions on Anaco products. This is an inevitable loss and does not arise from the manner in which the [**21] contract was terminated.

Plaintiff's reliance on *Cherick Distributors, Inc. v. Polar Corporation*, 41 Mass. App. Ct. 125, 669 N.E.2d 218 (Mass. App. Ct. 1996), is misplaced. In *Cherick*, the plaintiff's exclusive distributorship agreement was terminated by defendant on four days notice in retaliation for a letter plaintiff sent to other distributors urging the distributors to collectively negotiate with the defendant. The court determined that "whether the four-day termination notice constituted reasonable notice under commercial standards of good faith and fair dealing was a question properly put to the jury in this case." *669 N.E.2d at 220*. The court reasoned:

The evidence indicated that the four-day notice left Cherick with no time to secure another supplier, make adjustments in its equipment and warehouse, and maintain its staff. Accordingly, there was adequate support for the jury's finding that four days' notice was unreasonable and that it constituted a breach of the covenant of good faith and fair dealing.

Id. Here, in contrast, plaintiff did not present any evidence that a month was insufficient time to secure another supplier, [**22] to make adjustments to its operations, or that it provided Serpa with an inadequate opportunity to maintain its staff. Accordingly, [*15] *Cherick* does not require reversal of the district court's ruling.

B. Implied Covenant of Good Faith and Fair Dealing

Plaintiff argues that its abrupt termination constitutes a breach of the implied covenant of good faith and fair dealing that is implicit in every contract. See *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 583 N.E.2d 806, 820 (Mass. 1991) ("Every **HN13**[] contract implies good faith and fair dealing between the parties to it."). Plaintiff's argument is unavailing. The notice of termination was reasonable and there is nothing per se unreasonable about terminating an exclusive distributorship contract.

Plaintiff's reliance on *Cherick* is once again misplaced. The *Cherick* plaintiff was terminated by defendant on four days notice, in retaliation for its suggestion to similarly situated distributors that they band together and collectively bargain with the defendant manufacturer. In this case, there is no evidence that Anaco's termination of Serpa had a retaliatory motive, was undertaken in bad [**23] faith, or otherwise violated public policy. Additionally, Serpa was paid commissions for a period of thirty days following its termination. Under these circumstances, we find that Serpa cannot show a breach of the implied covenant of good faith and fair dealing.

C. Intentional Interference With Advantageous Business Relationship

HN14 [↑] Under Massachusetts law, to state a cause of action for intentional interference with an advantageous business relationship, plaintiff "must plead and prove that the defendants (1) engaged in intentional and willful acts (2) calculated to cause damage to the plaintiffs' lawful business (3) with an unlawful purpose and without right or justification, (4) thereby causing actual damage or loss." *Doyle v. Hasbro, Inc.*, 884 F. Supp. 35, 40 (D. Mass. 1995); *Chemawa Country Golf, Inc. v. Wnuk*, 9 Mass. App. Ct. 506, 402 N.E.2d 1069, 1072 (Mass. App. Ct. 1980).

In this case, Serpa argues that "defendants acted in stealthy haste to terminate Serpa's contract to prevent it from acquiring competing product lines to sell to its former Anaco customers." As with its other contractual claims, Serpa relies on *Cherick* in [**24] support of its argument. Again, however, we find that *Cherick* is inapposite. In *Cherick*, the court held "the jury could have found that the abrupt termination of Cherick's distributorship agreement, coinciding as it did with the planned meeting of Polar distributors, was calculated to put Cherick out of business and thereby discourage other distributors from meeting." *669 N.E.2d at 220*. Here, in contrast, defendants made a legitimate business decision based on obvious efficiency concerns to eliminate one of two overlapping distributors. There is no evidence in the record of an unlawful or improper motive, and nothing in the record indicates that defendants' conduct was calculated to injure Serpa. Further, there is no evidence that a month is insufficient notice of termination. Accordingly, we find that summary judgment on this claim was proper.

D. Massachusetts General Laws ("Chapter 93A")

HN15 [↑] For conduct to violate Chapter 93(A) it must (1) fall within "the penumbra of some common-law, statutory, or other established concept of unfairness"; (2) be "immoral, unethical, oppressive, or unscrupulous"; and (3) "cause[] substantial injury to [other businessman]. [**25] " *Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. 1, 679 N.E.2d 191, 209 (Mass. 1997) (quoting *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 321 N.E.2d 915, 917 (Mass. 1975)).

Here, Serpa relies on the "same facts underlying its federal antitrust claims to support its Massachusetts statutory claim."

[*16] Having carefully reviewed the record, we conclude there is no evidence of "immoral, unethical, oppressive, or unscrupulous" conduct sufficient to state a Chapter 93A claim. See *Bradley v. Dean Witter Realty, Inc.*, 967 F. Supp. 19, 29 (D. Mass. 1997). As a matter of law, "a refusal to deal, without a showing of monopolistic purpose or concerted effort to hinder free trade, is not an unfair trade practice under G.L.C. 93A, and is therefore not actionable." *PMP Assocs.*, 321 N.E.2d at 919. Accordingly, summary judgment on this claim was proper.

CONCLUSION

For the reasons stated above, we **affirm** the judgment of the district court.



Ford Motor Co. v. Metro Ford Truck Sales, Inc.

Court of Appeals of Texas, Fifth District, Dallas

December 9, 1999, Opinion Issued

No. 05-99-00031-CV

Reporter

1999 Tex. App. LEXIS 9187 *; 1999 WL 1126280

FORD MOTOR COMPANY, Appellant v. METRO FORD TRUCK SALES, INC., and DANIEL H. FOLEY, JR., Appellees

Notice: [*1] PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

Subsequent History: Petition for Review Denied April 5, 2001.

Related proceeding at [Ford Motor Co. v. Motor Vehicle Bd. of the Texas DOT, 2000 Tex. App. LEXIS 2713 \(Tex. App. Austin, Apr. 27, 2000\)](#)

Petition for review denied by, 04/05/2001

Appeal after remand at [Ford Motor Co. v. Metro Ford Truck Sales, 2002 Tex. App. LEXIS 7318, 2002 WL 31296626 \(Tex. App. Dallas, Oct. 14, 2002\)](#)

Prior History: On Appeal from the 44th Judicial District Court. Dallas County, Texas. Trial Court Cause No. 94-7174-B.

[Metro Ford Truck Sales v. Ford Motor Co., 145 F.3d 320, 1998 U.S. App. LEXIS 14509 \(5th Cir. Tex., June 26, 1998\)](#)

Disposition: AFFIRMED in part, REVERSED in part, REVERSED and REMANDED in part.

Core Terms

damages, summary judgment, dealers, trial court, trucks, matter of law, partial summary judgment, antitrust claim, attorney's fees, Antitrust, breach of contract, sales and service, zero damages, violations, nominal damages, federal court, customers, breached, discount, prices, summary judgment motion, cause of action, breach of contract claim, collateral estoppel, anti trust law, retail price, misrepresentations, charge-back, contractual, purchasers

LexisNexis® Headnotes

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN1 [down] **Estoppel, Collateral Estoppel**

Collateral estoppel, also known as issue preclusion, bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN2 [down] **Estoppel, Collateral Estoppel**

When a party raises collateral estoppel as an affirmative defense to state antitrust claims, it must conclusively prove all of the elements of the defense as a matter of law to establish its entitlement to summary judgment.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Governments > State & Territorial Governments > Relations With Governments

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN3 [down] **Estoppel, Collateral Estoppel**

Federal collateral estoppel rules apply when the doctrine is raised in state court proceeding following the conclusion of a related federal proceeding.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Governments > State & Territorial Governments > Relations With Governments

HN4 [down] **Estoppel, Collateral Estoppel**

A movant has the burden of conclusively establishing that (1) the prior federal decision resulted in a judgment on the merits; (2) the same fact issues sought to be precluded must have been actually litigated in federal court; and (3) the disposition of those issues must have been necessary to the outcome of the prior federal litigation.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN5 Antitrust & Trade Law, Sherman Act

Under the Sherman Act, [15 U.S.C.S. § 1](#), a vertical restraint is not illegal per se unless the plaintiff establishes that there is an express or implied agreement to set resale prices at some level.

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Contracts Law > Breach > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN6 Summary Judgment, Appellate Review

A reviewing court may not reverse and render summary judgment to a party on a ground on which it did not move for summary judgment. See [Tex. R. Civ. P. 166a\(c\)](#).

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > General Overview

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN7 Entitlement as Matter of Law, Appropriateness

If a zero damage jury award is appropriate, any trial court error in granting a summary judgment on liability would be harmless.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN8 Reviewability of Lower Court Decisions, Preservation for Review

Bare assertions of error without argument or authority waive error. See [Tex. R. App. P. 38.1\(h\)](#).

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review

HN9 Trials, Judgment as Matter of Law

When an appellant challenges the denial of its motion for judgment notwithstanding the verdict, the court reviews the record to determine if it contains more than a scintilla of evidence to support the jury's verdict.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

HN10 [L] **Types of Damages, Compensatory Damages**

In an action for breach of contract, actual damages may be recovered when the loss is the natural, probable, and foreseeable consequence of the defendant's conduct.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

HN11 [L] **Types of Damages, Compensatory Damages**

Nominal damages are merely a vehicle to tax costs against the defendant. It is not the type of valid claim contemplated by the legislature which will entitle a litigant to the additional relief of attorney's fees. Generally, where the record shows as a matter of law that the plaintiff is entitled only to nominal damages, the appellate court will not reverse merely to enable him to recover such damages.

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

HN12 [L] **Summary Judgment, Burdens of Proof**

A movant for summary judgment has the burden of conclusively negating at least one element of each of the non-movant's causes of action or pleading and conclusively establishing each element of an affirmative defense.

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

HN13 [L] **Contract Conditions & Provisions, Waivers**

Waiver is generally defined as the intentional relinquishment of a known right or conduct which warrants the inference of relinquishment of a known right. The elements of waiver include: (1) an existing right, benefit, or advantage; (2) knowledge, actual or constructive, of its existence; and (3) actual intent to relinquish the right, which can be inferred by conduct.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN14 [L] **Summary Judgment, Evidentiary Considerations**

A defendant does not satisfy its burden with respect to a traditional motion for summary judgment by showing a plaintiff lacks evidence to support an element of its cause of action. This is because a showing that a plaintiff lacks evidence of an essential element of its cause of action does not conclusively prove the element does not exist.

Contracts Law > ... > Damages > Types of Damages > Liquidated Damages

HN15 [blue icon] **Types of Damages, Liquidated Damages**

To determine the enforceability of a contractual damages provision, the court must consider whether (1) the harm caused by the breach is incapable or difficult of estimation and (2) the amount of liquidated damages called for is a reasonable forecast of just compensation.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Contracts Law > ... > Damages > Types of Damages > Liquidated Damages

Civil Procedure > Judgments > Summary Judgment > General Overview

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

HN16 [blue icon] **Summary Judgment, Evidentiary Considerations**

The question of whether a contractual provision is an enforceable liquidated damages provision or an unenforceable penalty is a question of law for the court to decide. However, where the summary judgment evidence does not conclusively establish the damage provision is unreasonable as matter of law, summary judgment is unsupportable on this ground.

Contracts Law > Contract Interpretation > General Overview

Governments > Legislation > Interpretation

HN17 [blue icon] **Contracts Law, Contract Interpretation**

Tex. Rev. Civ. Stat. Ann. art. 4413(36) § 5.02(b)(14) (1976 & Supp. 1999) precludes a manufacturer from requiring a dealer to pay or assume any part of any refund, rebate, discount, or other financial adjustment made by the manufacturer to, or in favor of, any customer of a dealer, unless the dealer voluntarily agrees.

Judges: Before Justices Lagarde, James, and Roach. Opinion By Justice Roach.

Opinion by: JOHN R. ROACH

Opinion

Opinion By Justice Roach

This matter arises out of a dispute between Ford Motor Company (Ford) and one of its franchisees, Metro Ford Truck Sales, Inc. (Metro),¹ over Ford's Competitive Price Assistance (CPA) program. After the trial court granted partial summary judgments (1) establishing Ford's liability on Metro's claims for breach of contract and antitrust violations and (2) dismissing Ford's affirmative claims, a jury trial was held on the issues of Metro's damages and attorney's fees. The jury awarded zero damages on Metro's breach of contract and antitrust claims, but awarded Metro \$ 800,000 in attorney's fees. The trial court thereafter entered judgment on the verdict.

¹ At all relevant times, appellee Daniel H. Foley, Jr. was the dealer-principal of Metro.

[*2] On appeal, Ford challenges the award of attorney's fees and the trial court's partial summary judgment rulings. Additionally, Ford contends the trial court erred in failing to grant Ford's motion for summary judgment on its claims for fraud, breach of contract, and RICO violations. In a cross-appeal, Metro challenges the jury's zero damage award and other issues related to damages.

For the reasons set forth below, we reverse and render judgment that Metro take-nothing on its antitrust claim. We affirm the jury's finding of no damages and reverse the attorney's fees award. We reverse the summary judgment on Ford's affirmative claims and remand those claims for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

At all times relevant to this appeal, Metro was a licensed motor vehicle dealership authorized to sell Ford trucks. Ford's CPA program, the focus of this appeal, was a pricing system that reduced the dealer's cost of a medium- or heavy-duty truck based on information the dealer provided to Ford. There were different levels of CPA. "Sales Advantage CPA" was the base level discount available to all dealers on every truck simply by providing [*3] Ford with the customer's name, the vehicle specifications, and desired options. Further wholesale price reductions were available under "Appeal Level CPA." To request Appeal Level CPA, the dealer provided Ford with details of the competitive situation surrounding the prospective purchase, in addition to the basic information above. Ford would analyze the situation and determine what additional amount of CPA, if any, would be granted. Ford also maintained standardized CPA allowances above the basic Sales Advantage CPA for a schedule of large volume purchasers. These standardized allowances were available to any dealer selling to a purchaser listed on the schedule without demonstrating individualized competitive need. CPA "packages," which locked in a specific CPA amount for all trucks ordered by a specific customer during a particular period of time, also avoided the regular CPA appeal process.

It is uncontested that, in order to get increased CPA on particular transactions, Metro provided Ford with incorrect names of the customers who were purchasing certain trucks. Metro asserted Ford representatives instructed it to use the names of customers eligible for standardized CPA allowances [*4] or CPA packages to get more CPA while circumventing the regular CPA appeal process. When Ford discovered Metro's misrepresentations, it threatened to terminate Metro's franchise. Metro responded by filing this lawsuit in state district court in Dallas. Additionally, Metro filed a protest with the Texas Motor Vehicle Board (TMVB) contesting Ford's proposed franchise termination and charge-back.² Ford counterclaimed in state court, seeking actual and punitive damages based on Metro's alleged misrepresentations.

[*5] Various motions for summary judgment were filed by both parties. Ultimately, the trial court granted Metro's motion for partial summary judgment on Ford's affirmative claims and denied Ford's motion. Further, the trial court granted Metro's motion for partial summary judgment on its breach of contract and state antitrust claims, leaving only the issues of Metro's damages and attorney's fees to be decided by a jury. The jury found Metro suffered no damages but awarded Metro \$ 800,000 in attorney's fees. Both Ford and Metro appealed.

METRO'S CLAIMS AGAINST FORD

In its second and third issues, Ford urges the trial court erred in granting Metro's partial summary judgment motion on its breach of contract and antitrust claims and in denying its motion on these claims. If Ford was entitled to summary judgment on either of these claims, we need not address many of the other issues presented by Ford and

² After an audit of Metro's books, Ford sought to charge back to Metro \$ 3.1 million of allegedly improperly obtained CPA pursuant to a provision in Ford's Sales and Service Agreement with Metro. While this lawsuit was pending in the trial court, the TMVB case proceeded. On March 5, 1998, a final order was signed prohibiting Ford's proposed CPA charge-back for the 317 trucks on which Ford claimed Metro misrepresented the name of the purchaser and dismissing Metro's protest of unreasonable discrimination under the motor vehicle code. The order further provided that Metro's franchise agreement with Ford be terminated after Metro's business was sold for an amount to be determined by an appraisal as described in the order. The order is currently on appeal before the Austin Court of Appeals.

Metro. We therefore begin our discussion by analyzing the merits of Metro's breach of contract and antitrust claims to determine whether Ford conclusively established its entitlement to summary judgment on these claims.

A. Antitrust Violations

At one point in this litigation, Ford [*6] had this case removed to federal court, and Metro added federal antitrust claims.³ Ultimately, the federal trial judge granted Ford summary judgment on all of Metro's federal claims and remanded Metro's remaining state law claims and Ford's counterclaims to state court for resolution. The Fifth Circuit Court of Appeals affirmed. *Metro Ford Truck Sales, Inc., v. Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998), cert. denied, 525 U.S. 1068, 142 L. Ed. 2d 660, 119 S. Ct. 798 (1999). Ford argues the federal court judgment collaterally estops Metro from pursuing its state antitrust claims for price discrimination under the Texas Free Enterprise and Antitrust Act of 1983.⁴ We agree with Ford.

[*7] Collateral estoppel, also known as issue preclusion, bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action. See *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984). HN2[] Because Ford raised collateral estoppel as an affirmative defense to Metro's state antitrust claims, it must conclusively prove all of the elements of the defense as a matter of law to establish its entitlement to summary judgment. See *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972). HN3[] Federal collateral estoppel rules apply when the doctrine is raised in state court proceeding following the conclusion of a related federal proceeding. *Shell Pipeline v. Coastal States Trading*, 788 S.W.2d 837, 843 (Tex. App.-Houston [1st Dist.]1990, writ denied). Accordingly, HN4[] Ford had the burden of conclusively establishing that (1) the prior federal decision resulted in a judgment on the merits; (2) the same fact issues sought to be precluded must have been actually litigated in federal court; and (3) the disposition of those issues must [*8] have been necessary to the outcome of the prior federal litigation. See *id.*

The record reflects Metro's federal antitrust claims and state antitrust claims⁵ were both based on the same underlying facts - that Ford used the CPA program to control indirectly the retail price of the trucks sold by Ford dealers. Metro claimed that by setting extremely high wholesale prices, Ford required Metro to request CPA for every transaction, thereby controlling the retail price. In granting summary judgment to Ford on Metro's vertical price fixing claims under federal law, the federal trial court noted that Metro did not allege an agreement between itself and Ford and it did not submit evidence of an express agreement between itself and Ford to fix retail prices. The federal trial court also determined that because the summary judgment evidence established Ford only set wholesale prices, and the CPA program increased interbrand competition, Metro could not prevail on its vertical price fixing claim under section one of the Sherman Act.

[*9] The purpose of the Texas Antitrust Act is to maintain and promote economic competition and its provisions must be construed in harmony with federal antitrust laws to the extent consistent with this purpose. *TEX. BUS. & COM. CODE ANN. § 15.04* (Vernon 1987). Because section 15.05(a) of the Texas Antitrust Act tracks the language and, in fact, is taken from section one of the Sherman Antitrust Act, we look to federal judicial interpretations of this section of the federal act in applying section 15.05(a). See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 687 (Tex. 1990). HN5[] Under section one of the Sherman Act, a vertical restraint is not illegal per se unless the plaintiff establishes that there is an express or implied agreement to set resale prices at some level. *Business Elecs. v. Sharp Elecs.*, 485 U.S. 717, 735-36, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988). Because there

³ Metro brought the federal antitrust claims under section one of the Sherman Act, *15 U.S.C. § 1*, and *section 2(a)* of the Robinson-Patman Act, *15 U.S.C. § 13(a)*.

⁴ *TEX. BUS. & COM. CODE ANN. § 15.01, et. seq.* (Vernon 1987 & Supp. 1999).

HN1[

⁵ Although Metro has not identified the particular section of the Texas Antitrust Act under which it brings its claims, the only section that is arguably applicable to Metro's claims is section 15.05 (a).

was no allegation or proof of an agreement between Ford and Metro allowing Ford to dictate retail prices, the federal court found the summary judgment evidence established Metro was free to set its own resale prices.

Metro asserts that unlike its federal [*10] counterpart, the Texas Antitrust Act merely requires Metro to establish that Ford (1) has engaged in a general policy of determining the prices at which its dealers can sell Ford trucks and (2) accomplished that result by a course of conduct designed and intended for that purpose and calculated to accomplish it. See *Ford Motor Co. v. State of Tex.*, 142 Tex. 5, 175 S.W.2d 230 (Tex. 1943). Although the *Ford* decision has never been overruled, we cannot overlook the fact that it was decided forty years before the current antitrust laws were enacted. In *Ford*, the supreme court addressed the question of whether the state attorney general had successfully pleaded a viable cause of action against Ford under the former state antitrust laws. Noting that it was a violation of state antitrust laws for one party to enter into a contract with another party whereby it is agreed that goods or products sold by the one party to the other party for resale shall be resold at prices to be determined by the original seller, the court stated any intentional course of conduct *by the parties to a contract* which accomplishes that result also violates the state antitrust act. [*11] *Ford*, 175 S.W.2d at 233. Because Ford made a contract which suggested it desired to fix prices to the extent lawful, furnished dealers with suggested retail prices and provided termination of the contract at will, the *Ford* court found a fact issue as to the control of resale prices. *Ford*, 175 S.W.2d at 235.

In the present case, the federal court has already determined that Ford merely sets wholesale prices and that Metro is free to determine the retail price of trucks its sells. Such a finding precludes Metro's state antitrust action even under the standards of *Ford*. Moreover, nothing shows that construing section 15.05(a) of the Texas Antitrust Statute in harmony with section one of the Sherman Act would be inconsistent with the intent of the Texas antitrust laws. On the contrary, to hold that Metro's evidence establishes a question of fact as to Ford's liability under the state antitrust act when the record before the federal court conclusively established Ford did not control retail pricing either directly or indirectly and increased interbrand competition, would fly in the face of the purpose of the Texas Antitrust Act. Accordingly, the trial court erred in granting Metro's motion for summary [*12] judgment on Ford's liability under state antitrust law. Instead, it should have rendered summary judgment to Ford based on collateral estoppel.

B. Breach of Contract

Ford also moved for summary judgment on Metro's breach of contract claim, asserting there was no evidence that Ford breached its contract with Metro. Ford asserted Metro's claims based on Ford's proposed termination and charge-back were barred as a matter of law because the uncontested evidence of Metro's misrepresentations in connection with Ford's CPA program conclusively established Ford's contractual right to terminate and charge back these excess amounts based on Section 17(b) and 12(b) of the Sales and Service Agreement. Metro likewise moved for partial summary judgment on its breach of contract claim arguing Ford's failure to publish appeal level CPA constituted a breach of paragraph ten of the sales and service agreement as a matter of law.

On appeal, Ford argues Metro's misrepresentations in connection with its CPA requests constitute a material breach of the sales and service agreement barring Metro's breach of contract claim as a matter of law. A review of the record reveals that Ford never moved for [*13] summary judgment on Metro's claim that Ford breached the provisions of paragraph ten of the sales and service agreement. To the extent that Ford now asserts Metro's misrepresentations and other alleged breaches of the sales and service contract bar Metro's breach of contract against Ford as a matter of law, these claims have not been preserved for appeal. HN6[] We may not reverse and render summary judgment to Ford on a ground on which it did not move for summary judgment. See TEX. R. CIV. P. 166a(c).

In any event, even assuming this argument was properly preserved for review, Ford has failed to present any compelling argument or authority as to how Metro's alleged breaches of the sales and service agreement precluded Metro from pursuing a breach of contract action based on paragraph ten of the sales and service agreement. Ford has not asserted its obligations under paragraph ten were contingent upon the provisions Metro is alleged to have violated. We therefore conclude Ford failed to establish its entitlement to summary judgment on Metro's breach of contract claim as a matter of law.

Having concluded that Ford was not entitled to summary judgment on Metro's breach of contract claim, [*14] we now turn to whether the trial court erred in granting Metro's motion for partial summary judgment on this cause of action. However, we must address Ford's contention that the trial court erred in this respect only if we conclude there is reversible error in connection with the jury's zero damage award. [HN7](#)[] In other words, if the record reveals the zero damage award was appropriate, any trial court error in granting the summary judgment on liability would be harmless. Accordingly, we begin our review with Metro's challenge to the jury finding on damages.

In the second, fourth, and sixth issues presented in its cross-appeal, Metro generally complains the trial court erred in entering judgment on the jury's damage award.⁶ [*15] Metro contends that the jury's failure to award damages is contrary to the great weight and preponderance of the evidence and that Metro established its damages as a matter of law. We first address Metro's contentions that the trial court erred in failing to award Metro a judgment notwithstanding the verdict for actual or nominal damages.⁷

[HN9](#)[] When an appellant challenges the denial of its motion for judgment notwithstanding the verdict, we review the record to determine if it contains more than a scintilla of evidence to support the jury's verdict. [Brush v. Reata Oil & Gas Corp., 984 S.W.2d 720, 724](#) (Tex. App.-Waco 1998, pet. denied). Metro claims that the uncontested evidence in this case established that if Ford had not breached the sales and service agreement and instead offered Metro published prices and discounts equal to those offered other dealers, Metro would have been entitled to purchase its trucks for the same price Ford sold comparable trucks to any of Ford's other dealers. Metro further argues that it conclusively established, through the testimony of computer expert and database engineer Fred A. Kinder, Jr., the amount of its damages from Ford's breach at \$ 4,967,485.

Kinder [*16] testified that he went through Ford's records and calculated Metro's damages based on the difference between the amount of CPA Ford gave Metro for a particular truck purchase and the highest CPA Ford gave another dealer on a "comparable" truck for purchases made from 1991-1997. Metro claims Kinder's testimony with respect to the total amount of Ford's overcharges conclusively established the amount of money that would place Metro in the same position it would have been in if Ford had not breached the contract and, therefore, requires us to reverse the trial court's judgment and render judgment for Metro in the amount \$ 4,967,485 in actual damages. Ford asserts the underlying basis for Metro's damage calculation was called into question by Ford's expert Dr. Thomas Saving. Dr. Saving testified that Metro's method of determining comparable trucks was invalid because it did not consider different market factors such as the time of the sale, geographic location of the sale, and the number of trucks purchased, all of which would dramatically effect the price of trucks sold to different dealers.

[HN10](#)[] In an action for breach of contract, actual damages may be recovered when the loss is the natural, [*17] probable, and foreseeable consequence of the defendant's conduct. [Mead v. Johnson Group, Inc., 615 S.W.2d 685, 687 \(Tex. 1981\)](#). Although Metro claimed it would have been entitled to the Appeal Level CPA given to other dealers for certain truck purchasers had these figures been published, Metro presented no evidence that its truck purchases matched all the relevant criteria Ford considered when giving out Appeal Level CPA to other dealers for a particular purchase. In other words, the jury was free to find that even if Ford had breached its contract with Metro by not publishing Appeal Level CPA it had given to other dealers on all other truck sales, Metro did not establish that it met all of the criteria Ford used to determine entitlement to Appeal Level CPA in a given transaction. Accordingly, we conclude the trial court did not err in denying Metro's request for JNOV for damages. For the same

⁶ In its fifth issue presented, Metro complains about the trial court's restriction on Metro's argument and evidence with respect to Ford's liability and the proper measure of damages. It also complains about the trial court's failure to limit Ford's evidence and argument relating to Metro's profits. Although Metro generally contends these alleged errors contributed to the jury's improper damage award, Metro does not provide any argument or authority with respect to why these particular trial court rulings were error and how these alleged errors resulted in an improper verdict. [HN8](#)[] Bare assertions of error without argument or authority waive error. See [TEX. R. APP. P. 38.1\(h\)](#).

⁷ Having concluded that Metro was collaterally estopped as a matter of law from pursuing its state antitrust claims, we need not address Metro's third issue requesting a JNOV for punitive damages under that cause of action.

reasons, we also conclude that the jury verdict awarding Metro zero damages is not against the great weight of the evidence.

Presumably in response to Ford's contention that the \$ 800,000 attorney's fees award must be reversed because the jury found Metro sustained zero damages, [*18] Metro also claims the trial court erred in failing to award a judgment notwithstanding the verdict for nominal damages. Specifically, Metro argues that because Ford was found to have breached paragraph ten of the sales and service agreement as a matter of law, the trial court should have awarded Metro nominal damages for violating Metro's contractual rights, even if Metro failed to prove actual damages. Ford, on the other hand, contends that nominal damages alone, even if Metro were entitled to them as a matter of law, would not support a recovery of attorney's fees under [section 38.001 of the Texas Civil Practice and Remedies Code](#).⁸ See [ITT Commercial Fin. Corp. v. Riehn, 796 S.W.2d 248, 256](#) (Tex. App.-Dallas 1990, no writ). We agree with Ford.

HN11[] Nominal damages [*19] are merely a vehicle to tax costs against the defendant. See [id. at 257](#). "[It] is not the type of 'valid' claim contemplated by the Legislature which will entitle a litigant to the 'additional' relief of attorney's fees." *Id.* Generally, where the record shows as a matter of law that the plaintiff is entitled only to nominal damages, the appellate court will not reverse merely to enable him to recover such damages. [Travelers Ins. Co. v. Employers Cas. Co., 380 S.W.2d 610, 614](#) (Tex. 1964). The record before us reveals no reason to deviate from this general rule. Because the jury's finding of zero damages is legally and factually sufficient, and nominal damages were an insufficient basis for the recovery of attorney's fees, we reverse the judgment awarding Metro \$ 800,000 in attorney's fees and hold that Metro is not entitled to recover an award of attorney's fees under the facts of this case.

FORD'S CLAIMS FOR RELIEF

Ford's fourth and fifth issues address Ford's affirmative claims against Metro and Daniel H. Foley. Ford asserts the trial court erred in granting summary judgment for Metro on these claims and should have granted its motion [*20] for partial summary judgment holding Metro and Foley liable for fraud, breach of contract, and RICO violations. We begin our analysis by addressing the propriety of the trial court's ruling on Metro's motion.

In its motion, Metro asserted Ford could not establish damages on any of its causes of action as a matter of law because Ford's damages were: (1) nothing more than lost profits and Ford stipulated in federal court it was not seeking lost profits; (2) barred by section 5.02(b) (14) of the Texas Motor Vehicle Commission Code; (3) barred as a penalty; and (4) speculative.⁹ **HN12**[] As movant for summary judgment, Metro had the burden of conclusively negating at least one element of each of Ford's causes of action or pleading and conclusively establishing each element of an affirmative defense. [Science Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911](#) (Tex. 1997).

[*21] Initially, Ford claims its stipulation that it was not seeking lost profits, made during a discovery hearing in federal court, did not waive its right to recover any and all damages from Metro's misrepresentations with respect to Ford's CPA program. After reviewing the summary judgment record, we agree.

HN13[] Waiver is generally defined as the intentional relinquishment of a known right or conduct which warrants the inference of relinquishment of a known right. [FDIC v. Attayi, 745 S.W.2d 939, 946](#) (Tex. App.-Houston [1st Dist.] 1988, no writ). The elements of waiver include: (1) an existing right, benefit, or advantage; (2) knowledge,

⁸ [Section 38.001](#) permits the recovery of reasonable attorney's fees in addition to the amount of a valid claim based on an oral or written contract. [TEX. CIV. PRAC. & REM. CODE ANN. § 38.001\(8\)](#) (1997).

⁹ Additionally, Metro claimed it was entitled to summary judgment on Ford's claim for breach of the duty of good faith and fair dealing asserting Texas does not recognize such a tort. On appeal, Ford does not address this ground for summary judgment and instead focuses on Metro's arguments relating to Ford's damages. The failure to present any argument on Metro's alternative ground for summary judgment on Ford's claim for breach of the duty of good faith and fair dealing results in waiver. See [Martin v. Cohen, 804 S.W.2d 201, 202](#) (Tex. App.-Houston [14th Dist.] 1991, no writ). Accordingly the trial court's judgment with respect to this cause of action will not be disturbed.

actual or constructive, of its existence; and (3) actual intent to relinquish the right, which can be inferred by conduct. *Id.*

Here, Metro's attempt to equate Ford's request for the return of CPA Metro allegedly obtained by fraud with a claim for lost profits is unconvincing. Irrespective of how the parties now try to characterize Ford's measure of damages, the summary judgment evidence does not conclusively establish that Ford waived its right to recover the measure of damages it now seeks. Accordingly, Metro was not entitled [*22] to summary judgment on this ground.

Metro next claimed Ford is unable to ascertain its damages within a reasonable degree of certainty because Ford cannot prove that Metro would have ordered and purchased the trucks if it had not been given the CPA discount it actually received. [HN14](#) A defendant does not satisfy its burden with respect to a traditional motion for summary judgment by showing a plaintiff lacks evidence to support an element of its cause of action. [Wochner v. Johnson, 875 S.W.2d 470, 473](#) (Tex. App.-Waco 1994, no writ); [State v. Seventeen Thousand and No/100 Dollars U.S. Currency, 809 S.W.2d 637, 640](#) (Tex. App.-Corpus Christi 1991, no writ); [Christensen v. Sherwood Ins. Servs., 758 S.W.2d 801, 804](#) (Tex. App.-Texarkana 1988, writ denied). This is because a showing that a plaintiff lacks evidence of an essential element of its cause of action does not conclusively prove the element does not exist. [Christensen, 758 S.W.2d at 804](#). Accordingly, we conclude summary judgment was not proper on this ground.

Metro's summary judgment motion additionally claimed Ford's contractual damages under paragraph 12(b) of the [*23] franchise agreement was in actuality a penalty clause and therefore unenforceable. Ford counters that the clause is a reasonable forecast of just compensation. Paragraph 12(b) of the franchise agreement provides:

The Company may charge back to the Dealer all payments or credits made by the Company to the Dealer pursuant to [warranty and repair] claims or otherwise which were improperly claimed or paid.

[HN15](#) To determine the enforceability of a contractual damages provision, we must consider whether (1) the harm caused by the breach is incapable or difficult of estimation and (2) the amount of liquidated damages called for is a reasonable forecast of just compensation. [Phillips v. Phillips, 820 S.W.2d 785, 788](#) (Tex. 1991). In support of its claim that this contractual provision was a penalty, Metro submitted summary judgment evidence that Ford considered the charge-back a penalty. It also claimed the provision was not carefully drawn because it would allow Ford to charge back all discounts granted even if a dealer merely reported an incorrect zip code. We disagree with Metro.

The provision in question permits charge-backs only for payments or credits improperly made. [*24] Consequently, if the incorrect zip code had no effect on the payment or credit to be given, Ford would not be entitled to a charge-back. Moreover, Metro presented no summary judgment evidence that the amount of charge-backs was an unreasonable forecast of just compensation. In so concluding, we recognize [HN16](#) the question of whether a contractual provision is an enforceable liquidated damages provision or an unenforceable penalty is a question of law for the court to decide. *Id.* However, where, as here, the summary judgment evidence did not conclusively establish the damage provision was unreasonable as matter of law, summary judgment is unsupportable on this ground.

Finally, Metro sought summary judgment on the ground that section 5.02(b)(14) of the Texas Motor Vehicle Commission Code barred all of Ford's damage claims as a matter of law. Ford asserts summary judgment could not have been granted on this ground because the section does not apply to Ford's right to recover damages for discounts Metro received from Ford by fraud.

[HN17](#) Section 5.02(b)(14) precludes a manufacturer from requiring a dealer to pay or assume any part of any refund, rebate, discount, or other financial adjustment [*25] made by the manufacturer to, or in favor of, any customer of a dealer, unless the dealer voluntarily agrees. TEX. REV. CIV. STAT. ANN. art. 4413(36) § 5.02(b)(14) (Vernon 1976 & Supp. 1999).

Although Metro submitted deposition testimony from Ford representatives and Dr. Saving stating CPA was a discount program designed to benefit a dealer's customers, other summary judgment evidence indicated CPA was

a discount Ford gives to dealers on the wholesale price charged for a truck. The evidence suggested it was the dealer who ultimately decided if and what amount of CPA would be passed on to the retail customer. Because the summary judgment evidence did not conclusively establish Ford's CPA program provided a benefit to or in favor of Metro's customers, Metro was not entitled to summary judgment on this basis. Having determined that Metro was not entitled to summary judgment on any of the grounds it raised relating to Ford's claims for breach of contract, fraud and RICO violations, we conclude the trial court erred in granting Metro's motion for summary judgment on these claims and turn next to Ford's motion.

Ford claims it was entitled to partial summary [*26] judgment holding Metro liable for breach of contract, fraud, and RICO violations. As a general rule, when both sides move for summary judgment and the trial court grants one motion and denies the other, we should review the summary judgment evidence presented by both sides and determine all issues presented. See *Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988)*. However, after reviewing the record in this case, we question whether the trial court ever considered the merits of Ford's motion. There is no written order expressly denying Ford's motion for partial summary judgment. Moreover, Ford's motion does not appear to have been heard at the same time as Metro's defensive motion for summary judgment on the same claims. Because the trial court concluded Ford could not establish damages on any of its causes of action as matter of law, it is likely the trial court never considered the merits of Ford motion, which addressed liability issues only. Consequently, the granting of Metro's summary judgment did not necessarily imply a denial of Ford's motion for partial summary judgment, but instead made the motion moot. There being no indication in the record that the trial [*27] court ever ruled on the merits of Ford's motion for partial summary judgment, we conclude Ford has failed to preserve for appellate review the trial court's error in failing to grant the motion. See *Tex. R. App. P. 33.1(a)*.

CONCLUSION

In conclusion, we sustain Ford's complaints regarding the trial court's error in connection with Metro's state antitrust claims and hold that these claims were barred as a matter of law by collateral estoppel. We also conclude the evidence was legally and factually sufficient to support the jury's zero damage award and the trial court did not err in refusing to grant Metro judgment notwithstanding the verdict for actual damages. Additionally, we conclude that because nominal damages cannot support the jury's attorney's fees pursuant to *section 38.001 of the Texas Civil Practice and Remedies Code*, the trial court erred in entering judgment on that portion of the jury's verdict. With respect to Ford's affirmative claims against Metro and Foley, we conclude that Metro failed to conclusively establish Ford's damages were unrecoverable as a matter of law. Whether Ford was entitled to partial summary judgment on Metro's and Foley's liability for fraud, [*28] breach of contract and RICO violations has not been preserved for review.

We affirm the trial court's judgment that Metro recover zero damages on its breach of contract claim. We reverse the trial court's judgment as to Metro's state antitrust claims and render judgment that Metro take nothing on these claims. We also reverse that part of the judgment awarding Metro \$ 800,000 in attorney's fees. Finally, we reverse the trial court's judgment in favor of Metro and Foley on Ford's breach of contract, fraud and RICO claims and remand these causes to the trial court for further proceedings consistent with this opinion.

JOHN R. ROACH

JUSTICE



Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.

United States District Court for the Western District of Washington

December 13, 1999, Decided ; December 13, 1999, Filed; December 14, 1999, Entered

NO. C98-1675Z

Reporter

79 F. Supp. 2d 1219 *; 1999 U.S. Dist. LEXIS 19408 **

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, a Washington unincorporated association, et al., Plaintiffs, vs. PHILIP MORRIS INCORPORATED, et al., Defendants.

Disposition: [**1] Defendants' motion to dismiss GRANTED.

Core Terms

plaintiffs', patients, smokers, antitrust, defendants', injuries, costs, tobacco company, damages, proximate cause, unreimbursed, tobacco, anti trust law, special duty, conspiracy, smoking, unjust enrichment, products, public hospital, derivative, illnesses, nicotine, tobacco product, public health, allegations, fraudulent, addiction, treating, remote, cases

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss

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

HN1[] Motions to Dismiss, Failure to State Claim

On a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), the court must accept as true all plaintiffs' allegations and construe those allegations in the light most favorable to plaintiffs. Thus, the complaint should be dismissed for failure to state a claim only if plaintiffs can prove no set of facts which would entitle them to relief.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN2[] Regulated Practices, Private Actions

Both the Sherman Act, [15 U.S.C.S. § 1](#), and RICO, [18 U.S.C.S. § 1964\(c\)](#), provide a private right of action only to those plaintiffs injured in their business or property by reason of a violation of the laws substantive provisions.

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Antitrust & Trade Law > Exemptions & Immunities > General Overview

Securities Law > RICO Actions > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN3 [down] Antitrust & Trade Law, Exemptions & Immunities

Both the Sherman Act, [15 U.S.C.S. § 1](#), and RICO, [18 U.S.C.S. § 1964\(c\)](#), require that the alleged violation be a proximate cause of the injury suffered. Proximate cause means that the injury to business and property must be directly caused by the conduct alleged. Thus, plaintiffs asserting antitrust or RICO claims must establish both "standing" or "proximate cause" as well as an "antitrust injury" to recover. Each requirement must be analyzed separately.

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

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

HN4 [down] Private Actions, Standing

The concept of antitrust standing requires the court to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. The Supreme Court identifies several factors to be considered in determining whether a plaintiff has antitrust standing: (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws are 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 > ... > Private Actions > Remedies > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN5 [down] Private Actions, Remedies

The antitrust laws protect competition, not competitors. The corollary is that the injured party must be a participant in the same market.

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

HN6 [down] Private Actions, Remedies

A direct relationship between the injury and the alleged wrongdoing is one of the central elements of proximate causation in antitrust claims.

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

HN7 [down] Private Actions, Standing

A direct relationship between the injury and the alleged wrongdoing, although not the sole requirement of RICO and antitrust proximate causation, is one of its central elements. Thus, a plaintiff who complains of harm flowing merely

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from the misfortunes visited upon a third person by the defendant's acts is generally said to stand at too remote a distance to recover.

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

[**HN8**](#) [] **Private Actions, Remedies**

Even if plaintiffs could demonstrate standing, they must also demonstrate an antitrust injury. An "antitrust injury" is an injury of the type the antitrust laws were intended to prevent. Plaintiffs must have suffered their alleged antitrust injury in the market where competition is being restrained.

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

[**HN9**](#) [] **Private Actions, Remedies**

Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury.

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

[**HN10**](#) [] **Private Actions, Remedies**

Because the plaintiffs and defendants are in different markets, no "antitrust injury" occurs.

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

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[**HN11**](#) [] **Justiciability, Standing**

Plaintiffs must have standing to assert their RICO claims against the defendants. The standing requirements under RICO are similar to those under antitrust law.

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

[**HN12**](#) [] **Justiciability, Standing**

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss courts presume that general allegations embrace those specific facts that are necessary to support the claim. Nothing more is needed to confer standing.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

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[**HN13**](#) [L] Racketeering, Racketeer Influenced & Corrupt Organizations Act

The RICO statute also requires that the alleged violation of the law be a "proximate cause" of the injury suffered.

Torts > ... > Elements > Causation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN14**](#) [L] Elements, Causation

An essential element of any claim for fraud is proximate cause.

Torts > ... > Elements > Duty > General Overview

[**HN15**](#) [L] Elements, Duty

The existence of a special duty is an issue of law in Washington.

Torts > ... > Elements > Duty > General Overview

[**HN16**](#) [L] Elements, Duty

Proximate cause is required for a claim of breach of special duty.

Torts > ... > Elements > Duty > General Overview

[**HN17**](#) [L] Elements, Duty

A claim of a breach of a special duty requires "physical harm" to plaintiffs.

Contracts Law > Personal Property > Choses in Action

Contracts Law > Remedies > Restitution

[**HN18**](#) [L] Personal Property, Choses in Action

A person confers a benefit upon another if he gives to the other possession of or some interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or duty of the other, or in any way adds to the others' security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word benefit, therefore, denotes any form of advantage.

Torts > Business Torts > Unfair Business Practices > General Overview

[**HN19**](#) [L] Business Torts, Unfair Business Practices

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In order to recover under a claim stated under the Washington Consumer Protection Act, [Wash. Rev. Code §§ 19.86.020-030](#), plaintiffs must allege an injury to their business or property causally related to the alleged unfair act or practice.

Torts > Remedies > Damages

[HN20](#) [] Remedies, Damages

Expenses for personal injuries are not injuries to business or property under the Washington Consumer Protection Act.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

[HN21](#) [] Concerted Action, Civil Conspiracy

In Washington, a civil conspiracy claim must be based on underlying "actionable wrongs," "overt acts," or a tort working damage to the plaintiffs. A conspiracy claim fails if the underlying act or claim is not actionable.

Counsel: For ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, GRAYS HARBOR COUNTY PUBLIC HOSPITAL DISTRICT NO 1, KING COUNTY PUBLIC HOSPITAL DISTRICT NO 1, OKANOGAN COUNTY PUBLIC HOSPITAL DISTRICT NO 4, plaintiffs: Bradley J. Berg, Christopher Kane, Roger D. Mellem, Michael K Vaska, FOSTER PEPPER & SHEFELMAN, SEATTLE, WA.

For ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO 2, ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO 3, AFFILIATED HEALTH SERVICES, CHELAN COUNTY PUBLIC HOSPITAL DISTRICT NO 2, CLALLAM COUNTY PUBLIC HOSPITAL DISTRICT NO 1, CLALLAM COUNTY PUBLIC HOSPITAL DISTRICT NO 2, DOUGLAS GRANT LINCOLN OKANOGAN COUNTIES PUBLIC HOSPITAL DISTRICT NO 6, FERRY COUNTY PUBLIC HOSPITAL DISTRICT NO 1, GARFIELD COUNTY PUBLIC HOSPITAL DISTRICT, GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO 1, GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO 2, JEFFERSON COUNTY PUBLIC HOSPITAL DISTRICT NO 2, KENNEWICK PUBLIC HOSPITAL DISTRICT, KING COUNTY PUBLIC HOSPITAL DISTRICT NO 2, KITTITAS COUNTY PUBLIC HOSPITAL DISTRICT NO 1, LEWIS COUNTY PUBLIC HOSPITAL DISTRICT NO 1, MASON COUNTY PUBLIC HOSPITAL DISTRICT NO 1, OKANOGAN COUNTY PUBLIC HOSPITAL DISTRICT NO 3, OKANOGAN AND DOUGLAS COUNTIES [**2] PUBLIC HOSPITAL DISTRICT NO 1, PACIFIC COUNTY PUBLIC HOSPITAL DISTRICT NO 2, PACIFIC COUNTY PUBLIC HOSPITAL DISTRICT NO 3, PEND OREILLE COUNTY PUBLIC HOSPITAL DISTRICT NO 1, SKAGIT CO PUBLIC HOS, SKAGIT COUNTY PUBLIC HOSPITAL DISTRICT NO 2, SKAGIT AND WHATCOM COUNTIES PUBLIC HOSPITAL DISTRICT NO 304, SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO 1, SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO 2, SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO 3, WHITMAN COUNTY PUBLIC HOSPITAL DISTRICT NO 1-A, WHITMAN COUNTY PUBLIC HOSPITAL DISTRICT NO 3, plaintiffs: Christopher Kane, FOSTER PEPPER & SHEFELMAN, SEATTLE, WA.

For GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO 3, PROSSER PUBLIC HOSPITAL DISTRICT, plaintiffs: Michael K Vaska, FOSTER PEPPER & SHEFELMAN, SEATTLE, WA.

For PHILIP MORRIS INC, defendant: John Wentworth Phillips, HELLER EHRMAN WHITE & MCAULIFFE, SEATTLE, WA.

For R J REYNOLDS TOBACCO COMPANY, defendant: Bradley S. Keller, BYRNES & KELLER, SEATTLE, WA.

For R J REYNOLDS TOBACCO COMPANY, defendant: Peter J Busch, HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN, SAN FRANCISCO, CA.

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For BROWN & WILLIAMSON TOBACCO CORP, defendant: John Arthur Tondini, BYRNES & KELLER, SEATTLE, [**3] WA.

For BAT INDUSTRIES PLC, defendant: Stephen Murray Todd, Mark Robert Koenig, TODD & WAKEFIELD, SEATTLE, WA.

For UNITED STATES TOBACCO CO, defendant: Delbert D Miller, MILLER BATEMAN LLP, SEATTLE, WA.

For TOBACCO INSTITUTE INC, defendant: Patrick S Davies, COVINGTON & BURLING, WASHINGTON, DC.

For SMOKELESS TOBACCO COUNCIL INC, defendant: John D. Wilson, Jr., WILSON, SMITH, COCHRAN & DICKERSON, SEATTLE, WA.

For LIGGETT GROUP INC, LIGGETT & MYERS INC, defendants: John G. Bergmann, Robert N Gellatly, Jr., HELSELL FETTERMAN LLP, SEATTLE, WA.

Judges: THOMAS S. ZILLY, UNITED STATES DISTRICT JUDGE.

Opinion by: THOMAS S. ZILLY

Opinion

[*1221] ORDER

Plaintiffs are Public Hospital Districts in counties throughout Washington State, and the trade association of these hospital districts (collectively, the "plaintiffs"). Defendants are tobacco companies and related entities associated with the tobacco manufacturers (collectively, the "defendants"). Plaintiffs have brought federal and state claims against defendants for the unreimbursed health care costs associated with treating patients with smoking-related illnesses. This matter comes before the Court on the defendants' motion to dismiss [**4] pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#), docket no. 34. The Court heard oral argument on October 15, 1999, and took the matter under advisement. The Court has considered the briefs of the parties and the oral argument of counsel and now GRANTS defendants' motion to dismiss for the reasons stated in this order.

BACKGROUND

Plaintiffs, political subdivisions of the State of Washington, are required by law to provide medical care and services for the residents of their districts. [RCW 70.44.003](#). Each plaintiff alleges that it was required by law to provide unreimbursed health care services to patients who have suffered from tobacco-related diseases. Second Amended Complaint ("SAC"), PP 1 and 17; [RCW 70.170.060](#). Plaintiffs allege that defendants engaged in deceptive acts and conspired to perpetuate smoking and nicotine addiction in the United States. Plaintiffs further allege that the tobacco companies have forced the public hospitals and others to bear the cost of such care. Plaintiffs seek to recover the unreimbursed portion of this cost, SAC at PP 1-10, as well as other equitable and injunctive relief.

Plaintiffs seek recovery under various legal theories including federal [**5] antitrust violations, RICO violations, fraudulent misrepresentation, fraudulent concealment, breach of a special duty to disclose health hazards, unjust enrichment, conspiracy, violations of the Washington Consumer Protection Act, and public nuisance. Defendants have moved pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) to dismiss plaintiffs' claims for several reasons, including, but [*1222] not limited to: (1) plaintiffs' claims are too remote and wholly derivative of injuries to unnamed smoker-patients; and (2) plaintiffs' losses are in fact expenses which the plaintiffs had a duty to incur. Defendants' memo in supp., docket no. 35, at 1.

Plaintiffs here bring claims similar to other plaintiffs who have unsuccessfully sought recovery for injuries that derive from the treatment of smokers' illnesses. In [Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.](#), 185 F.3d 957 (9th Cir. 1999), petition for cert. filed, 68 U.S.L.W. 3274 (U.S. Oct. 12, 1999)(No. 99-642) the Ninth Circuit affirmed the dismissal of the plaintiff union trusts' claims for failure to state a claim. In that case, the

Court concluded that plaintiffs' claims were "too remote" [**6] from defendants' alleged wrongdoing to allow recovery. *Id. at 964*. In other words, there was no showing of a direct link between the alleged misconduct of many of the same defendant tobacco companies and the alleged damage to the union trusts. Three other Circuits have reached the same result. See *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 1999 WL 639865 (2d Cir. 1999)*, petition for cert. filed, 68 U.S.L.W. 3327 (U.S. Nov. 4, 1999)(No. 99-791); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3d Cir. 1999)*, petition for cert. filed, 68 U.S.L.W. 3251; *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 1999 WL 1034711 (7th Cir. 1999)*. This Court has dismissed similar derivative actions by third party payors of medical costs. *Regence Blueshield v. Philip Morris, Inc., 40 F. Supp. 2d 1179 (W.D. Wash. 1999)*, appeal docketed, No. 99-35204 (9th Cir. March 1, 1999); see also *Int'l Bhd. of Teamsters, 196 F.3d 818, 1999 WL 1034711* [**7] (dismissing claims by Blue Cross and Blue Shield, consolidated with trust fund suits). Plaintiffs in these cases asserted the same federal, state statutory, and common law claims now alleged in the present case.

The issue presented in this case is whether plaintiffs' claims are different than the previous unsuccessful claims of the union trusts and third party insurance providers. For the reasons stated in this order, the Court concludes that they are not; the rationale of *Oregon Laborers* is fatal to plaintiffs' claims and this case must be dismissed. As in *Oregon Laborers*, plaintiffs' claims in this case are derivative of the harm suffered by non-party smokers and the defendants did not proximately cause the injuries alleged.

ANALYSIS

(A) *Rule 12(b)(6)* Standard

HN1[] On a motion to dismiss under *Rule 12(b)(6)* the Court must accept as true all plaintiffs' allegations and construe those allegations in the light most favorable to plaintiffs. *NOW v. Scheidler, 510 U.S. 249, 256, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994)*; *Nelson v. City of Irvine, 143 F.3d 1196, 1200* (9th Cir.), cert. denied, 525 U.S. 981, 119 S. Ct. 444, 142 L. Ed. 2d 399 (1998). [**8] Thus, the complaint should be dismissed for failure to state a claim only if plaintiffs can prove no set of facts which would entitle them to relief.

For purposes of this motion, the Court assumes that the following facts alleged by plaintiffs are true. Tobacco use is harmful to the user's health. See SAC PP 73-82. The defendants had evidence of this fact for many years and have conspired to withhold this information from the public, including the public health care industry. See *id.* PP 87-163. This lack of information prevented plaintiffs from properly informing its patients about the dangers of tobacco use and delayed the implementation of programs to reduce tobacco use. See *id.* PP 17-18, 317-319. The defendants conspired to suppress the research and development of less harmful tobacco products. See *id.* PP 204-234, 304-310. The absence of less harmful tobacco products prevented public health officials from encouraging patients to utilize safer products. See *id.* PP 317-319, 401. Plaintiffs have incurred costs associated with the unreimbursed health care treatment of tobacco-related illnesses. See *id.* PP 1-3. Had the defendants [*1223] not withheld information and [**9] suppressed research into less harmful products, fewer patients would have used the more harmful products. See *id.* PP 4-10. Consequently, fewer patients would have developed a tobacco-related illness and the public hospitals' costs for providing medical treatment for such illnesses would have been reduced. See *id.* P 10. Based on these alleged facts, plaintiffs argue that injury to their business and property arose as a direct result of the defendants' conduct.

(B) Antitrust Claims

Plaintiffs allege violations of the Sherman Act, *15 U.S.C. § 1* and RICO, 18 U.S.C. § 1964(c). **HN2**[] Both statutes provide a private right of action only to those plaintiffs "injured in [their] business or property by reason of" a violation of the laws' substantive provisions. *Oregon Laborers, 185 F.3d at 963*; *18 U.S.C. § 1964* (RICO); *15 U.S.C. § 15(9)* (antitrust). **HN3**[] Both statutes also require that the alleged violation be a "proximate cause" of the injury suffered. *Blue Shield of Virginia v. McCready, 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)* (antitrust); *Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)* [**10] (RICO). Proximate cause means that the injury to business and property must be directly caused by

the conduct alleged. Thus, plaintiffs asserting antitrust or RICO claims must establish both "standing" or "proximate cause" as well as an "antitrust injury" to recover. Each requirement must be analyzed separately.

(1) Antitrust Standing and Proximate Cause

"The antitrust laws do not provide a remedy to every party injured by unlawful economic conduct." [American Ad Management Inc. v. GTE of California, 190 F.3d 1051, 1055 \(9th Cir. 1999\)](#). Antitrust laws are only intended to preserve competition for the benefit of consumers. [Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#). [HN4](#)[] The concept of antitrust standing requires the Court to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." [Associated General Contractors, 459 U.S. at 535](#). The Supreme Court has identified several factors to be considered in determining whether a plaintiff has antitrust standing: "(1) the nature of the [**11] 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." [Amarel v. Connell, 102 F.3d 1494, 1507 \(9th Cir. 1997\)](#), citing [Associated General Contractors, 459 U.S. at 535](#).

(a) Nature of the injury

"The [HN5](#)[] 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 \(1977\)](#) (citations and quotations omitted). The corollary is that the injured party must be a participant in the same market. [Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 \(9th Cir. 1985\)](#). Plaintiffs' contention, that they are "direct purchasers of . . . nicotine delivery products for the treatment of nicotine addition," and thus "consumers in the same market," SAC P 10, is without merit. It cannot be said that plaintiffs either compete with the tobacco companies in the manufacture or sale of cigarettes or that they directly [**12] consume these products. To the extent plaintiffs have suffered damages, their claims are derivative of the injuries suffered by the smoker patients.

(b) Directness of injury

Plaintiffs allege both a "direct" and an "indirect" injury as a result of defendants' conduct, specifically that defendants conspired to withhold information from plaintiffs [*1224] that was necessary to properly diagnose and treat smoking as an addiction. Plaintiffs argue that "the tobacco defendants' conspiracy made the plaintiffs unwitting accomplices in increasing their own injuries." Plaintiffs' memo in opp., docket no. 84, at 2. Thus, plaintiffs contend, the defendants' conspiracy resulted in a direct injury to plaintiffs' business and property. Plaintiffs also allege indirect injury in the form of excessive costs necessary to treat their smoker-patients.

[HN6](#)[] A direct relationship between the injury and the alleged wrongdoing is "one of [the] central elements" of proximate causation in antitrust claims. See [Holmes, 503 U.S. at 269](#), citing [Associated General Contractors, 459 U.S. at 540](#); see also [Oregon Laborers, 185 F.3d at 963](#). Smokers that have become ill [**13] as a result of using tobacco products are the direct victims of the misconduct asserted in this litigation. These smokers can bring claims directly against the tobacco companies for their injuries. The existence of these more direct victims of the alleged wrongful conduct weighs in favor of barring plaintiffs' claims.

In [Oregon Laborers, 185 F.3d at 961](#), six Oregon-based employee health and welfare trust plans filed suit against various tobacco companies based upon federal antitrust, RICO and other state law claims. The case was dismissed on motion for summary judgment and affirmed by the Ninth Circuit. The plaintiffs in *Oregon Laborers* alleged claims against the tobacco defendants very similar to those presented in this case. The Ninth Circuit, following the Supreme Court's lead in [Holmes, 503 U.S. at 269](#), held that the claims were too remote to allow recovery under RICO and antitrust laws, reasoning:

[HN7](#)[] A direct relationship between the injury and the alleged wrongdoing, although not the sole requirement of RICO and antitrust proximate causation, has been one of its central elements. Thus, a plaintiff who

complained of harm flowing merely [**14] 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. (citations and quotations omitted)

Like the plaintiffs in *Oregon Laborers*, plaintiffs' alleged injuries are derivative by nature. The injuries to plaintiffs occur only if there is first an injury to smoking patients. *Oregon Laborers*, 185 F.3d at 963. Without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers. *Id.* There is therefore no direct link between the alleged misconduct of the tobacco companies and the claimed damage to plaintiffs. See *Id.*; *Laborers Local 17*, 191 F.3d at 239 (dismissing RICO claims because trust funds' damages "are entirely derivative of the harm suffered by plan participants as a result of using tobacco products"); *Steamfitters*, 171 F.3d at 928 (holding that regardless of plaintiffs' characterization as direct or indirect, claims "fail for being too remotely connected in the causal chain from any wrongdoing on defendants' part.")

(c) *Speculative nature of harm*

Plaintiffs allege [**15] that but for the defendants' conspiracy, they would have "many years earlier" diagnosed smoking as an addiction, banned or limited the sale of cigarettes on their premises, and taken other steps to ensure their patients were properly diagnosed and treated. SAC, P 371. Plaintiffs contend that these steps "would have reduced [their] damages from treating smoking-related diseases." Plaintiffs' memo in supp., docket no. 84, at 4. In order to calculate damages, plaintiffs would be required to prove how many smokers would have stopped smoking with more information, how many would have smoked less dangerous products, how much healthier these hypothetical reformed smokers would have been, and how much less unreimbursed care and services would have been incurred by the plaintiffs. These damage claims are highly speculative in light of the multitude of factors that might affect damages. "The difficulty of [**1225] ascertaining the damages attributable to defendants' alleged wrongful conduct and the complexity involved in calculating these damages weigh heavily, if not dispositively, in favor of barring plaintiffs' actions." *Oregon Laborers*, 185 F.3d at 965.

(d) *Risk of duplicative [**16] recovery and complexity in apportioning damages*

Plaintiffs have already been reimbursed, in part, for services under Medicare and Medicaid and have accepted reimbursement "as payment in full." *42 CFR § 447.15*; WAC 388-550-3000(6). Other litigation pursued directly by smokers or by the State of Washington has resulted or will result in substantial recoveries or settlements. The Court would be forced to adopt complicated rules apportioning damages to eliminate the risk of multiple recoveries. This factor also weighs in favor of barring plaintiffs' action.

(e) *Standing and proximate cause precedents*

Several other courts have held that third party insurers and trusts funds lacked standing to sue tobacco companies for medical care costs of smoking-related illness. See, e.g., *Laborers Local 17*, 191 F.3d at 239; *Oregon Laborers*, 185 F.3d at 969; *Steamfitters*, 171 F.3d at 927; *Regence Blueshield*, 40 F. Supp. 2d at 1185. In each case, plaintiffs could not demonstrate that the defendants proximately caused their injuries.

Plaintiffs attempt to distinguish these cases by demonstrating the differences between insurance [**17] providers and health and welfare trust funds, on the one hand, and the Public Hospital Districts, on the other. Unlike the insurance providers and union trusts funds, plaintiffs argue they have a duty to safeguard public health, an obligation to provide care even if smokers cannot pay, and no subrogation rights. Thus, plaintiffs directly incur the costs of treating smoking-related illness through unreimbursed medical treatment of patients, unlike insurers who pass such costs on to their insureds. Plaintiffs also claim to provide advice about smoking and health, and directly purchase nicotine products to treat those addicted to tobacco. Plaintiffs rely on these alleged differences to argue that they have standing to bring their claims in this litigation. The Court is unconvinced; these claimed differences in the structure and functions of the Public Hospital Districts do not support standing to bring these antitrust and RICO claims. Plaintiffs bring claims which are almost identical to the claims of the third party insurers and health and welfare trust funds. "No amount of semantic gymnastics can detract from the conclusion that [plaintiffs'] claims are completely derivative of the [**18] personal injuries to [smokers] allegedly caused by the defendants' conduct." *Regence Blueshield*, 40 F. Supp. 2d at 1184.

Plaintiffs further allege that their special relationship with patients confers standing, relying in part upon the decisions in *Singleton v. Wulff*, 428 U.S. 106, 112-13, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976) (ruling that respondent-physicians suffered concrete injury from an anti-abortion statute that denied physicians Medicaid reimbursement for abortions not "medically indicated"); and *Lee v. State of Oregon*, 869 F. Supp. 1491, 1494-95 (D. Or. 1994) (holding doctors had third party standing to challenge physician-assisted suicide based on showing of direct financial impact on their practices). These cases have allowed doctors to challenge laws that directly impacted their medical practice. However, these cases do not provide support for granting plaintiffs standing under the antitrust laws.

Plaintiffs also base standing on the duty owed by hospitals to their patients. See *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997) (holding Courts have held that hospitals have a "duty [**19] to protect its patients from the tortious or criminal actions of third parties" due to "the special relationship between the hospital and the patient."); *Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991) (ruling that hospitals owe non-delegable [*1226] duty directly to their patients). Public hospitals must provide care for their patients regardless of their ability to pay. *RCW 70.170.060*. Plaintiffs allege that this duty distinguishes the cases of third party payors, who had merely a contractual relationship with the injured smokers.

Unquestionably hospitals have a duty to protect their patients. But hospitals may not generally sue companies who have caused their patients' illnesses. Could plaintiffs sue an auto manufacturer for the unreimbursed costs of treating a patient injured as a result of a defective car? Could plaintiffs sue food manufacturers for the unreimbursed costs of treating persons injured as a result of food poisoning? In these hypothetical cases, plaintiffs could not show that the defendant's actions proximately caused their injuries. The same is true here. Thus, plaintiffs do not have standing to sue the tobacco companies for the unreimbursed [**20] costs of treating smokers.

(f) Conclusion: plaintiffs do not have standing

Each of the factors identified in *Associated General Contractors* weigh against antitrust standing in this case. Plaintiffs alleged damages were not the type the antitrust laws were intended to forestall. The claimed damages are highly speculative and uncertain. Allowing the case to proceed could result in duplicative and complex damages. Plaintiffs' damages are derivative of injuries to others and they cannot demonstrate proximate cause.

(2) Antitrust Injury

HN8[¹] Even if plaintiffs could demonstrate standing, they must also demonstrate an antitrust injury. An "antitrust injury" is an injury of the type the antitrust laws were intended to prevent. *Associated General Contractors*, 459 U.S. at 540. Plaintiffs must have suffered their alleged antitrust injury in the market where competition is being restrained. *American Ad Mgmt.*, 190 F.3d at 1057.

Defendants are in the market of selling cigarettes and tobacco products, while plaintiffs are in the health care market. Plaintiffs attempt to stretch the definition of market by labeling the tobacco companies "sellers in the [**21] broad U.S. market for drugs." SAC, P 80. Plaintiffs assert that they are purchasers of drugs, including "nicotine delivery products" used to treat nicotine addiction. However, plaintiffs' alleged injuries did not arise from their purchase of nicotine products but from their patients' consumption of tobacco products. Plaintiffs and tobacco companies are not in the same market; they are neither consumers, competitors, suppliers, or dealers, nor do they have a sufficiently close tie with the tobacco market.

"Parties **HN9**[¹] whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *American Ad Mgmt.*, 190 F.3d at 1057. **HN10**[¹] Because the plaintiffs and defendants are in different markets, no "antitrust injury" occurred. See *Bhan*, 772 F.2d at 1470; see also *Steamfitters*, 171 F.3d at 926. Interpreting the definition of market as broadly as plaintiffs suggest

would enable dentists to sue candy makers for their unreimbursed cost of treating their patients' cavities. The Court declines to so extend the scope of the antitrust laws.¹

[**22] [*1227] (C) *RICO Claims*

(1) *RICO Standing*

HN11 Plaintiffs must have standing to assert their RICO claims against the defendants. The standing requirements under RICO are similar to those under antitrust law. See *Holmes, 503 U.S. at 268*; *Oregon Laborers, 185 F.3d at 963*. Thus, the Court's analysis for antitrust standing is applicable for RICO.

Plaintiffs rely heavily on *NOW v. Scheidler, 510 U.S. 249, 256, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994)* in support of RICO standing. In *Scheidler*, the Court allowed abortion clinics to pursue RICO claims against anti-abortion protesters who allegedly conspired to use or threaten violence against clinic employees, doctors and patients. The conspiracy was actively directed at the clinics and their employees, and the injuries to clinic business were directly caused by the defendants' alleged activities. The Supreme Court held that "at **HN12** the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim . . . Nothing more is [**23] needed to confer standing." *Id.* (citations omitted). Plaintiffs allege that "as in *Scheidler*, the PHDs are health care providers who have alleged injuries to business and property as a result of the Tobacco defendants' predicate RICO acts." Plaintiffs' memo in opp., docket no. 64, at 11. However, the activities of the tobacco companies in this case were not directly aimed at causing injury to plaintiffs. Rather, plaintiffs suffered incidental damage as a result of the injuries to smokers who were the direct target of the defendants' activities. Plaintiffs have alleged no specific facts that could overcome the proximate cause and standing concerns of the Court.

Plaintiffs also rely on *Pharmacare v. Caremark, 965 F. Supp. 1411 (D. Haw. 1996)*. In that case, the court denied a motion to dismiss RICO claims brought by a healthcare provider against a competitor who had illegally paid doctors for patient referrals. The Court held that plaintiffs had standing to pursue their RICO claims because the alleged fraud could foreseeably affect the plaintiffs. There, the plaintiffs were the direct target of the defendants' scheme to obtain an unfair competitive advantage [**24] by fraudulently soliciting these referrals. Here, however, the tobacco companies would not stand to benefit competitively by harming plaintiffs, and plaintiffs were not the direct target of the defendant's activities. Therefore, plaintiffs lack standing for their RICO claims.

(2) *RICO Injury*

HN13 The RICO statute also requires that the alleged violation of the law be a "proximate cause" of the injury suffered. See *Holmes, 503 U.S. at 268*. Plaintiffs claims in this action are too remote to allow recovery under RICO. *Oregon Laborers, 185 F.3d at 963*; see also *Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303 (9th Cir. 1992)*, cert. denied, 507 U.S. 1004, 123 L. Ed. 2d 266, 113 S. Ct. 1644 (1993) (holding that subcontractors lacked standing to bring RICO claim against defendant, whose fraud allegedly caused their prime contractor to lose bid); *Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 929 (9th Cir. 1994)* (affirming dismissal of subtenant's RICO claim that defendant's fraudulent acts raised master tenant's rent, which was passed on to plaintiff). Here again, plaintiffs cannot get beyond [**25] the fact that any injuries they might have suffered occurred only as a result of injuries suffered first by individual consumers of the defendant's product. Plaintiffs cannot therefore show that their injuries were proximately caused by defendant's conduct.

D. *State Law Claims*

¹ One narrow exception to this market participant requirement is for parties whose injuries are "inextricably intertwined" with the injuries of market participants. See *McCready, 457 U.S. at 484* (granting standing to psychologists to challenge restrictions for psychotherapeutic services). This test requires that the plaintiffs are a "necessary means to achieve the conspirators' illegal end as well as an integral and inextricable part of the anticompetitive scheme." *Ostroff v. H.S. Crocker Co., 740 F.2d 739, 746 (9th Cir. 1984)*. The injury to plaintiffs is not "inextricably intertwined" with the tobacco companies' unlawful activities. The injuries sustained by plaintiffs were incidental to the alleged scheme of the defendants, and occurred in a completely distinct market.

1. Fraudulent Concealment and Misrepresentation

Plaintiffs' fifth and sixth claims are for fraudulent misrepresentation and fraudulent concealment under Washington [*1228] State law. [HN14](#)[] An essential element of any claim for fraud is proximate cause. [Amtruck Factors v. International Forest Products, 59 Wn. App. 8, 14, 795 P.2d 742 \(1990\)](#), rev. denied, [116 Wn.2d 1003, 803 P.2d 1310 \(1991\)](#). For the reasons heretofore stated, plaintiffs cannot establish proximate cause in this case as a matter of law. [Oregon Laborers, 185 F.3d at 964](#).

2. Breach of Special Duty

Count 7 of plaintiffs' complaint alleges that the defendants breached a special duty owed by defendants to the plaintiffs under Washington State law. Plaintiffs allege that defendants voluntarily assumed a special duty to protect public health by making statements to the public, beginning with the "Frank [**26] Statement to Cigarette Smokers" in 1954. SAC, P 375. Plaintiffs allege that the defendants breached that duty by suppressing information vital to the public health, such as the addictiveness of nicotine and the relationship between disease and tobacco use. According to plaintiffs, the breach of this duty caused more smokers to smoke, and the public hospitals to bear increased health costs.

[HN15](#)[] The existence of a special duty is an issue of law in Washington. [Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 \(1992\)](#). Even assuming the "Frank Statement to Cigarette Smokers" created a special duty to the public health community, plaintiffs cannot establish that any breach proximately caused the damages claimed. *State of Washington v. American Tobacco Co.*, 1996 WL 931316, *8, No. 96-2-15056-8 SEA, (Wash. Sup. Ct. Nov. 19, 1996) (rejecting similar special duty claim under Washington law against Tobacco defendants); [Herskovits v. Group Health Cooperative, 99 Wn.2d 609, 617, 664 P.2d 474 \(1983\)](#) (holding [HN16](#)[] proximate cause required for claim of breach of special duty).

In addition, [HN17](#)[] a claim of a breach of a special duty requires "physical harm" [**27] to plaintiffs. [Restatement \(Second\) of Torts § 323; Herskovits, 99 Wn.2d at 615](#); *American Tobacco, Co.*, 1996 WL 931316 at *7 (dismissing claim of breach of special duty for lack of physical harm). This element is also missing in the present case.

3. Unjust Enrichment

Plaintiffs allege in Count 8 that defendants have been unjustly enriched by their treatment of smokers. Plaintiffs contend that the defendants owe a duty to the public (including the plaintiffs) not to deceive people about the dangers of smoking. SAC, P 382. They claim that the tobacco companies owed a duty to plaintiffs to research the dangers of smoking and disclose the results. *Id.* However, plaintiffs do not assert that defendants actually had an obligation to pay the medical costs of the smoker-patients treated by the plaintiffs. Without such an allegation, plaintiffs cannot maintain their claim for unjust enrichment. *American Tobacco*, 1996 WL 931316 at *6 (dismissing similar unjust enrichment claim).

Plaintiffs' unjust enrichment claim turns on whether their treatment of smokers benefitted defendants. Washington courts have defined a benefit as any form [**28] of advantage:

[HN18](#)[] A person confers a benefit upon another if he gives to the other possession of or some interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or duty of the other, or in any way adds to the others' security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word benefit, therefore, denotes any form of advantage.

American Tobacco Co., 1996 WL 931316 at *8 quoting [Chemical Bank v. Washington Public Power Supply Sys., 102 Wn.2d 874, 910, 691 P.2d 524 \(1984\)](#), cert. denied, 471 U.S. 1065, 85 L. Ed. 2d 497, 105 S. Ct. 2140 (1985) (citations and quotations omitted).

Plaintiffs do not claim to have given the tobacco companies possession of or an interest [*1229] in services rendered. Plaintiffs provided medical treatment to smokers, and the benefits of that treatment went to the patients,

not the defendants. Without alleging that the defendants are responsible for the medical costs of their patients, the alleged benefits that plaintiffs conferred [**29] on the defendants are too indirect and speculative to support its unjust enrichment claim under Washington law. See *American Tobacco Co.*, 1996 WL 931316 at *9; see also *Chemical Bank*, 102 Wn.2d at 910-11. Plaintiffs cannot maintain an action for unjust enrichment against defendants merely because defendants were incidentally benefitted by their treatment of smokers. See *Oregon Laborers*, 185 F.3d at 968. Without a legal obligation on the part of defendants to pay, the treatment by plaintiffs did not "benefit" the defendants, and the unjust enrichment claim fails. See *id.*

4. Consumer Protection Act

Plaintiffs also seek recovery under [HN19](#) the Washington Consumer Protection Act, [RCW 19.86.020-030](#). In order to recover under this claim plaintiffs must allege an injury to their business or property causally related to the alleged unfair act or practice. [Washington State Physicians Ins. Exchange & Ass'n. v. Fisons Corp.](#), 122 Wn.2d 299, 312, 858 P.2d 1054 (1993).

The alleged injuries to plaintiffs are based on personal injuries to smokers. Plaintiffs allege that the defendants' conspiracy to restrict trade suppressed [**30] the development, manufacture, and sale of safer tobacco products. Plaintiffs further allege that the lack of safer tobacco increased the number of smokers seeking treatment at public hospitals, thereby increasing their costs. [HN20](#) Expenses for personal injuries are not injuries to business or property under the Washington Consumer Protection Act. See [Northwest Laborers](#), 58 F. Supp. 2d 1211 at 1215; [Fisons](#), 122 Wn.2d at 318; [Stevens v. Hyde Athletic Industries, Inc.](#), 54 Wn. App. 366, 370, 773 P.2d 871 (1989). Judge Dwyer explained in [Northwest Laborers](#), 58 F. Supp. 2d at 1215, that this general rule "cannot change when the injured person's medical expenses are paid by someone else." The costs derived from these personal injuries do not become less "personal" when borne by plaintiffs in the form of unreimbursed health care services. Thus, these costs cannot be recovered under the Washington Consumer Protection Act.²

[**31] 5. Nuisance

Plaintiffs' twelfth claim alleges that defendants perpetrated a public nuisance. Plaintiffs contend that the defendants' actions endangered the public health, causing the public hospitals (and others) to bear the costs of unreimbursed health care services for tobacco-related diseases. Plaintiffs claim for nuisance fails because plaintiffs cannot demonstrate proximate cause. [Northwest Laborers](#), 58 F. Supp. 2d at 1215.

6. Conspiracy

Finally, plaintiffs' conspiracy claim fails because there are no underlying illegal acts. [HN21](#) In Washington, a civil conspiracy claim must be based on underlying "actionable wrongs," "overt acts," or a "tort working damage to the plaintiffs." [Northwest Laborers](#), 58 F. Supp. 2d at 1216, citing [W.G. Platts, Inc. v. Platts](#), 73 Wn.2d 434, 438-40, 438 P.2d 867 (1968). A conspiracy claim fails if the underlying act or claim is not actionable. See *id.*; [Wilson v. State](#), 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996).

E. Conclusion

The injuries alleged in this litigation may be recovered by the persons who [*1230] were directly harmed by defendants' conduct. Plaintiffs' claims are [**32] derivative of the claims of smokers and, under long-standing judicial precedent, cannot be allowed to proceed.

IT IS SO ORDERED.

² The *Fisons* decision does not require a contrary result. In *Fisons*, a physician whose reputation was injured had standing to sue a drug company for unfair and deceptive practices by failing to warn the physician of known dangers of its drug. In *Fisons*, the Court relied on the unique relationship between drug company and physician. Plaintiffs have no similar relationship with the defendants.

79 F. Supp. 2d 1219, *1230 (1999 U.S. Dist. LEXIS 19408, **32

DATED this 13th day of December, 1999.

THOMAS S. ZILLY

UNITED STATES DISTRICT JUDGE

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George Lussier Enters. v. Subaru of New Eng., Inc.

United States District Court for the District of New Hampshire

December 13, 1999, Decided

Civil No. C-99-109-B

Reporter

1999 U.S. Dist. LEXIS 19769 *

George Lussier Enterprises, Inc., d/b/a Lussier Subaru, et al. v. Subaru of New England, Inc., et al.

Notice: [*1] NOT FOR PUBLICATION

Disposition: SNE's motion to dismiss the dealers' antitrust claim denied.

Core Terms

dealers, costs, tying product, accessories, switching, tying arrangement, discretionary, aftermarkets, lock-in, tied product, dealerships, franchises, replacement part, allegations, market power, manufacturer's, derivative, franchise agreement, seller

LexisNexis® Headnotes

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

Evidence > ... > Documentary Evidence > Writings > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN1[] Summary Judgment, Supporting Materials

Motion to dismiss is not converted into a motion for summary judgment when court reviews document referred to in the complaint if the plaintiff's cause of action depends on the document and the document's authenticity is not in dispute.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN2 [down arrow] Antitrust & Trade Law, Sherman Act

A tying arrangement violates the Sherman and Clayton Acts under "rule of reason" analysis even if it is not per se unlawful if it unreasonably restrains competition.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN3 [down arrow] Regulated Practices, Private Actions

In antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN4 [down arrow] Price Fixing & Restraints of Trade, Tying Arrangements

A tying arrangement ordinarily will be deemed per se unlawful if: (1) it involves a "tying" product and a distinct "tied" product; (2) the seller conditions the right to purchase the tying product on the purchase of the tied product; (3) the seller has sufficient market power in the market for the tying product to appreciably restrain trade in the market for the tied product; and (4) as a result, the seller is able to foreclose a "not insubstantial" amount of interstate commerce in the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN5 [down arrow] Price Fixing & Restraints of Trade, Tying Arrangements

Antitrust plaintiffs are provided with a framework for bringing a per se tying arrangement claim in cases where a plaintiff argues that the defendant has substantial market power in a product aftermarket even though it lacks power in the market for the primary product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6 [down arrow] Price Fixing & Restraints of Trade, Tying Arrangements

An antitrust plaintiff cannot succeed on a Kodak-type theory tying arrangement claim when the defendant has not changed its policy after locking-in some of its customers.

Counsel: For GEORGE LUSSIER ENTERPRISES, INC., SULLIVAN COUNTY MOTORS, INC., SUBARU OF WAKEFIELD, INC., CAMILLERI BROTHERS, INC., BALD HILL REALTY, INC., KINNEY MOTORS, LTD., REYNOLDS' GARAGE & MARINE, INC., plaintiffs: Richard B. McNamara, Esq., Wiggin & Nourie, Manchester, NH.

For SUBARU OF NEW ENGLAND, INC., ERNEST J. BOCH, JR., defendants: Michael C. Harvell, Esq., Sheehan, Phinney, Bass & Green, P.A., Manchester, NH.

For SUBARU OF NEW ENGLAND, INC., defendant: William A. Kershaw, Esq., Kronick, Moskovitz, Tiedemann & Girard, Sacramento, CA.

For SUBARU OF NEW ENGLAND, INC., defendant: Howard M. Cooper, Esq., Todd & Weld, Boston, MA.

For ERNEST J. BOCH, JR., defendant: Robert J. Cordy, Esq., McDermott, Will & Emery, Boston, MA.

Judges: Paul Barbadoro, Chief Judge.

Opinion by: PAUL BARBADORO

Opinion

MEMORANDUM AND ORDER

Seven current and former New England Subaru dealers have filed a class action complaint against their distributor, Subaru of New England, Inc. ("SNE"). The dealers contend that SNE withholds approximately 10% of the new Subaru vehicles destined for the New England market and illegally requires dealers to purchase vehicles with expensive accessories such as leather seats and keyless entry systems in order to obtain any of the withheld vehicles. The dealers argue that this practice constitutes a tying arrangement prohibited by [section 1](#) of the Sherman Act and section 3 of the Clayton Act, [15 U.S.C. §§ 1](#) & [14](#).¹ SNE has responded with a motion to dismiss arguing that the dealers have failed to allege that SNE has sufficient power in the market for new Subaru vehicles to restrain competition in the automobile accessory market. I disagree and accordingly deny the motion.

[*2] I.

SNE is the exclusive distributor of Subaru vehicles in New England.² In this capacity, it has entered into franchise agreements with all of the region's Subaru dealers. SNE's franchise agreements contain or incorporate by reference certain standard provisions dictated by Subaru's national distributor. One such provision states that "It is understood and agreed that [SNE] will allocate all affected Subaru products equitably, using appropriate factors such as the respective inventory levels and sales performance of [its] dealers during a representative period of time immediately prior to such allocation." Dealership Agreement and Standard Provisions, Defendants' Joint Appendix, Tab A(1) at 9.³

[*3] SNE implemented a vehicle distribution plan on February 1, 1987, dubbed "Fair Share II." Under the plan, SNE allocates 90% of its vehicles to dealerships based upon a formula tied to the number of vehicles each dealership sells during a given allocation period. The plan specifies that the remaining discretionary vehicles may

¹ The dealers also assert that SNE breached its dealership agreements and violated various state dealer protection statutes, and that both SNE and its sole shareholder, Ernest Boch, violated the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C. §§ 1961 et seq.](#) I confine my analysis to the sufficiency of the dealers' antitrust claim.

² I take the facts from the complaint and describe them in the light most favorable to the plaintiffs. See [Miranda v. Ponce Fed. Bank, 948 F.2d 41, 43 \(1st Cir. 1991\)](#).

³ The dealers paraphrase certain provisions in SNE's dealership agreement and other related documents. I quote from the documents, which were supplied by the defendants in support of their motion. See [Beddall v. State Street Bank and Trust Co., 137 F.3d 12, 16-17 \(1st Cir. 1998\)](#) (motion [HN1](#) to dismiss is not converted into a motion for summary judgment when court reviews document referred to in the complaint if the plaintiff's cause of action depends on the document and the document's authenticity is not in dispute).

be withheld by SNE and used for "executive vehicles and discretionary purposes such as market action vehicles."⁴ Fair Share II Distribution System, Defendants' Joint Appendix, Tab B(2).

At some point not specified in the complaint but after the dealers signed their franchise agreements and incurred substantial costs to acquire [*4] and develop their dealerships, SNE began to condition a dealer's right to obtain discretionary vehicles on an agreement to purchase vehicles with a variety of pre-installed accessories such as leather seats, CD players, air filtration systems, and keyless entry systems. The dealers claim that this practice is particularly burdensome because SNE withholds as discretionary vehicles a disproportionate number of Subaru's most popular models.

The accessories SNE requires dealers to purchase in order to obtain discretionary vehicles are installed by a contractor working for SNE. Although a distinct market exists for the sale and installation of automobile accessories, SNE is able to force the dealers to pay higher than market rates for accessories by exploiting the demand among the dealers for discretionary vehicles. As a result, the complaint alleges, SNE is able to foreclose a substantial amount of the accessory business that otherwise would have gone to SNE's competitors.

The dealers allege that SNE's practice of conditioning a dealer's right to acquire discretionary vehicles on an agreement to purchase accessories violates its franchise agreements with the dealers. They also allege [*5] that SNE intentionally prevented the dealers from learning of the tying arrangement until after they had signed their franchise agreements and incurred substantial costs to develop their dealerships. Finally, they claim that they would incur substantial switching costs if they were to replace their demand for discretionary vehicles with a competing manufacturer's models.

II.

The dealers argue both that SNE's tying arrangement is "per se" unlawful⁵ [*6] and that it is unlawful under "rule of reason" analysis.⁶ Because SNE challenges only the dealers' per se tying claim, I focus my analysis on the sufficiency of this claim.⁷

⁴ The plan elsewhere defines "discretionary vehicles" as "vehicles to be used as demonstrators by Subaru of New England; vehicles to be used for *major* auto shows; vehicles set aside to assist dealers who, at the sole discretion of Subaru of New England, need assistance and vehicles delivered to VIPs." Defendants' Joint Appendix, Tab B(3) (emphasis in original).

⁵ While some courts have suggested that a per se tying violation is a misnomer because "some element of [market] power must be shown and defenses are effectively available," [U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 n.2 \(1st Cir. 1993\)](#); see also [Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 477 & n.8 \(3d Cir. 1992\)](#) (en banc), the Supreme Court has continued to endorse a per se rule in the tying context. See [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#) ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'").

⁶ [HN2](#) A tying arrangement violates the Sherman and Clayton Acts under "rule of reason" analysis even if it is not per se unlawful if it unreasonably restrains competition. See [Jefferson Parish, 466 U.S. at 29-31](#); [Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 799 \(1st Cir. 1988\)](#).

⁷ I review the dealers' antitrust claims under the particularly liberal standard articulated by the United States Supreme Court in [Hospital Building Company v. Trustees of Rex Hospital, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 \(1976\)](#) ("In [HN3](#) antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.") (internal citation omitted). Accordingly, I must deny SNE's motion to dismiss unless the dealers could not prevail even if all of their allegations prove to be true and they are given the benefit of all reasonable inferences. See [Cooperman v. Individual, Inc., 171 F.3d 43, 46 \(1st Cir. 1999\)](#).

[*7] A tying arrangement ordinarily will be deemed per se unlawful if: (1) it involves a "tying" product and a distinct "tied" product; (2) the seller conditions the right to purchase the tying product on the purchase of the tied product; (3) the seller has sufficient market power in the market for the tying product to appreciably restrain trade in the market for the tied product; and (4) as a result, the seller is able to foreclose a "not insubstantial" amount of interstate commerce in the tied product. See ABA Section of *Antitrust Law, Antitrust Law Developments* 177-78 (4th ed. 1997). SNE argues here that the dealers' tying claim must be dismissed because it does not adequately allege that SNE has sufficient power in the market for the tying product (in this case new Subaru vehicles) to restrain trade in the market for the tied product (in this case automobile accessories).

SNE bases its argument on the First Circuit's opinion in *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988). In *Grappone*, a Subaru dealer brought a tying claim against SNE, alleging that it had conditioned vehicle allocations on the dealer's purchase of spare [*8] parts. See *id. at 793*. The court rejected the dealer's attempt to define the relevant market for the tying product narrowly, in terms of the Subaru brand of automobile, and thereby to assert that SNE wielded power over that market. Rather, because SNE competed with other automobile manufacturers and distributors, the court concluded that "Subaru's market share, whether measured in terms of sales of all autos or of imports or in any other reasonable way, is minuscule." *Id. at 797*. Because SNE had an insubstantial share of the market for the tying product, and in the absence of any evidence that Subaru automobiles "had any special or unique features, such as patents or copyrights," *id. at 798*, the court concluded that SNE lacked the market power necessary to force the dealer to purchase the spare parts. See *id. at 797*. The First Circuit accordingly held that the dealer had "failed to prove that the per se anti-tying rules apply in this case." *Id. at 800*.

SNE argues here that the court's ruling in *Grappone* necessarily precludes the dealers' claims that SNE has market power in the market for Subaru [*9] vehicles. Certainly nothing in the dealers' complaint suggests that SNE's share of the New England automobile market has grown from minuscule to dominant since the First Circuit's decision in *Grappone*. Accordingly, I agree that *Grappone* dictates that the dealers in this case cannot successfully plead a traditional per se tying violation. This conclusion does not, however, necessarily doom the dealers' claim because they base their right to recovery on the Supreme Court's more recent analysis of the issue in *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992).

HN5  *Kodak* provides antitrust plaintiffs with a framework for bringing a per se tying claim in cases where a plaintiff argues that the defendant has substantial market power in a product aftermarket even though it lacks power in the market for the primary product. Kodak manufactured and sold photocopiers and micrographic equipment. See *504 U.S. at 455, 456*. It also sold two aftermarket products related to the equipment: replacement parts and service. See *id. at 455, 457*. After many customers had already purchased [*10] Kodak equipment, numerous independent service organizations (ISOs) began to offer service for the machines at a lower price than that charged by Kodak. See *id. at 455, 457*. Kodak reacted by tying the availability of Kodak replacement parts, which were the only parts that could be used in servicing the machines, to the purchase of service from Kodak. See *id. at 457, 458*. As a result, the ISOs were no longer able to compete with Kodak in the market for equipment servicing. See *id. at 458*.

A group of ISOs sued Kodak, claiming, inter alia, that Kodak had tied the sale of service to the sale of replacement parts, in violation of § 1 of the Sherman Act. See *id. at 459*. In response, Kodak insisted that it was entitled to judgment as a matter of law because the existence of competition in the market for equipment, which was conceded, necessarily meant that there must be competition in the derivative aftermarket for replacement parts. See *id. at 465-66*. Therefore, Kodak argued, it lacked sufficient power over the market for replacement parts (the "tying product") to commit a per se tying violation. See [*11] *id.* Kodak's proposed legal rule -- that "equipment competition precludes any finding of monopoly power in derivative aftermarkets," *id. at 466* (internal quotation marks omitted) -stemmed from an assumption about the perfect operation of the "cross-elasticity of demand" between the primary equipment market and the derivative aftermarkets. *Id. at 469* (internal quotation marks omitted).

The Court rejected Kodak's contention, concluding instead that "there is no immutable physical law -- no 'basic economic reality' -- insisting that competition in the equipment market cannot coexist with market power in the

aftermarkets." [*Id. at 471*](#). Rather, the court held that the ISOs were entitled to the opportunity to prove that two factors -- "information costs" and "switching costs" -- "foiled the simple assumption that the equipment and service markets act as pure complements to one another." [*Id. at 477*](#). The Court determined that information costs could undermine the "cross-elasticity of demand" between the equipment market and derivative aftermarkets if consumers who purchased Kodak equipment lacked the information necessary [*12] to calculate the total "life-cycle" cost of the equipment, including the cost of tied parts and service, at the time that they decided which manufacturer's machines to purchase. See [*id. at 473-76*](#). The Court also reasoned that consumers who purchased Kodak equipment might be willing to pay supra-competitive prices for Kodak service (the tied product) in order to get the replacement parts (the tying product) they needed to maintain their original investment in the equipment (the "lock-in product"), particularly if their only alternative was to switch to another manufacturer's machines and thereby abandon the substantial investment already made in the Kodak equipment. See [*id. at 476-77*](#).

The First Circuit applied the *Kodak* framework in the context of a Rule 12(b)(6) motion in [*Lee v. Life Insurance Company of North America, 23 F.3d 14 \(1st Cir. 1994\)*](#). In *Lee*, the plaintiffs were University of Rhode Island (URI) students who brought antitrust and other claims against the university, university officials, and the university's student-health insurer. See [*id. at 15*](#). The crux of the students' antitrust claim was that [*13] URI had committed unlawful tying in violation of § 1 of the Sherman Act by requiring all full-time undergraduate students to pay a health-services fee and to carry supplemental health insurance. See [*id. at 15-16*](#). Among various tying theories, the students advanced a *Kodak* "lock-in" claim in which first semester matriculation at URI was identified as the "lock-in product," subsequent semesters at URI were the "tying product," and the health-services fee and supplemental insurance coverage were the "tied product." See [*id. at 18*](#).

The First Circuit assumed that *Kodak* potentially applied to the students' tying claim but ultimately rejected the claim because the students failed to allege either the information costs or the switching costs discussed by the Supreme Court in *Kodak*. The students were unable to allege information costs, according to the court, because it was evident that prior to enrolling at URI, students were informed that continued enrollment was conditioned on paying the health-services fee and obtaining supplemental insurance. See [*id. at 19*](#). The court found that the students "made no allegations sufficient [*14] to give rise to a reasonable inference that the health-care and insurance-cost information needed to make an informed decision whether to accept the preconditions to continued matriculation at URI is either difficult or expensive to obtain or correlate." *Id.* (emphasis in original). The court also observed that the students failed to plead the switching costs necessary for a "lock-in," i.e., they failed to allege "actual costs associated with switching from URI after their first semester." *Id.* The court emphasized that "the timing of the 'lock-in' at issue in *Kodak* was central to the Supreme Court's decision," [*id. at 20*](#) (emphasis in original), and noted that the students could not mirror the claim in *Kodak* that the tying arrangement was instituted only after many customers had already purchased the equipment and then applied retroactively to the "locked-in" customers. See *id.*⁸ Finally, the court distinguished the context of its case from *Kodak* by pointing out that the students' claims did not involve a "derivative aftermarket" or "complex durable goods." [*id. at 19-20*](#).

[*15] Accepting all of the allegations pleaded in the dealers' complaint as true and drawing all reasonable inferences in their favor, I conclude that the dealers have stated a cognizable tying claim under *Kodak*. In the present case, the "lock-in products" are the Subaru franchises (analogous to the Kodak equipment), the "tying products" are the Subaru vehicles (analogous to the Kodak replacement parts), and the "tied products" are the accessories (analogous to the Kodak service). The dealers' complaint, unlike the students' complaint in *Lee*, includes allegations of information costs, switching costs, and the timing of the "lock-in" effect that bring it within the

⁸ Other Circuits have agreed with the First Circuit that the timing of the tying arrangement was crucial to the result in *Kodak*. See, e.g., [*PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 820*](#) (6th Cir.) (holding that "an [HN6](#) antitrust plaintiff cannot succeed on a *Kodak*-type theory when the defendant has not changed its policy after locking-in some of its customers"), cert. denied, [*520 U.S. 1265, 138 L. Ed. 2d 195, 117 S. Ct. 2434 \(1997\)*](#); [*Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756, 763 \(7th Cir. 1996\)*](#) (stating that "the Court in *Kodak* did not doubt 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").

framework created by *Kodak*. Moreover, unlike the students' claim in *Lee*, the dealers' claim arises in the context of derivative aftermarkets in complex durable goods, e.g., automobiles and automobile accessories.

The dealers have adequately alleged that they did not have access to the information necessary to accurately assess the life-cycle cost of their dealership franchises, including the actual cost of vehicles and accessories, because Subaru of New England concealed the tying arrangement until after [*16] they became locked into their dealerships. See First Am. Compl. (Doc. # 31) P 147 at 43. Without the knowledge that they would be required to purchase accessories as a condition of obtaining discretionary vehicles, the dealers could not have accurately calculated the costs of a franchise at the time that they were deciding whether to sign dealership agreements with Subaru of New England.⁹

The dealers [*17] have also alleged the timing and switching costs necessary to give rise to a "lock-in" tying claim. The dealers claim that they did not discover the tie between discretionary vehicles and accessories until after they were "locked in" (financially committed) to the franchise relationship." *Id.* P 147 at 43. While this allegation is general in nature, it provides a sufficient basis for inferring that the tying arrangement was instituted only after a significant number of dealers had signed agreements with Subaru of New England. It also supports an inference that the dealers could not abandon their franchises and switch to another automobile manufacturer without accruing significant costs and losing their substantial investments in the franchises. Further, the complaint alleges that SNE has succeeded in exploiting its power in the tying product to foreclose sales in the tied product by competing suppliers. See *id.* P 149 at 44. These allegations are sufficient to support a per se tying claim under *Kodak*.

This reasoning is consistent not only with *Kodak* and *Lee*, but also with the opinions of other federal courts considering analogous claims. In the years since the Supreme [*18] Court decided *Kodak*, federal courts have entertained a spate of *Kodak*-based tying claims. Some of these claims have been dismissed, either for failure to state a claim or on summary judgment, due to the plaintiffs' failure to provide factual allegations or produce evidence of information and switching costs.¹⁰ [*19] However, in other cases where the plaintiffs have alleged or produced admissible evidence of substantial information costs, switching costs, and the timing necessary to create a "lock-in effect," courts have recognized a cognizable claim under *Kodak*.¹¹

[*20] SNE implicitly challenges the applicability of *Kodak* and *Lee* to most franchise tying claims where the tying product is not unique. Although it confines its argument on this point to a single footnote in a 25-page

⁹ In *Lee*, the First Circuit noted that the students did not "suggest that URI had any incentive to conceal the scope of past . . . increases" in the health-services fee and the cost of supplemental insurance. *Lee*, 23 F.3d at 19 n.10. In the present case, by contrast, the dealers have alleged that Subaru of New England had a strong economic incentive to conceal (and did in fact conceal) the tying arrangement -- and thus the true cost of a Subaru dealership franchise -- until after the dealers had signed their agreements. See First Am. Compl. (Doc. # 31) PP 147, 150, 153 at 43, 44, 45.

¹⁰ See, e.g., *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 440, 441 (3d Cir. 1997) (affirming dismissal of plaintiffs' *Kodak*-based tying claim where tying arrangement was spelled out in franchise agreement, and thus life-cycle cost information was available to plaintiffs before they were "locked-in"), cert. denied, 118 S. Ct. 1385 (1998); *United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exchange*, 89 F.3d 233, 237-39 (5th Cir. 1996) (affirming grant of summary judgment to defendant where plaintiffs failed to produce evidence of significant information or switching costs), cert. denied, 519 U.S. 1116, 136 L. Ed. 2d 846, 117 S. Ct. 960 (1997).

¹¹ See, e.g., *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660, 666-67 (6th Cir. 1993) (holding that plaintiff had stated valid tying claim under *Kodak* by producing, among other evidence, expert testimony concerning lock-in and switching costs); *Red Lion Med. Safety, Inc. v. Ohmeda, Inc.*, 63 F. Supp. 2d 1218, 1232 (E.D. Ca. 1999) (denying defendant's motion for summary judgment on plaintiff's *Kodak*-based tying claim because plaintiffs presented sufficient evidence of information costs and "lock-in"); *Subsolutions, Inc. v. Doctor's Assoc., Inc.*, 62 F. Supp. 2d 616, 626 (D. Conn. 1999) (concluding that plaintiff franchisees had stated a *Kodak* lock-in claim based on factual allegations relating to information costs and timing); *Collins v. Int'l Dairy Queen, Inc.*, 939 F. Supp. 875, 883 (M.D. Ga. 1996) (denying summary judgment to defendants because, inter alia, plaintiff-franchisees had produced evidence of switching costs and resultant lock-in effect); *Wilson v. Mobil Oil Corp.*, 940 F. Supp. 944, 947-48, 953-54 (E.D. La. 1996) (denying motion to dismiss and concluding that plaintiff-franchisees had stated a *Kodak* lock-in claim based on allegations of information and switching costs).

memorandum, see Def. Subaru of New England, Inc.'s Mot. to Dismiss (Doc. # 34) at 17 n.12, SNE appears to assert that a franchisor cannot be deemed to have achieved market power in a market for a tying product with otherwise interchangeable substitutes by concealing the tying arrangement from the franchisees until after it has locked the franchisees into contractual commitments and substantial "sunk" costs. Instead, SNE suggests that a seller may achieve power in a tying product market in such circumstances only if the tying product is unique.

I decline to address this difficult argument at the present time because it has not been adequately briefed. While there is some support for SNE's position in both the case law¹² and the academic literature,¹³ contrary views also abound.¹⁴ [*22] Moreover, it is difficult to reconcile SNE's position with the First Circuit's opinion in *Lee*, which assumes that the existence of substantial information and switching costs [*21] can give a seller power in the market for an otherwise interchangeable tying product. See [23 F.3d at 18](#). In light of the complexity of this issue and SNE's failure to properly brief it, I decline to address the merits of the argument.¹⁵

SNE also asserts that the dealers' tying claim must be dismissed even if SNE was able to lock the dealers into their franchises before disclosing the tying arrangement because it imposed the arrangement on only 10% of the vehicles it released into the New England market. I reject this argument. If the dealers have correctly characterized the tying product market as the market for new Subaru vehicles, it is undisputed that SNE has a monopoly in the New England market. The fact that it has been successful in exploiting that monopoly to foreclose substantial commerce in the automobile accessories market by imposing the tying arrangement on only 10% of its vehicles is hardly a viable defense to the dealers' claim.

III.

The dealers have stated a cognizable per se tying claim under the *Kodak* framework. Accordingly, SNE's motion to dismiss the dealers' antitrust claim is denied.

SO ORDERED.

Paul Barbadoro

Chief Judge

December 13, 1999

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¹² See [Queen City Pizza, Inc. v. Domino's Pizza, Inc.](#), 124 F.3d 430, 440-41 (3rd Cir. 1997); [United Farmers Agents Ass'n v. Farmers Ins. Exchange](#), 89 F.3d 233, 236-37 (5th Cir. 1996); [Chawla v. Shell Oil Co.](#), 75 F. Supp. 2d 626, 1999 U.S. Dist. LEXIS 20352, 1999 WL 1081002, at *10-12 (S.D. Tex. 1999).

¹³ See P. Areeda and H. Hovencamp, *Antitrust Law*, P 510b at 111 (Supp. 1998); T. Lin, *Distinguishing Kodak Lock-In and Franchise Contractual Lock-In*, [23 S. Ill. U. L.J. 87, 120 \(1998\)](#); A. Silberman, *The Myths of Franchise Market Power*, 65 Antitrust L.J. 181 (1996).

¹⁴ See cases cited at note 11; B. Klein, *Market Power in Franchise Cases in the Wake of Kodak: Applying Post-Contract Hold-Up Analysis to Vertical Relationships*, 67 Antitrust L.J. 283 (1999); W. Grimes, *Market Definition in Franchise Antitrust Claims: Relational Market Power and the Franchisor's Conflict of Interest*, 67 Antitrust L.J. 243 (1999).

¹⁵ SNE may renew its argument later in a properly supported motion for summary judgment.



Covad Communs. Co. v. Pac. Bell

United States District Court for the Northern District of California

December 14, 1999, Decided ; December 14, 1999, Filed

No. C 98-1887 SI

Reporter

1999 U.S. Dist. LEXIS 22789 *; 1999 WL 33757058

COVAD COMMUNICATIONS COMPANY, Plaintiff, v. PACIFIC BELL, et al., Defendants.

Subsequent History: [*1] Reconsideration Denied May 8, 2000, Reported at: [2000 U.S. Dist. LEXIS 21267](#).

Disposition: Defendant SBC Communication's motion to dismiss for lack of personal jurisdiction DENIED and defendant Southwestern Bell's motion to dismiss for lack of personal jurisdiction GRANTED. Defendant Pacific Bell's motion to dismiss the monopolization and attempted monopolization claims DENIED, and Pacific Bell's motion to dismiss plaintiff's tying claim GRANTED. Defendant SBC Communication's motion to dismiss plaintiff's intentional and negligent misrepresentation claims GRANTED, with leave to amend. Defendant SBC Communication's motion to dismiss plaintiff's claim for violation the Telecommunications Act of 1996 and for interference with prospective economic advantage DENIED. Defendant SBC-TRI's motion to dismiss GRANTED with leave to amend.

Core Terms

SBC, collocation, alleges, motion to dismiss, loop, interconnection, Telecommunications, asserts, competitors, personal jurisdiction, monopolization, arbitration, incumbents, subsidiary, antitrust, prices, cages, technology, squeeze, lack of personal jurisdiction, district court, leave to amend, Sherman Act, misrepresentation, network, space, amended complaint, monopoly power, regulation, contacts

LexisNexis® Headnotes

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Communications Law > Federal Acts > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN1 [] Introducing Competition, Duties of Incumbent Carriers & Resellers

Under the Telecommunications Act of 1996, incumbent exchange carriers (incumbents) are required provide their new competitors with access to both their facilities for interconnection and to unbundled network elements. [47 U.S.C.S. § 251\(c\)\(2\)-\(3\)](#). [Section 251\(c\)\(6\)](#) of the Act requires incumbents to provide for physical collocation of

equipment necessary for interconnection or access to unbundled network elements at its premises. [47 U.S.C.S. § 251\(c\)\(6\)](#). Physical collocation allows an interconnecting competitor to lease segregated space at the incumbent's premises and to set up a mini-facility comprised of its own interconnection equipment in the leased space. An alternative to physical collocation is virtual collocation, in which the interconnecting equipment is placed among the incumbent's equipment and operated and maintained by the incumbent.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

[**HN2**](#) [down] In Rem & Personal Jurisdiction, In Personam Actions

In a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of proof on the necessary jurisdictional facts. When a court rules on the basis of affidavits and discovery materials without holding an evidentiary hearing, plaintiff's burden is met with a simple *prima facie* showing of personal jurisdiction. In determining whether a plaintiff has met this burden, uncontested allegations in the plaintiff's complaint must be taken.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Consent

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Domicile

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

[**HN3**](#) [down] In Personam Actions, Consent

Personal jurisdiction must comport with the state long-arm statute, and with the constitutional requirements of due process. California's long-arm statute permits a court to exercise personal jurisdiction over nonresident defendants on any basis not inconsistent with the California or United States Constitution. [Cal. Civ. Proc. Code § 410.10](#). Absent traditional bases for personal jurisdiction (physical presence, domicile or consent), due process requires that the defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN4 **Subject Matter Jurisdiction, Jurisdiction Over Actions**

A court must determine whether sufficient minimum contacts between the moving defendants and the forum state exist to allow the exercise of personal jurisdiction over them. In this regard, courts may exercise either general or specific jurisdiction over nonresident defendants. General jurisdiction exists when the nonresident has substantial or systematic and continuous contacts with the forum state, and the exercise of jurisdiction satisfies traditional notions of fair play and substantial justice. In order to support an exercise of specific personal jurisdiction, plaintiffs must demonstrate that defendants had purposeful contacts with the forum state, that the present cause of action arose out of those contacts, and that exercising jurisdiction over defendants would not be unreasonable.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN5 **Jurisdiction, Jurisdictional Sources**

Specific jurisdiction exists when the nonresident has purposeful contacts with California that are directly related to the subject matter of the litigation, and the exercise of jurisdiction is reasonable. Courts have established a three-step test to determine whether the court may exercise specific jurisdiction over a nonresident defendant. First, specific jurisdiction requires a showing that the out-of-state defendant purposefully directed its activities toward residents of the forum state or purposefully availed itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws. Second, the controversy must be related to or arise out of defendant's contact with the forum. Third, the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable. Generally, the relationship between the defendant, the forum and the litigation is the essential foundation of personal jurisdiction.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN6 **Jurisdiction, In Rem & Personal Jurisdiction**

On a motion to dismiss for lack of personal jurisdiction, plaintiff must make a *prima facie* showing of personal jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN7[] In Rem & Personal Jurisdiction, In Personam Actions

A court must resolve disputed jurisdictional facts found in affidavits and declarations regarding jurisdictional issues in favor of plaintiff.

Business & Corporate Law > ... > Establishment > Elements > General Overview

HN8[] Establishment, Elements

A parent company must exercise substantial day-to-day control of its subsidiary in order for its subsidiary to be viewed as its agent.

Business & Corporate Law > Foreign Corporations > General Overview

Legal Ethics > Legal Services Marketing > Advertising

Business & Corporate Law > ... > Establishment > Elements > General Overview

HN9[] Business & Corporate Law, Foreign Corporations

The agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative, that it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporations own officials would undertake to perform substantially similar services. Moreover, neither confusing or misleading brand advertising nor shared legal counsel is sufficient to show agency.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN10[] Clayton Act, Jurisdiction

The Clayton Act provides for nationwide service of process in antitrust actions.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN11[] In Rem & Personal Jurisdiction, Constitutional Limits

Even when a party has purposefully interjected itself into the forum state, any assertion of jurisdiction must conform with due process. To determine whether assertion of jurisdiction over non-resident defendants is reasonable, five factors are considered: the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; the forum state's interest in adjudicating the suit; the most efficient judicial resolution of the dispute; and the

convenience and effectiveness of relief for the plaintiff. While the court must balance these five factors, the application of these factors is not mechanical.

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

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

HN12 [] Motions to Dismiss, Failure to State Claim

Under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim.

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

HN13 [] Motions to Dismiss, Failure to State Claim

In the context of a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss, a court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. Even if the pleadings suggest that the chance of recovery is remote, the court must allow the plaintiff to develop the case at this stage of the proceedings.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN14 [] Motions to Dismiss, Failure to State Claim

If a court chooses to dismiss the complaint, it must decide whether to grant leave to amend. In general, leave to amend is only denied if it is clear that amendment would be futile and that the deficiencies of the complaint could not be cured by amendment.

Antitrust & Trade Law > Sherman Act > General Overview

HN15 [] Antitrust & Trade Law, Sherman Act

In order to state a claim for monopolization under § 2 of the Sherman Act, a plaintiff must allege that: (1) the defendant possesses monopoly power in the relevant market; (2) the defendant has willfully acquired or maintained that power; and (3) the defendant's conduct has caused antitrust injury. In order to state a claim for attempted monopolization, a plaintiff must show: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury.

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

Civil Procedure > Pleading & Practice > Pleadings > General Overview

[**HN16**](#) [L] Motions to Dismiss, Failure to State Claim

To survive a motion to dismiss pursuant to [*Fed. R. Civ. P. 12\(b\)\(6\)*](#), an antitrust complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN17**](#) [L] Antitrust & Trade Law, Sherman Act

Under the Sherman Act, to show injury a plaintiff must prove that his loss flows from an anti-competitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition. If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal per se.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

[**HN18**](#) [L] Antitrust & Trade Law, Sherman Act

Under the Sherman Act, governmental regulation does not prevent an allegation or finding of monopoly power. A plaintiff does not need to make a showing that market entry is completely impeded.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

[**HN19**](#) [L] Antitrust & Trade Law, Sherman Act

Under the Sherman Act, under certain circumstances, an assessment of market power may provide a basis to survive a motion to dismiss.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

[**HN20**](#) [L] Regulated Practices, Price Fixing & Restraints of Trade

Price regulation dramatically alters the calculus of antitrust harms and benefits.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN21 [blue icon] **Antitrust & Trade Law, Sherman Act**

Normally a price squeeze standing alone in a regulated industry would not equal exclusionary practices under the Sherman Act.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN22 [blue icon] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) requires that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. These allegations must be specific enough to give defendant notice of the particular misconduct which is alleged to constitute the fraud charged so that it can defend against the charge and not just deny that it has done anything wrong.

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

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

HN23 [blue icon] **Intentional Interference, Elements**

The five elements for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN24 [blue icon] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8 requires that plaintiff set forth a short and plain statement of the claim showing that the pleader is entitled to relief.

Counsel: For COVAD COMMUNICATIONS COMPANY, Plaintiff: Alfred C. Pfeiffer, Jr., Nora Cregan, Laura Mazzarella, McCutchen Doyle Brown & Enersen LLP, San Francisco, CA.

For COVAD COMMUNICATIONS COMPANY, Plaintiff: Bernard Chao, Covad Communications Company, Santa Clara, CA.

For PACIFIC BELL, SBC COMMUNICATIONS, INC., SBC TECHNOLOGY RESOURCES, INC., SBC TELECOMMUNICATIONS, INC., defendants: Jeffrey H. Howard, David M. Schnorrebnerg, Crowell & Moring, [*2] Washington, DC.

For SOUTHWESTERN BELL TELEPHONE CO., defendant: Jeffrey H. Howard, Crowell & Moring, Washington, DC.

For PACIFIC BELL, SBC TECHNOLOGY RESOURCES, INC., defendants: Robert A. Mittelstaedt, Pillsbury Winthrop LLP, San Francisco, CA.

For PACIFIC BELL, defendant: Caroline N. Mitchell, Pillsbury Winthrop LLP, Bobby C. Lawyer, Marlin D. Ard, Eric V. Berg, Pacific Telesis Group, San Francisco, CA.

For PACIFIC BELL, SBC COMMUNICATIONS, INC., SBC TECHNOLOGY RESOURCES, INC., SBC TELECOMMUNICATIONS, INC., defendants: Patrick W. Lee, Pillsbury Winthrop LLP, San Francisco, CA.

For PACIFIC BELL, SBC COMMUNICATIONS, INC., SBC TECHNOLOGY RESOURCES, INC., defendants: Donald L. Flexner, Amy J. Mauser, Alfred P. Levitt, Kevin R. Anthony, Boies Schiller & Flexner LLP, Washington, DC.

For SBC COMMUNICATIONS, INC., SOUTHWESTERN BELL TELEPHONE CO., defendants: Donald L. Flexner, Wm. Randolph Smith, Amy J. Mauser, David M. Schnorrenberg, Crowell & Moring, Washington, DC.

For SBC COMMUNICATIONS, INC., SOUTHWESTERN BELL TELEPHONE CO., defendants: Mark D. Plevin, Crowell & Moring, Irvine, CA.

For SBC TECHNOLOGY RESOURCES, INC., defendant: Paul R. Griffin, [*3] Mark D. Weideman, Pillsbury Winthrop LLP, San Francisco, CA.

For VERIZON SELECT SERVICES, INC., Miscellaneous: Thomas M. Riordan, O'Melveny & Myers, Los Angeles, CA.

For ALBERT O. STEIN, Intervenor: Willem F. Jonckheer, Schubert & Reed LLP, San Francisco, CA.

For ALBERT O. STEIN, Intervenor: Roy A. Katriel, Finkelstein Thompson & Loughran, Washington, DC.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER GRANTING DISMISSAL IN PART AND DENYING DISMISSAL IN PART

On December 10, 1999, this Court heard argument on defendants' motions to dismiss for lack of personal jurisdiction or for failure to state a claim upon which relief may be granted. Having carefully considered the arguments of the parties and the papers submitted, the Court DENIES defendant SBC Communication's motion to dismiss for lack of personal jurisdiction and GRANTS defendant Southwestern Bell Telecommunications' motion to dismiss for lack of personal jurisdiction. Defendant Pacific Bell's motion to dismiss the monopolization and attempted monopolization claims is DENIED, and Pacific Bell's motion to dismiss plaintiff's tying claim is GRANTED. The Court GRANTS, with leave [*4] to amend, defendant SBC Communication's motion to dismiss plaintiff's intentional and negligent misrepresentation claims, but DENIES defendant SBC Communication's motion to dismiss plaintiff's claim for violation of the Telecommunications Act of 1996 and for interference with prospective economic advantage. Defendant SBC-TRI's motion to dismiss is GRANTED with leave to amend.

BACKGROUND

1. Procedural Background

Covad Communications Company ("Covad") is a competitive local exchange carrier ("competitor" or "CLEC") founded as a result of the Telecommunications Act of 1996. On April 21, 1997, Covad and Pacific Bell ("Pacific") entered into a written interconnection agreement delineating the terms and conditions under which Pacific would provide Covad access to Pacific's local exchange network. Covad did not seek arbitration of the interconnection agreement, and the agreement was reviewed and approved by the California Public Utilities Commission ("CPUC"). The interconnection agreement provides for binding arbitration before the American Arbitration Association. In March 1998, Covad submitted a demand for AAA arbitration. Pursuant to Pacific's response, Covad agreed that only [*5] its contract claim was proper for arbitration.

Covad also attempted to negotiate an interconnection agreement for telecommunications services in Texas with Southwestern Bell Telecommunications ("SWBT"), a Missouri corporation with its principal place of business in Texas, which provides local telecommunications services in Arkansas, Kansas, Missouri, Oklahoma, and Texas. Unable to reach an agreement, the parties submitted the disputed issues to arbitration before the Texas Public Utilities Commission ("TPUC"). In the meantime, the parties performed pursuant to an interim agreement. The Arbitrators issued a decision on or about November 30, 1999. See Attachment to Cregan Letter (December 6, 1999).

On May 8, 1998, Covad filed a complaint alleging monopolization and attempted monopolization under § 2 of the Sherman Act, common law and statutory unfair competition, breach of the Telecommunications Act of 1996, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation. On June 12, 1998, Covad filed its First Amended Complaint against defendants Pacific and SBC Technology Resources, Inc. ("SBC-TRI"). On November 18, 1998, the Court granted defendant's [*6] motion to dismiss plaintiff's third cause of action, and granted in part defendant's motion to dismiss plaintiff's fifth cause of action. Subsequently, on August 30, 1999, this Court granted plaintiff's motion for leave to file a Second Amended Complaint ("SAC"). One month later on September 29, 1999, plaintiff filed its Second Amended Complaint, adding defendants SBC Communications, Inc. ("SBC") and Southwestern Bell Telecommunications ("SWBT"). Covad alleges several causes of action: (1) monopolization in violation of § 2 of the Sherman Act against Pacific and SWBT; (2) attempted monopolization in violation of § 2 of the Sherman Act against Pacific and SWBT; (3) illegal tying in violation of §§ 1 and 2 of the Sherman Act against Pacific and SWBT; (4) breach of the statutory duty to negotiate in good faith in violation of the Telecommunications Act of 1996 against SBC and SWBT; (5) illegal restraint of trade under the Cartwright Act against Pacific; (6) intentional misrepresentation against Pacific and SBC; (7) negligent misrepresentation against Pacific and SBC; (8) statutory unfair competition against Pacific, SBC, SBC-TRI; (9) interference with contractual relations against SBC [*7] and SBC-TRI; (10) common law unfair competition against Pacific, SBC, and SBC-TRI; and (11) interference with prospective economic advantage against Pacific, SBC, SBC-TRI, and SWBT.

Defendants now bring a motion to dismiss based upon lack of personal jurisdiction and failure to state a claim on which relief can be granted. Alternatively, defendant SWBT requests that the Covad's claims against it be transferred to a Texas district court. Defendants also request that plaintiff's state law claims be dismissed, should this Court grant dismissal of plaintiff's federal claims.

II. Factual Background

Plaintiff Covad alleges that defendants Pacific, SBC, SBC-TRI and SWBT have engaged in unlawful and monopolistic maneuvers to exclude Covad from the local telecommunications market. Covad is a Santa Clara, California corporation that provides a specific type of local telecommunications service: widespread, high-speed connections to Internet service providers ("ISP"s), business, and residential end-users through Digital Subscriber Line technology, or "DSL." See SAC P 14. Covad alleges that Pacific¹ has refused to provide Covad with access to

¹ Pacific is a California company and wholly-owned subsidiary of Nevada-incorporated Pacific Telesis, which is in turn a wholly-owned subsidiary of defendant SBC, a Delaware holding company.

Pacific's local telephone network [*8] which Covad needs in order to provide DSL service. Covad further claims that Pacific is imposing unnecessary and unreasonable requirements, as well as falsely asserting that collocation space is unavailable at Pacific's facilities -- all in an attempt to disadvantage Covad and to promote Pacific's own DSL service. Moreover, Covad states that Pacific has done so at the direction of SBC-TRI (a research and development company) and their common parent company, SBC.

Covad also alleges that SWBT participated in anti-competitive activities in an attempt to maintain its monopoly in its local telecommunications market in Texas. Specifically Covad complains that SWBT (1) refused to provide Covad with SDSL, a kind of DSL service and (2) offered unreasonable deadlines for price quotes, thereby delaying Covad's entry into the market. [*9] See SAC P 39. Covad further claims that SWBT wrongly withheld information, creating greater delay. See *id.* P 40.

A. Collocation

HN1[] Under the Telecommunications Act of 1996 ("Act"), incumbent exchange carriers ("incumbents" or "ILEC"s) are required provide their new competitors with access to both their facilities for interconnection and to unbundled network elements. See [47 U.S.C. § 251\(c\)\(2\)-\(3\)](#). [Section 251\(c\)\(6\)](#) of the Act requires incumbents "to provide . . . for physical collocation of equipment necessary for interconnection or access to unbundled network elements at [its] premises." [47 U.S.C. § 251\(c\)\(6\)](#). "Physical collocation" allows an interconnecting competitor to lease segregated space at the incumbent's premises and to set up a mini-facility comprised of its own interconnection equipment in the leased space. The equipment is maintained and operated by the competitor. An alternative to physical collocation is "virtual collocation," in which the interconnecting equipment is placed among the incumbent's equipment and operated and maintained by the incumbent. The Act expresses a clear preference for physical collocation [*10] over virtual collocation, allowing virtual collocation only if the incumbent "demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." *Id.*

Covad alleges (1) that Pacific's system for processing collocation requests is unreasonably slow and serves to delay competition; and (2) that Pacific has unreasonably denied Covad's requests for physical collocation, stating that there was no space for collocation at certain sites, and later installing its own DSL equipment at those same sites. Pacific requires the installation of a "collocation cage," a fenced-in space in which the competitor's equipment is housed inside the central office. SAC P 47. Covad's specific complaint regarding the collocation cages is that Pacific's collocation request process is unreasonably slow. One reason for the lengthy process is the time required to construct the cages. See SAC P 48. Furthermore, Covad claims that Pacific routinely fails to meet the deadlines to deliver cages and items required to be delivered with the cages. See SAC P 53. Covad contends that in order to provide immediate physical collocation, Pacific should [*11] be required to collocate Covad's equipment without cages, because it argues (1) the cages are not necessary to ensure security, (2) the cages take up an inordinate amount of space which could otherwise be used for collocation equipment, (3) the cages are prohibitively expensive (\$ 8,000 to more than \$ 100,000), and (4) they are not required by the Act. See SAC PP 47 - 52. Covad also alleges that because Pacific allows competitors to order "transport" to make the collocated equipment usable only after the cage is completed, Pacific effectively delays Covad's competitive entry into the market. Covad argues that by denying its requests for physical collocation, Pacific has severely damaged Covad's speed of entry into the geographic markets serviced by these central offices. See SAC P 49. Covad asserts that Pacific has performed all of the alleged acts at the behest of its parent company, SBC. See SAC PP 43 - 50.

B. Local Loop Failures and DSL Technology

Covad alleges that Pacific Bell routinely fails to deliver timely and properly installed local "loops" (telephone lines connecting end-users to central offices). See SAC P 55. According to Covad, the loops that [*12] Pacific delivers are either extremely late, do not work, are improperly installed, or all of the above, thereby forcing Covad to wait months and further delaying its market entry. See *id.* P P 55 - 56.

Additionally, Covad claims that SBC, SBC-TRI, and SWBT (the "SBC entities") collectively have attempted to spread doubt throughout the market about Covad's ability to offer adequate DSL services. Specifically Covad claims that the SBC entities (1) have announced, without sound technological reason, that all competitors must conform with SBC's chosen DSL technology; (2) have restricted Covad's access to necessary planning and implementation data; and (3) have used their control over operations support systems ("OSS") to gain an unfair competitive advantage. See *id.* P 56.

C. Price Squeeze

Covad claims that Pacific and SWBT have created an anti-competitive scheme when allocating the costs of loops sold to Covad and other competitors, thereby creating a "price squeeze" between wholesale and retail loop prices. See SAC P 59. Specifically, Covad alleges that Pacific and SWBT set loop prices to Covad above wholesale, while setting retail prices for its services at or below [*13] wholesale prices. Additionally, Covad charges that the SBC entities charge excessive one-time fees to "condition" the loops, then set retail prices for services that use the loops at or near wholesale prices. See *id.* P 59.

D. Tying

Covad also alleges tying claims under §§ 1 and 2 of the Sherman Act. Covad asserts that both Pacific and SWBT attribute most costs of local loops to analog voice service. However, Pacific and SWBT "line share," that is, they provide DSL service over already-installed loops used for both analog voice and data service. However, any competitor who provides solely DSL service (or solely voice service), must purchase an entirely new loop. Covad asserts that compelling it to purchase a full loop, when it only desires access to the data service, constitutes the tying of two products: data service and voice service. Therefore, Covad claims, Pacific and SWBT's ability to use a single, already-installed loop for both analog voice and DSL service, while forcing Covad to purchase new loops to provide only DSL service, places Covad and other CLEC's at a competitive disadvantage. See *id.* P 60 - 62.

E. Spectral Interference Requirements

According [*14] to Covad, Pacific and SWBT announced that all competitors providing DSL services must conform to a specific type of DSL technology chosen by Pacific and SWBT. The reason for the specific technology, Pacific and SWBT explained, was to reduce the risk of "spectral interference" or "cross talk," the phenomenon of stronger signals bleeding over to weaker ones and disrupting service in adjoining cables. Covad claims that this requirement is unnecessary because it has been deploying different DSL technology for months without complaint, and another incumbent has used and permits the use of other DSL technologies. See SAC PP 65-66.

DISCUSSION

I. Personal Jurisdiction

HN2 In a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of proof on the necessary jurisdictional facts. See *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995). When a court rules on the basis of affidavits and discovery materials without holding an evidentiary hearing, plaintiff's burden is met with a simple *prima facie* showing of personal jurisdiction. See *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). [*15] In determining whether a plaintiff has met this burden, uncontested allegations in the plaintiff's complaint must be taken as true, and "conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor." *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996) (internal citations and quotations omitted).

HN3 Personal jurisdiction must comport with the state long-arm statute, and with the constitutional requirements of due process. See *Omeluk v. Langsten Slip and Batbyggeri A/S*, 52 F.3d 267 (9th Cir. 1995) (citing *Chan v.*

Society Expeditions, Inc., 39 F.3d 1398 (9th Cir. 1994). California's long-arm statute permits this Court to exercise personal jurisdiction over nonresident defendants on any basis not inconsistent with the California or United States Constitution. See Cal. Code Civ. Proc., § 410.10. Absent traditional bases for personal jurisdiction (physical presence, domicile or consent), due process requires that the defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and [*16] substantial justice. See International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

HN4 [↑] The Court must determine whether sufficient minimum contacts between the moving defendants and the forum state exist to allow the exercise of personal jurisdiction over them. In this regard, courts may exercise either general or specific jurisdiction over nonresident defendants. See FDIC v. British-American Ins. Co., LTD., 828 F.2d 1439, 1442 (9th Cir. 1987). General jurisdiction exists when the nonresident has substantial or systematic and continuous contacts with the forum state, and the exercise of jurisdiction satisfies traditional notions of fair play and substantial justice. See Ziegler, 64 F.3d 470 (9th Cir. 1995). In order to support an exercise of specific personal jurisdiction, plaintiffs must demonstrate that defendants had purposeful contacts with California, that the present cause of action arose out of those contacts, and that exercising jurisdiction over defendants would not be unreasonable. **HN5** [↑] Specific jurisdiction exists when the nonresident has purposeful contacts with California that are directly related [*17] to the subject matter of the litigation, and the exercise of jurisdiction is reasonable. *Id.* The Ninth Circuit has established a three-step test to determine whether the court may exercise specific jurisdiction over a nonresident defendant. See British-American, 828 F.2d at 1442; Ziegler, 64 F.3d at 473. First, specific jurisdiction requires a showing that the out-of-state defendant purposefully directed its activities toward residents of the forum state or purposefully availed itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). Second, the controversy must be related to or "arise out of" defendant's contact with the forum. Ziegler, 64 F.3d at 473. Third, the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable. See British-American, 828 F.2d at 1442. Generally, the relationship between the defendant, the forum and the litigation is the essential foundation of personal jurisdiction. [*18] See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984) (citing Shaffer v. Heitner, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977)).

A. SBC

HN6 [↑] On a motion to dismiss for lack of personal jurisdiction, plaintiff must make a *prima facie* showing of personal jurisdiction. See Data Disc, Inc. v. Systems Technology Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). Plaintiff asserts that SBC is amenable to general jurisdiction because it has substantial and systematic and continuous contacts with California. Covad has introduced evidence that SBC maintains offices in California and has recruited for employment positions in California. See Nissen Decl., Exhs. 5, 6, 21. Covad further alleges that the Court has general jurisdiction of SBC by virtue of SBC's "agency" relationship with Pacific, its subsidiary. Plaintiff essentially asserts that for jurisdictional purposes, SBC is Pacific. Covad states that SBC issues directives to Pacific regarding its interconnection policies; maintains a competitor online website which provides a critical interface for all competitors [*19] doing business with Pacific (<http://clec.sbc.com>); created an "ASDL Business case" for Pacific, Nevada Bell and SWBT; encourages a marketing image which does not distinguish between SBC and its "brands"; and shares legal counsel with its subsidiaries. See, e.g., Chao Decl., Exh. E; Nissen Decl., Exh. 8-21. Covad further alleges that SBC played a critical role in the negotiation and arbitration of the Covad/Pacific interconnection agreement, maintains an office in San Francisco, and has interjected itself into the California market through its CPUC application for acquisition of Pacific Bell.

SBC counters that SBC and Pacific are distinct entities. SBC states that it is merely a holding company; it maintains no offices, employees, real or personal property in California; it is not licensed to do business in California; and it

has never done business in California.² SBC further responds that it does not control its subsidiaries' day-to-day operations, and that the policy decisions it makes are "nothing more than the typical minimal involvement of a holding company parent in the affairs of its subsidiary, which is inadequate to confer jurisdiction over a parent." SBC and SWBT Reply [*20] in Supp. of Mtn. to Dismiss, at 8. Finally, SBC states that the officials to whom Covad refers are not SBC employees, and that any confusion on Covad's part cannot be attributed to SBC.

The jurisdictional facts are highly disputed. However, plaintiff has presented a powerful case that SBC may conduct a variety of activities. For example, plaintiff [*21] directs the Court's attention to several exhibits in which SBC repeatedly states that it does much more than simply hold stock in its regional companies. See, e.g., Nissen Decl., Exhs.8-21; see also *id.* Exh. 10 (displaying SBC news release representing that "SBC has signed 554 interconnection agreements -- agreements that open the door for these companies to use our network to compete" and "spent \$ 1.3 billion to open its local phone markets"). [HN7](#)[↑] The Court must resolve disputed jurisdictional facts found in affidavits and declarations regarding jurisdictional issues in favor of plaintiff. See [AT&T v. Compagnie Bruxelles Lambert](#), 94 F.3d 586, 588 (9th Cir. 1996). Given the wide array of documents presented to the Court, representing either that SBC is present in California or is, in fact, more than a simple holding company, the Court finds that plaintiff has stated a *prima facie* case of personal jurisdiction over SBC.

The Court does not agree, however, that personal jurisdiction may be exercised under an "agency" theory. [HN8](#)[↑] A parent company must exercise substantial day-to-day control of its subsidiary in order for its subsidiary to be viewed as its agent. The facts [*22] that plaintiff alleges in its complaint are insufficient to establish such control. [HN9](#)[↑] The "agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative, that it performs services that are 'sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporations' own officials would undertake to perform substantially similar services.' [Doe I v. Unocal Corp.](#), 27 F. Supp. 2d 1174 (C.D. Cal 1998) (quoting [Chan v. Society Expeditions, Inc.](#), 39 F.3d 1398, 1405 (9th Cir. 1994)); see also [Kramer v. British Leyland, Ltd.](#), 628 F.2d 1175, 1177 (9th Cir. 1980) (finding that the facts that the parent company was generally responsible for the sale the subsidiaries' products outside, had general executive responsibility for the operation of a subsidiary, reviewed and approved major policy decisions, guaranteed its subsidiary's obligations, worked closely with executives regarding product pricing, and approved proposals for consolidating distribution were insufficient to make the subsidiary an agent of the parent for jurisdictional purposes). Moreover, [*23] neither confusing or misleading brand advertising nor shared legal counsel is sufficient to show agency. See [Ameritec Corp. v. Ameritech Corp.](#), 1986 WL 10702 (C.D. Cal. Apr. 29, 1986); [Calvert v. Huckins](#), 875 F. Supp. 674, 677-78 (E.D. Cal. 1995).

B. SWBT

Covad served defendant SWBT under [HN10](#)[↑] the Clayton Act, which provides for nationwide service of process in antitrust actions. Covad asserts that, because SWBT traveled to the forum to negotiate and sign the Texas interconnection agreement and has an employee based in San Francisco, the Court may properly exercise personal jurisdiction. SWBT counters that it is a Missouri corporation with its principal place of business in Texas. Moreover, all of the activities alleged by Covad occurred outside of California. Therefore, SWBT contends, assertion of jurisdiction over it would offend due process. This Court previously stated that the Second Amended Complaint contained "no allegations that would provide a basis for the Court's assertion of personal jurisdiction over SWBT." Order Denying Defendant's Mtn to Extend Stay and Granting Plff's Mtn for Leave to File Amended Complaint, at 4 n.1 (November 18, 1998). [*24] Having once again reviewed the Second Amended Complaint, the Court finds that it is unreasonable to assert jurisdiction over SWBT.

² SBC asserts that the Dunn & Bradstreet listing and the Internet job postings, reflecting ongoing presence in California, were mistakes. See SBC and SWBT Reply in Supp. of Mtn. to Dismiss, at 10-11. At oral argument SBC counsel responded to the assertion that SBC actively recruits for employment positions in California, see Nissen Decl., Exh. 4-6, by stating that "an HR person in San Ramon [California]" had made the mistake, which was corrected when plaintiff called it to SBC's attention. While no clarification was provided regarding by whom the human resources staff member was employed, the reference suggests that the employee worked at the behest of SBC.

HN11 Even when a party has purposefully interjected itself into the forum state, any assertion of jurisdiction must conform with due process. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). To determine whether assertion of jurisdiction over non-resident defendants is reasonable, five factors are considered: the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; the forum state's interest in adjudicating the suit; the most efficient judicial resolution of the dispute; and the convenience and effectiveness of relief for the plaintiff. See *Pilgrim Tel. v. Southwestern Bell Tel.*, Civ. No. 93-2001 (D.D.C. Dec. 6, 1995)(unpublished case) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987)); see also *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1198-99 (9th Cir. 1988)(seven factor test to determine same issue). While the court must balance these five factors, [*25] the application of these factors is not mechanical.

1. Burden on the Defendant. There is a definite burden on defendant SWBT in defending a case in California. Though SWBT employees have previously traveled to California for negotiations, it was for a limited time period. Conversely, Covad has also traveled to Texas to participate in extensive arbitrations before the TPUC, and has offices in Texas. There is little burden in asking plaintiff to return to that forum in order to bring a suit which relates to actions taken while implementing a Texas interconnection agreement. Moreover, the majority of witnesses necessary to plaintiff's suit are located in Texas. Therefore, although both parties have traveled to the others' forums, the balance tips sharply in favor of dismissal.

2. California's Interest in Adjudicating the Suit. Covad, a California corporation, is a party to this suit; therefore California does have a limited interest in this action. However, Covad has chosen to enter the telecommunications market in Texas. Congress has placed the interconnection agreement between Covad and SWBT under the auspices of the home state's PUC and has provided review by that state's [*26] federal court. Therefore, Texas has a much stronger interest in adjudicating this matter. Though Covad's claims are independent of the interconnection agreement, they are nonetheless inextricably integrated with the relationship established by that agreement. Because the TPUC and the Texas district courts have jurisdiction over most disputes concerning the performance of Texas interconnection agreements, Texas has a distinct interest in consistent adjudication of *all* controversies (breach of contract or antitrust) arising from the agreements that the TPUC and district courts are charged with supervising. Moreover, any conclusion made by this Court could potentially conflict with the findings and jurisdiction of the TPUC or the Texas district court. Accordingly, this factor weighs heavily in favor of dismissal.

3. Convenience and Effectiveness of Relief for the Plaintiff. Though Texas may not be the most convenient forum for plaintiff, plaintiff has spent several months in Texas arbitrating its interconnection agreement before the TPUC. As stated above, plaintiff has failed to show that California is more convenient forum. Moreover, Covad has demonstrated neither that its [*27] action cannot be adjudicated fairly nor that it would be unable to obtain appropriate relief in a Texas federal court. Therefore, requiring plaintiff to also file its lawsuit in Texas is not unreasonable. Accordingly, this factor weighs in favor of dismissal.

4. Efficient Judicial Resolution. Covad also asserts that, because its claims against SWBT are similar to those against SBC and Pacific, one action will promote judicial economy. However, the Court finds that it is more expedient for a Texas court, which is more familiar with the TPUC and its policy concerns, to review all issues regarding performance of the agreements that Congress has specifically placed under that court's jurisdiction. Resolution of these disputes by the Texas district court will prevent any potential conflicts between decisions of this Court and the TPUC.

5. Several States' Interest in Furthering Fundamental Social Policies. Texas, which approves and supervises interconnection agreements in that state, has a substantial interest in also determining whether the actions taken pursuant to those contracts constitute anti-competitive behavior. Texas' substantial knowledge of and interest in the proper [*28] regulation of its local telephone markets outweighs any concern California may have regarding the litigation between the Covad and SWBT.

Accordingly, all claims against defendant SWBT are dismissed without prejudice.³

II. Failure to State a Claim Upon Which Relief Can Be Granted

HN12[] Under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented [*29] by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim. See [Scheuer v. Rhodes](#), 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).

HN13[] The Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. See [Usher v. City of Los Angeles](#), 828 F.2d 556, 561 (9th Cir. 1987). Even if the pleadings suggest that the chance of recovery is remote, the Court must allow the plaintiff to develop the case at this stage of the proceedings. See [United States v. City of Redwood City](#), 640 F.2d 963, 966 (9th Cir. 1981).

HN14[] If the Court chooses to dismiss the complaint, it must decide whether to grant leave to amend. In general, leave to amend is only denied if it is clear that amendment would be futile and "that the deficiencies of the complaint could not be cured by amendment." [Noll v. Carlson](#), 809 F.2d 1446, 1448 (9th Cir. 1987) (quoting [Broughton v. Cutter Laboratories](#), 622 F.2d 458, 460 (9th Cir. 1980) (per curiam)); see [Poling v. Morgan](#), 829 F.2d 882, 886 (9th Cir. 1987) [*30] (citing [Foman v. Davis](#), 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)) (futility is basis for denying amendment under Rule 15).

A. Antitrust Claims against Pacific Bell

1. Monopolization and Attempted Monopolization

HN15[] In order to state a claim for monopolization under § 2 of the Sherman Act, a plaintiff must allege that: (1) the defendant possesses monopoly power in the relevant market; (2) the defendant has willfully acquired or maintained that power; and (3) the defendant's conduct has caused antitrust injury. In order to state a claim for attempted monopolization, a plaintiff must show: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury.⁴ See [Cost Management Servs. v. Washington Natural Gas](#), 99 F.3d 937, 949 (9th Cir. 1996) (citations omitted). **HN16**[] To survive a motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#), an antitrust complaint "need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws. [*31]" *Id.* (citations omitted).

³ Defendant SWBT argued in its papers that "if the Court does not dismiss Covad's claims against SWBT, at a minimum, the Court should transfer them to Texas for the convenience of the parties and witnesses, and in the interest of justice. [28 U.S.C. § 1404\(a\)](#)." SBT and SWBT Memo in Supp. of Mtn. to Dismiss, at 20 n.19. Were this Court to find that it had jurisdiction over SWBT, for the same reasons as are articulated above it would also find transfer to Texas under [28 U.S.C. § 1404\(a\)](#) to be appropriate.

⁴ The Ninth Circuit in [Cost Management](#) stated that **HN17**[] to show injury,

a plaintiff must prove that his loss flows from an anti-competitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition. If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal per se.

[Cost Management](#), 99 F.3d at 949 n.13 (quoting [Rebel Oil Co., Inc. v. Atlantic Richfield Co.](#), 51 F.3d 1421, 1433 (9th Cir.), cert. denied, 516 U.S. 987, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1995)).

Pacific asserts that Covad's antitrust claims should be dismissed with prejudice. Specifically, Pacific argues that, because it has neither the power to control prices nor to exclude competitors from the market, as a matter of law, it does not possess [*32] monopoly power. Pacific claims that because its prices are state- and FCC-regulated, it cannot possibly wield monopolistic power. Pacific further points out that statistical market share is neither an adequate nor reliable indicator of monopoly power. The Court disagrees.

Pacific essentially argues that, because it is a regulated entity and because Covad has indeed entered the market, it cannot exercise monopoly power. However, [HN18](#) governmental regulation does not prevent an allegation or finding of monopoly power. See [Cost Management, 99 F.3d at 950](#). Moreover, plaintiff is correct in the assertion that it does not need to make a showing that market entry is completely impeded. See [Aspen Skiing Co. v. Aspen Skiing Corp., 472 U.S. 585, 605 n.32, 86 L. Ed. 2d 467, 105 S. Ct. 2847 \(1985\)](#) (stating that "exclusionary" behavior includes acts that "tend[] to impair the opportunities of rivals . . . [or] either does not further competition on the merits or does so in an unnecessarily restrictive way"). Here, plaintiff has sufficiently alleged that Pacific has imposed costly and unnecessary conditions upon access to its network, and intentionally delayed performance [*33] of obligations under the agreement, in an effort to prevent it from entering the market.

Pacific further points to [Metro Mobile CTS, Inc. v. NewVector Communications, Inc., 892 F.2d 62 \(9th Cir. 1989\)](#) in support of its argument that it holds no monopoly power. The Court in *Metro* stated both that reliance upon statistics was foolish and that courts should look to the reality of the market. See [id. at 62-63](#). However, the market reality which the *Metro* court faced was quite different from the reality with which this Court is faced.⁵ Moreover, the Ninth Circuit has stated that [HN19](#) under certain circumstances, an assessment of market power may provide a basis to survive a motion to dismiss. See [Cost Management, 99 F.3d at 951](#). Covad has alleged that Pacific controls over 85% of the relevant local telecommunications market, and that Pacific's practices (e.g., requiring collocation cages, refusing to service ASDL, providing defective loops) present a barrier to competition. These allegations are adequate to survive a motion to dismiss.

[*34] 2. Price Squeeze

Pacific asserts that the Court must also dismiss Covad's price squeeze claims, because, as a matter of law, Pacific's actions were not a violation of **antitrust law**. Pacific cites to such cases as [City of Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1377 \(9th Cir. 1992\)](#) and [Town of Concord v. Boston Edison Co., 915 F.2d 17 \(1st Cir. 1990\)](#), cert. denied, 499 U.S. 931, 113 L. Ed. 2d 268, 111 S. Ct. 1337 (1991) (discussed extensively by *City of Anaheim*) to support its position that a plaintiff may not state a price squeeze claim against Pacific, because Pacific's prices are regulated both by the FCC and the CPUC. See [Town of Concord, 915 F.2d at 18](#) (stating that [HN20](#) price regulation "dramatically alters the calculus of antitrust harms and benefits"); [City of Anaheim, 955 F.2d at 1378](#) (asserting that "we, too, would be reluctant to hold that a mere showing that a squeeze developed would suffice to cause antitrust liability").

The Court in *City of Anaheim* stated that "[HN21](#) normally" a price squeeze standing alone in a regulated industry would not equal exclusionary practices [*35] under the Sherman Act. See [id. at 1377](#). The Court insisted that "something more" was necessary. See [id. at 1378](#). Here, plaintiff has alleged more than a price squeeze. See SAC P 41-78, 82-160. Specifically against Pacific, Covad asserts various forms of anti-competitive conduct, illegal restraint of trade, fraud, negligent misrepresentation, statutory and common law unfair competition, and interference with prospective economic advantage. See *id.* Plaintiff also alleges that Pacific performed these actions with the

⁵ The relevant market in *Metro* was the cellular telephone market -- a new market in which defendant NewVector had neither a years-long monopoly nor owned the only physical facilities by which the product could be supplied to all consumers. Rather defendant had managed to gain a seventeen-month "headstart" over other competitors. See [Metro, 892 F.2d at 63](#). Pacific cites to other cases which are also distinguishable upon the facts or the posture of the case. See, e.g., [United States v. Syufy Enterprises, 903 F.2d 659, 664 \(9th Cir. 1990\)](#) (finding, after significant findings of fact and a trial, that plaintiff who bought out competitors had committed no antitrust violations); [Adaptive Power Solutions v. Hughes Missile Sys. Co., 141 F.3d 947, 951 \(9th Cir. 1998\)](#) (reviewing a grant of summary judgment).

"intent to preserve and extend its monopoly power and position." SAC P 29. Furthermore, because Pacific is no longer a lawful monopoly, this Court need not "tread" as lightly as the Court in *City of Anaheim*. See [955 F.2d at 1378](#) (stating that "given the fact that the parties operate in an area where . . . monopoly is legal, courts should tread carefully").⁶ Finally, both *City of Anaheim* and *Town of Concord* were decided, not upon a motion to dismiss, but after a trial on the merits. Therefore, Pacific's motion to dismiss plaintiff's price squeeze claim is DENIED.

[*36] 3. Tying

Defendant Pacific argues that the Court should dismiss Covad's tying claims because, during the periods in question, the FCC did not permit Pacific to "line share," that is to offer voice analog and digital (data) services over the same local loop. Covad counters that neither the FCC nor the CPUC has ever issued a regulation or order prohibiting line sharing. Rather, the FCC has given state PUCs the ability to offer additional unbundled network elements ("UNEs") at their discretion. Covad further states that other incumbents have allowed line sharing at their facilities. Because Covad has not shown that voice and data service constitute two separate and distinct products under the Act, Covad's tying claim (fifth cause of action) hereby is DISMISSED.

In early 1999, the CPUC affirmed an arbitrator's decision regarding an interconnection agreement. See *In the Matter of the Petition of PDO Communications, Inc.*, Decision No. 99-01-009. No. A. 98-06-052 (Cal. P.U.C., Jan. 7, 1999), 1999 WL 116230 (Cal. P.U.C.), Exh. 1 to Appendix of Unpublished Authorities in Supp. of Defendant Pacific's Mtn. to Dismiss SAC. In that opinion, the CPUC found that Pacific [*37] was not required to "line share" with PDO Communications, Inc., because such line sharing was not permitted by the FCC. See *id.* at *8. The CPUC specifically relied upon the FCC's refusal "to define a loop element in functional terms, rather than in terms of the facility itself." *Id.* at *10 (quoting *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98 and 95-185, FCC 96-325 (August 9, 1996) P 385 ("First Report and Order")). Accordingly, the local loop is itself defined as an unbundled network element ("UNE"), which need not be further broken down. See 47 C.F.R. P 51.319.⁷

[*38] The Court acknowledges that, before the FCC issued its recent order requiring line sharing, the obligations and rights of incumbents and competitors respectively was unclear. As plaintiff points out, other incumbents had provided line sharing and the FCC had not by regulation prohibited the practice. However, the FCC defined the loop element in terms of the physical component (i.e., the loop), rather than in terms of the functions the loop can perform (i.e., voice service and data service). See *In the Matter of PDO*, at *10 (citing First Report and Order P 385). Covad maintains that this Court should find that voice and data services are two distinct products. However, to find in favor of what Covad requests would be to do that which the FCC (prior to its new rule) had refused to do -- to define the loop in reference to its function. The Court declines to do so. The Court, therefore, concludes that plaintiff has not stated a claim for tying under §§ 1 and 2 of the Sherman Act, and this claim is DISMISSED.

B. Claims against SBC

⁶The FCC in *In re Applications of Ameritech and SBC*, CC Docket No. 98-141 (October 8, 1999), at 107, asserted that, because of "existing regulatory safeguards, [incumbents] do not have a significant ability to act" on the incentive to conduct a price squeeze. Nonetheless, the FCC noted that incumbents do have an incentive to perform such a squeeze and did not definitively conclude that a price squeeze could not happen.

⁷The FCC had also issued a Notice of Proposed Rulemaking (NPRM) addressing line sharing. See *In the Matters of Deployment of Wireline Services Offering Advances Telecommunications Capability*, et al., CC Docket No. 98-147, et al. Memorandum and Order, and Notice of Proposed Rulemaking, FCC 98-188 (August 7, 1998) (hereinafter NPRM). After reviewing the text of the document, the CPUC agreed with the conclusion that, "the clear import of the NPRM is that different service providers are not currently permitted to offer services over the same loop." *In the Matter of PDO*, at *8. The Commission agreed with the arbitrator's assessment that it was difficult to explain "how an FCC question asking whether [line sharing] 'should be allowed,'" could be interpreted as stating that line sharing is required. See *In the Matter of PDO*, at 9.

1. Intentional and Negligent Misrepresentation

SBC contends that Covad has failed to meet the heightened pleading standard under [Federal Rule of Civil Procedure 9\(b\)](#) for both its intentional and negligent misrepresentation claims. Defendant SBC claims that plaintiff has not come close to stating the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." [Silicon Knights, Inc. v. Crystal Dynamics, Inc., 983 F. Supp. 1303, 1315 \(N.D. Cal. 1997\)](#), nor providing the circumstances surrounding the misrepresentation.⁸

[HN22](#) [Rule 9(b)] requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." These allegations must be specific enough to give SBC notice of the particular misconduct which is alleged to constitute the fraud charged so that it can defend against the charge and not just deny that it has done anything wrong. See [Neubronner v. Milken, 6 F.3d 666, 671 \(9th Cir. 1993\)](#).

Covad alleges misrepresentation, based upon the fact that Pacific denied that collocation space was available for DSL collocation but thereafter set up DSL collocation in the same central offices to which it had denied Covad access.⁹ Covad further alleges that Pacific "and SBC" stated that they would perform their obligations under the interconnection agreements fully and timely, but failed to do, by not performing by February 1998.

[*41] The complaint's allegations of intentional and negligent misrepresentation by SBC neither state the time, place and manner of the alleged misrepresentations, nor identify the SBC official who made the statement. The Court concludes that plaintiff has not offered sufficient facts as to SBC to state a claim on which relief can be granted. Therefore, this claim is dismissed with leave to amend.

2. Claim under the Telecommunications Act

SBC asserts that Covad cannot state a claim for failure to negotiate in good faith in violation of [§ 251\(c\)\(1\)](#) of the Telecommunications Act, because that section does not create a private right of action. SBC further maintains that this Court may not imply a right of action, because (1) there is a general presumption against implied private rights of action and (2) to imply a private right of action would dismantle the intricate statutory dispute resolution scheme established by Congress. Covad counters that § 207 allows it to pursue its § 206 claim for violation of [§ 251](#) before the FCC or the district court. Covad alleges that because DSL is an interstate service, its claims fall within § 207's jurisdiction.

Defendant SBC cites to [Maydak v. Bonded Credit Co., 96 F.3d 1332 \(9th Cir. 1997\)](#) [*42] to support its contention that there is no private right of action under the Act. Plaintiff contends that, though *Maydak* does state that courts should be reluctant to imply rights under the Act, *Maydak* also made clear that if a plaintiff alleges a violation of another section of the Act (rather than simply suing defendant under § 206), there is jurisdiction under § 207. See *id. at 1334* (stating that if plaintiff "sued [a carrier] for a violation of a stated statutory provision, the district court would clearly have had subject matter jurisdiction under § 207"). Furthermore, the court in [AT&T v. Pacific Bell, 60 F. Supp. 2d 997, 1999 U.S. Dist. LEXIS 12623 \(N.D. Cal. June 24, 1999\)](#), stated that "defendant contends that Section 207 applies only if the dispute involves interstate communications. . . . This contention appears to be correct." [60 F. Supp. 2d 997, 999](#), *Id.* at *7.

⁸ Defendant Pacific did not move to dismiss these causes of action for failure to state a claim, but relied on its contention that because the federal claims should be dismissed, the state claims should likewise be dismissed as a discretionary matter. The essential flaw in the state claims as they are currently framed is that they do not identify the actions taken or statements made by SBC, as contrasted with Pacific, which form the basis for the charges.

⁹ Nine of 20 central offices which Pacific represented were without space in November 1997 and August 1998, were later found to have space. See SAC P 124. Covad claims that Pacific and SBC had represented that these denials were taken after careful evaluation. See *id. P 123*.

SBC argues that the complaint by its own terms states that the DSL market is extremely local in nature. See SAC P 25. However, despite Covad's characterization of the consumers and market as local, in at least one order, the FCC has concluded that DSL is an interstate service. See Memorandum Opinion and Order, [*43] *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, October 30, 1999, at P 1. Because DSL is an interstate service, § 207 is applicable to this action. Therefore, plaintiff may assert its claim for violation of [§ 251](#) of the Act.

3. Interference with Prospective Economic Advantage

[HN23](#) [↑] The five elements for intentional interference with prospective economic advantage are: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [*Youst v. Longo, 43 Cal. 3d 64, 71, 233 Cal. Rptr. 294, 729 P.2d 728 \(1987\)*](#).

Covad has claimed that its relationships with its present customers were damaged by and economic harm resulted from defendant's alleged attempt to disparage Covad's reputation and goodwill by, for example, announcing that competitors would be forced to [*44] use a specific type of DSL technology, by delaying collocation, and delivering defective products. These allegations, taken as true, are sufficient to survive a motion to dismiss.

C. Claims against SBC-TRI

[HN24](#) [↑] [*Rule 8 of the Federal Rules of Civil Procedure*](#) requires that plaintiff set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Defendant SBC-TRI asserts that the claims against it fail to meet this standard, because they are conclusory and give neither proper notice of the nature of the allegations against it nor of their relationship to the actions at issue in this case. Covad asserts that its allegations that SBC-TRI "actively directed the collocation and spectrum management policies of both Pacific and SWBT, policies that have anticompetitively and unreasonably restricted Covad's deployment of telecommunications services" are sufficient. Plff's Oppo. to Mtn to Dismiss, at 12.

The Court agrees that the allegations contained in the complaint do not offer sufficient information to place defendant SBC-TRI on notice of the specific conduct it asserts is relevant to the claims against it. See SAC P 13, P 39. The claims against [*45] SBC-TRI are therefore dismissed with leave to amend.

CONCLUSION

For the foregoing reasons, the Court DENIES defendant SBC Communication's motion to dismiss for lack of personal jurisdiction and GRANTS defendant Southwestern Bell's motion to dismiss for lack of personal jurisdiction. Defendant Pacific Bell's motion to dismiss the monopolization and attempted monopolization claims is DENIED, and Pacific Bell's motion to dismiss plaintiff's tying claim is GRANTED. The Court GRANTS, with leave to amend, defendant SBC Communication's motion to dismiss plaintiff's intentional and negligent misrepresentation claims, but DENIES defendant SBC Communication's motion to dismiss plaintiff's claim for violation the Telecommunications Act of 1996 and for interference with prospective economic advantage. Defendant SBC-TRI's motion to dismiss is GRANTED with leave to amend.

Any amended complaint in accordance with this Order must be filed no later than January 7, 2000.

IT IS SO ORDERED.

Dated: December 14, 1999

SUSAN ILLSTON

United States District Judge

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Stucky v. City of San Antonio

United States Court of Appeals for the Fifth Circuit

December 14, 1999, Decided

No. 98-50934

Reporter

1999 U.S. App. LEXIS 38905 *

BRENDA L. STUCKY, d/b/a Bill's Wrecker Service; RICHARD VILLANEVA, d/b/a Creswells 24 Hr. Wrecker Service, Plaintiffs - Counter-Defendants Appellees-Cross-Appellants versus CITY OF SAN ANTONIO, Defendant-Appellant - Cross-Appellee. TEXAS TOWING CORPORATION, Intervenor Defendant - Counter-Plaintiff-Appellant-Cross-Appellee

Notice: RULES OF THE FIFTH 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.

Prior History: [*1] Appeals from the United States District Court for the Western District of Texas. (SA-96-CV-1285).

Stucky v. City of San Antonio, 204 F.3d 1115, 1999 U.S. App. LEXIS 35046 (5th Cir. Tex., 1999)

Core Terms

towing, Ordinance, bid, partial summary judgment, district court, nonconsent, VACATE, void, summary judgment motion, final judgment, declare null, permanently, antitrust, enjoined, renewing, dismissal with prejudice, interlocutory appeal, permanent injunction, claim for damages, injunctive relief, summary judgment, anti trust law, federal law, compliance, portions, preempts, certify, abated, orders

Judges: Before KING, Chief Judge, and REYNALDO G. GARZA and EMILIO M. GARZA, Circuit Judges.

Opinion

PER CURIAM:^{*}

The district court has issued two purportedly dispositive "orders" and a separate final judgment in this case. On August 25, 1998, the district court "ordered," in relevant part, that: 1) Plaintiffs Stucky and Villaneva ("Stucky")'s motion for partial summary judgment was granted, such that Ordinances 82744 and 87775 were declared null and void; 2) Defendant City of San Antonio ("City") was permanently enjoined from renewing its nonconsent towing contract with any party without allowing open bids on the contract; 3) City's and Intervenor Texas Towing ("Texas Towing")'s motions for summary judgment were granted in part, such that Stucky's claims for relief under [42 U.S.C.](#)

* Pursuant to **5TH CIR. R. 47.5**, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in **5TH CIR. R. 47.5.4**.

§ 1983 and for violations of federal antitrust law were dismissed with prejudice; 4) City's and Texas Towing's motions for summary judgment [*2] were denied as to Stucky's claims for injunctive relief under antitrust law.¹

On September 21, 1998, the district court granted Texas Towing's unopposed motion to enter final judgment as to certain claims and to certify certain issues for interlocutory appeal. In its "order" granting Texas Towing's motion, the court "directed the clerk to enter a final judgment that", in relevant part: 1) Stucky's motion for partial summary judgment was granted, such that Ordinance 82744 and Ordinance 87775 were declared null and void; 2) City was permanently enjoined from renewing its nonconsent towing contract with any party without allowing open bids on the contract; and 3) City's and Texas Towing's motions for summary judgment were granted in part, such that Stucky's § 1983 and antitrust damage claims were dismissed with prejudice. The court also ordered, without further comment, that Texas Towing's motion to certify issues for interlocutory appeal was granted.² Finally, the court abated the remainder of the case pending appellate review.

On October 13, 1998, the district court issued a "judgment" by which it was "ordered, adjudged, and decreed" that, in relevant part: 1) Stucky's motion for partial summary judgment was granted, as 49 U.S.C. § 14501(c) preempts Ordinance 82744 and Ordinance 87775, and those ordinances were declared null and void; 2) Stucky's request for a permanent injunction against City was granted, and City was ordered either to put its nonconsent towing contract up for bid or to adopt some other measure to bring the system into compliance with federal law; 3) the portion of Stucky's partial summary judgment motion requesting that the court find that 49 U.S.C. § 14501(c) preempts municipalities from adopting single-vendor open bid towing systems was denied; 4) summary judgment for City and Texas Towing was granted on Stucky's § 1983 and antitrust damage [*4] claims; 5) summary judgment for City and Texas Towing was denied on Stucky's claim for antitrust injunctive relief.

After closely reviewing the record, we hereby VACATE the portions of the August 25 Order, the September 21 Order, and the October 13 Judgment which grant Stucky's motion for partial summary judgment and declare Ordinances 82744 and 87775 null and void. We also VACATE the portions of the August 25 Order and the September 21 Order which permanently enjoin City from renewing its single vendor towing contract with any party without conducting open bidding, as well as the portion of the October 13 Judgment which grants a permanent injunction against City and orders it either to put its nonconsent towing contract up for bid or to otherwise bring its system into compliance with federal law. We also VACATE the abatement declared by the September 21 Order and REMAND these vacated holdings for further consideration in light of Cardinal Towing and Auto Repair, Inc. v. City of Bedford, Texas, 180 F.3d 686 (5th Cir. 1999).³⁴

¹ City and Texas Towing filed their notices of appeal to this court from the August 25, 1998 order.

² We find the district court's grant of Texas Towing's motion to [*3] certify issues for interlocutory appeal, without explanation, an insufficient basis on which to certify any aspect of this case for interlocutory appeal under 28 U.S.C. § 1292(b). The certification order, and Texas Towing's underlying motion, insufficiently delineate the exact issues to be certified, given the unusual procedural posture of this case.

³ We note that none of the parties urged summary judgment on Ordinances 82744 and 87775. We therefore question whether the district court's grant of partial summary [*5] judgment as to those Ordinances was permissible under FRCP 56.

⁴ The district court's dismissals of Stucky's § 1983 and antitrust damage claims are not challenged on appeal. Those dismissals therefore are unaffected by this opinion.

We also lack jurisdiction over the district court's denials of summary judgment. A denial of summary judgment is not a final order and thus does not confer appellate jurisdiction under 28 U.S.C. § 1291. See Landry v. G.B.A., 762 F.2d 462, 464 (5th Cir. 1985). Therefore, 1) the holding of the August 25 Order and the October 13 Judgment denying City's and Texas Towing's summary judgment motions as to Stucky's claims for injunctive relief under antitrust law, and 2) the holding of the October 13 Judgment denying Stucky's partial summary judgment motion in and so far as it claimed that § 14501(c) preempted municipalities from adopting single-vendor open-bid towing systems, are not properly before us. The district court is nevertheless free on remand to reconsider these holdings, or not, as it sees fit.

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Ocean View Capital, Inc. v. Sumitomo Corp. of Am.

United States District Court for the Southern District of New York

December 15, 1999, Decided ; December 15, 1999, Filed

98 Civ. 4067 (LAP)

Reporter

1999 U.S. Dist. LEXIS 19194 *; 2000-1 Trade Cas. (CCH) P72,756

OCEAN VIEW CAPITAL, INC., f/k/a TRIANGLE WIRE & CABLE, INC., Plaintiff, -against- SUMITOMO CORPORATION OF AMERICA, SUMITOMO CORPORATION, SUMITOMO FUTURES CORPORATION, YASUO HAMANAKA, GLOBAL MINERALS AND METALS CORPORATION, DAVID CAMPBELL, ASHLEY LEVETT CHARLES VINCENT, and CREDIT LYONNAIS ROUSE, Defendants.

Prior History: [Ocean View Capital, Inc. v. Sumitomo Corp. of Am. \(In re Copper Antitrust Litig.\), 1999 U.S. Dist. LEXIS 19199 \(J.P.M.L., Dec. 13, 1999\)](#)

Disposition: [*1] Defendants' motion to dismiss granted and amended complaint dismissed.

Core Terms

copper, defendants', cash market, prices, futures market, Clayton Act, alleges, contracts, damages, anti trust law, antitrust, factors, amended complaint, plaintiff's claim, conspiracy, motion to dismiss, manipulation, consumers, refined, indirect, markets, traded, general contractor, speculative, inflated, soybean, causal, scrap, antitrust violation, direct victim

LexisNexis® Headnotes

Civil Procedure > Dismissal > General Overview

[HN1](#) Civil Procedure, Dismissal

In deciding a motion to dismiss, a court must view the complaint in the light most favorable to plaintiff. A court must accept as true the factual allegations stated in the complaint, and draw all reasonable inferences in favor of plaintiff. A motion to dismiss can only be granted if it appears beyond doubt that plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Plaintiff's failure to meet even this liberal standard, however, mandated the dismissal of its amended complaint.

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

[HN2](#) Antitrust & Trade Law, Clayton Act

Section 4 of the Clayton Act provides that any person who shall be injured in his business or property by reason of anything forbidden in the **antitrust law** may sue therefor and shall recover threefold the damages by him sustained. [15 U.S.C.S. § 15\(a\) \(1999\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

[HN3](#) Antitrust & Trade Law, Clayton Act

Despite the broad language of [15 U.S.C.S. § 15\(a\) \(1999\)](#), the Supreme Court of the United States has placed limits on those who may recover for antitrust violations.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

[HN4](#) Clayton Act, Claims

The two types of limitations constrain those who can recover under Section 4 of the Clayton Act. First, the risk of duplicative recovery dictates that indirect purchasers do not have standing to sue for an antitrust violation. Second, those who have sustained injuries too remote from the illegal behavior do not have a cause of action. [15 U.S.C.S. § 15\(a\) \(1999\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

[HN5](#) Antitrust & Trade Law, Clayton Act

Five factors are articulated for determining whether a particular plaintiff has standing. These factors are: (1) the causal connection between an antitrust violation and the harm suffered by the plaintiff, and the intent of the defendant to cause that harm; (2) the nature of plaintiff's injury and whether the **antitrust law** was designed to provide redress for such an injury; (3) the directness of the asserted injury; (4) the existence of more direct victims who can assert a claim against the wrongdoer; and (5) the risk of duplicate recoveries or complex apportionment of damages.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

[HN6](#) Clayton Act, Claims

The mere fact that a claim is literally encompassed by the Clayton Act does not end inquiry. [15 U.S.C.S. § 15\(a\) \(1999\)](#).

Counsel: For OCEAN VIEW CAPITAL, INC., plaintiff: Sanford P. Dumain, Joseph Opper, Melvin I. Weiss, Clifford S. Goodstein, Azra Z. Mehdi, Milberg, Weiss, Bershad, Hynes & Lerach, L.L.P., New York, NY.

Judges: LORETTA A. PRESKA, U.S.D.J.

Opinion by: LORETTA A. PRESKA

Opinion

MEMORANDUM AND ORDER

LORETTA A. PRESKA, United States District Judge:

This is an action brought by plaintiff, Ocean View, formally known as Triangle Wire & Cable, Inc., against defendants Sumitomo Corporation with its affiliates, Sumitomo Corporation of America and Sumitomo Futures Corporation, Yasuo Hamanaka, who headed Sumitomo's copper trading operations from August 1987 to about June 1996, Global Minerals and Metals Corporation, David Campell, a principal of Global during the relevant time period, Ashley Levett and Charles Vincent, the principals of the Winchester Commodities Group and Winchester Asset management, and Credit Lyonnais Rouse. Plaintiff alleges federal claims under the Clayton Act, [Sections 15, 22, and 21](#) for violations of the Sherman Act Section 1 and state law claims under Rhode Island [Antitrust Law](#) Section 6-36-4. On June 9, 1998, Ocean View filed the original complaint. Defendants moved to dismiss on November 2, 1998. In response, on December 18, 1998, plaintiff amended the complaint. Defendants Sumitomo, joined by Global [*2] Minerals and Metals,¹ Ashley Levett and Charles Vincent and Credit Lyonnais Rouse each responded with a motion to dismiss the amended complaint. For the reasons discussed below, defendants' motion is granted, and the amended complaint is dismissed.

BACKGROUND

Plaintiff, a corporation that until October 31, 1996, was engaged in the manufacture of copper wire and cable for which it purchased substantial amounts of refined copper, (See Amended Compl., P 8), alleges that defendants conspired to manipulate, and succeeded in manipulating, the market for copper futures and physical copper. (See Amended Compl., P 22). Plaintiff alleges that defendants achieved this goal by engaging in futures and options transactions predominately on the London Metals Exchange (the "LME") and on the Commodity Exchange, Inc. (the "COMEX"). Plaintiff [*3] also alleges that defendants entered into a series of unusual copper purchase contracts. (See *id.*, P 27). These actions, plaintiff claims, caused the price of copper on the United States cash market to reach artificially inflated prices, (See *id.*, P 31), and, as a major purchaser of copper, plaintiff was damaged. (See *id.*, P 46).

DISCUSSION

I. Standard Applicable to a Motion to Dismiss

HN1[] In deciding a motion to dismiss, I must view the complaint in the light most favorable to plaintiff. [Scheuer v. Rhodes, 416 U.S. 232, 237, 94 S. Ct. 1683, 40 L. Ed. 2d 90 \(1974\)](#); [Yoder v. Orthomolecular Nutrition Inst., Inc., 751 F.2d 555, 562 \(2d Cir. 1985\)](#). I must accept as true the factual allegations stated in the complaint, [Zinermon v. Burch, 494 U.S. 113, 118, 110 S. Ct. 975, 108 L. Ed. 2d 100 \(1990\)](#), and draw all reasonable inferences in favor of plaintiff. [Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 \(1972\)](#); [Hertz Corp. v. City of New York, 1 F.3d 121, 125 \(2d Cir. 1993\)](#), cert. denied, 510 U.S. 1111, 127 L. Ed. 2d 375, 114 S. Ct. 1054, 114 S. Ct. 1055 (1994). [*4] A motion to dismiss can only be granted if it appears beyond doubt that plaintiff can prove no set

¹ In addition to joining Sumitomo's Memorandum of Law and Reply Memorandum in Support of its Motion to Dismiss the Amended Complaint, Global submitted its own Reply Memorandum.

of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Plaintiff's failure to meet even this liberal standard, however, mandated the dismissal of its amended complaint.

II. Plaintiff Does not Have Standing to Assert a Claim under Antitrust Laws

HN2[⁵] Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the **antitrust law** may sue therefor . . . and shall recover threefold the damages by him sustained . . ." 15 U.S.C.A. § 15(a) (1999). **HN3**[⁶] Despite this broad language, the Supreme Court of the United States has placed limits on those who may recover for antitrust violations. See *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977). [*5] **HN4**[⁷] In *McCready*, the Court explained that two types of limitations constrain those who can recover under Section 4 of the Clayton Act. See *McCready*, 457 U.S. at 473, 102 S. Ct. at 2545. First, the risk of duplicative recovery dictates that indirect purchasers do not have standing to sue for an antitrust violation. See *id. at 473-74*. Second, those who have sustained injuries too remote from the illegal behavior do not have a cause of action. See *id. at 476*.

In light of these two limitations, the Court **HN5**[⁸] articulated five factors for determining whether a particular plaintiff has standing. These factors are:

- (1) the causal connection between an antitrust violation and the harm suffered by the plaintiff, and the intent of the defendant to cause that harm;
- (2) the nature of plaintiff's injury and whether the **antitrust law** was designed to provide redress for such an injury;
- (3) the directness of the asserted injury;
- (4) the existence of more direct victims who can assert a claim against the wrongdoer; and
- (5) the risk of duplicate recoveries or complex apportionment of damages.

See *Associated Gen. Contractors*, 459 U.S. at 537-46, 103 S. Ct. at 908-12. [*6]

In *Associated General Contractors*, plaintiffs, unions representing individual workers employed by defendants, asserted that defendants coerced landowners and general contractors to direct some of their business to nonunionized firms. This coercion, plaintiffs argued, adversely affected the unionized firms and thereby restrained the unions' business activities. The Supreme Court, considering the five-factor test, concluded that the unions were not injured by an antitrust violation as defined by Section 4 of the Clayton Act. See *Associated Gen. Contractors*, 459 U.S. at 545, 103 S. Ct. at 912.

The Court first noted that the unions did allege a connection between its harm and the alleged antitrust behavior and therefore satisfied the first factor. See *id. at 537, 103 S. Ct. at 908*. The first factor, however, was the only one in plaintiff's favor.

Continuing with the second factor, the Court observed that because the "Union was neither a consumer nor a competitor in the market in which trade was restrained," plaintiff's injury was not of the type that the antitrust laws were designed to prevent. See *id. at 538-39, 103 S. Ct. at 908-09*. [*7] Considering the third factor, the Court reasoned that the causal chain between the unions' injury and defendants' behavior contained "several somewhat vaguely defined links." See *id. at 540, 103 S. Ct. at 910*. In light of the third factor, the Court observed that there were immediate victims of defendants' actions that would have a right to maintain an action against defendants. See *id. at 541-42, 103 S. Ct. at 910-11*. Finally, in considering the last factor, the Court noted that "partly because it

is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative." *Id. at 542*; *103 S. Ct. at 911*.

Although decided before the Supreme Court delineated the five factors, the Court of Appeals, in *Reading Industrial, Inc. v. Kennecott Copper Corp., et al.*, 631 F.2d 10 (2nd Cir. 1980), dismissed plaintiff's antitrust claim, considering the third and fifth *Associated Contractors* factors.² In *Reading*, plaintiff, a refiner of copper scrap and a manufacturer of copper tubing, alleged that defendants' conspiracy [*8] to fix the price of domestically refined copper resulted in higher prices in the copper scrap market. Plaintiff purchased copper from this allegedly overpriced market and argued that it paid inflated prices for copper scrap. The Court reasoned that the causal relationship between defendants' actions and plaintiff's injury was too attenuated to support an antitrust claim. In so holding, the Court stated,

Reading's theory of antitrust injury depends upon a complicated series of market interactions between the two sources of copper: the refined copper market in which defendants acted and the copper scrap market in which Reading allegedly sustained injuries. . . . To find antitrust damages in this case would engage the court in hopeless speculation concerning the relative effect of an alleged conspiracy in the market for refined copper on the price of copper scrap, where countless other market variables could have intervened to affect those pricing decisions.

Id. at 13-14. Moreover, the Court held that "to find antitrust damages in this case would engage the court in hopeless speculation concerning the relative effect of an alleged conspiracy in the market [*9] for refined copper on the price of copper scrap, where countless other market variables could have intervened to affect those pricing decisions." *Id. at 13-14*.

Applying the *Associated General Contractors* factors to the case at bar, it becomes evident that plaintiff's claim is not cognizable under the Clayton Act.

Plaintiff does satisfy the first factor. The complaint alleges a causal connection between defendants' behavior and plaintiff's injury. However, as the Supreme Court noted, "the *HN6*[[↑]] mere fact that the claim is literally encompassed by the Clayton Act does not end inquiry. [*10]" *Associated Gen. Contractors*, 459 U.S. at 537, *103 S. Ct. at 908*.

The second factor is in defendant's favor, although only slightly. Congress enacted the Sherman Act "to assure customers the benefit of price competition" and to protect "the economic freedom of participants in the relevant market." *Id. at 538, 103 S. Ct. at 908*. Plaintiff is a consumer of copper, and therefore the Sherman Act was designed to protect its interest in its capacity as a customer. However, in this case, plaintiff alleges that the defendants violated the antitrust laws through their actions on the LME futures market. Plaintiff did not participate in the LME futures market. Hence, plaintiff is not a participant in the "relevant market," and the Sherman Act was not designed to protect plaintiff's interests with respect to defendants' activity on the LME.

The third factor strongly favors defendants. Similar to both *Associated General Contractors* and *Reading*, Ocean View's theory of liability is based on a tenuous causal chain of events. Defendants' allegedly unlawful activity principally involved a conspiracy to corner the futures market on the LME. (See Amended [*11] Compl., P 1; Plaintiff's Memorandum of Law in Opposition to the Sumitomo Defendants' Motion to Dismiss the Amended Complaint at 1) (hereinafter "Plaintiff's Memorandum"). Ocean View does not allege that it trades on the LME or in the futures market. However, Ocean View maintains that the LME and the COMEX function as a single market. "COMEX and the LME function from an economic standpoint as a single market, and prices on one market vary with prices on the other." (Amended Compl., P 17). Plaintiff further asserts that prices on

²I recognize that *Reading* predates the Supreme Court rulings *Associated Gen. Contractors* and *McCready*. However, the Second Circuit's analysis in *Reading* is in line with the Supreme Court's remoteness analysis in the aforementioned cases and therefore provides valid precedential assistance in this case. See *De Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510, 515 n.18 (S.D.N.Y. 1985).

the cash market are set by reference to the price (or in some cases, a monthly average price) of copper futures on the COMEX and, plus a "basis" price (a premium factor), determined at the time of contracting. Therefore, a manipulation of the price of copper futures on the COMEX and/or the LME would directly and predictably correlate with a manipulation of copper prices on the cash market.

(*Id.*, P 20). Ocean View made sizeable purchases of refined copper during the years of the alleged conspiracy, (see *id.*, P 8), but does not allege that any of those purchases were from Sumitomo or its alleged co-conspirators. Rather, Ocean View alleges [*12] that because the United States copper cash market is affected by the LME futures market, defendants' actions on the LME futures market had an adverse effect on it.

Even assuming the truth of the allegations of the amended complaint, this chain of events leading from defendants' alleged misconduct to plaintiff's harm is not cognizable under antitrust law. Ocean View did not suffer a harm directly flowing from defendants' alleged restraint of competition. On the contrary, plaintiff alleges that defendants caused it harm through a complex "master plan" of "manipulating copper exchange prices." (*Id.* P 23). It is possible that the increased refined copper prices for the specified period of time were due to factors wholly unrelated to defendants' transactions on the LME futures market. Indeed, plaintiff concedes that the copper cash price is partially based on a "premium factor" and not solely dependent on the COMEX futures price. (*Id.*, P 18, 20).

The facts alleged by plaintiff are remarkably similar to those in *DeAtucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510 (S.D.N.Y. 1985), where plaintiff's claim was dismissed for lack of standing because of the attenuated [*13] relationship between defendant's alleged misconduct and plaintiff's injury. See *id.* at 518. De Atucha, a citizen and resident of Argentina, purchased three silver contracts on January 18, 1980 on the LME which he sold on April 16, 1980 at a substantial loss. He alleged that defendants' conspiracy to manipulate the price of the silver futures on the COMEX caused the silver contracts on the LME to be artificially inflated. See *id.* at 511, 516. De Atucha further alleged that "'because of the fungibility of silver and silver futures, the United States market represented by the Comex and CBOT and the London Exchange [the LME] function from an economic standpoint as a single market'" *Id.* at 512 (quoting Compl., P 28). The Court concluded that this "indirect relationship between de Atucha's claim and the alleged violation is a factor which strongly supports the inapplicability of the antitrust laws to de Atucha's claim." See *id.* at 516.

Dismissal of Ocean View's complaint is also supported by the fourth factor, the existence of more direct victims. Since defendants allege that the illegal behavior principally [*14] occurred on the LME futures market, those who traded on this market are more direct victims of defendants' behavior. Furthermore, because plaintiff alleges that the LME prices affect the COMEX copper future prices, which in turn affect the copper cash prices, those who trade on the COMEX futures market also are more direct victims than plaintiff. Therefore, this factor also suggests to the court that plaintiff's claim should be dismissed.

The last factor, the nature of plaintiff's damages, also favors dismissal of plaintiff's claim. Not only would a calculation of alleged damages require a determination of the relationship between the prices on the LME and the prices on the COMEX, but it also would require a determination of the effect of the COMEX on the cash market. This speculative nature of damages further supports the dismissal of plaintiff's claims. See *Associated Gen. Contractors*, 459 U.S. at 542, 103 S. Ct. at 911; *Reading Indus., Inc.*, 631 F.2d at 13-14. Indeed in *de Atucha*, in which plaintiff's damages claim involved the prices on related international markets, the court remarked that other courts have rejected as too speculative and [*15] indirect damages involving "equilibration of prices on related domestic markets" and held that the nature of de Atucha's damages was another factor dictating dismissal. *De Atucha*, 608 F. Supp. at 516.

Ocean View attempts to distinguish its claims from those of de Atucha by explaining that the *de Atucha* court granted defendants' motion to dismiss because the Clayton Act does not protect consumers such as de Atucha, who are consumers in foreign markets, and not because the link between the LME and the American markets was tenuous. (See Plaintiff's Memorandum at 18). In dismissing de Atucha's complaint, the court did consider plaintiff's nationality and concluded that Congress did not intend for the Clayton Act to provide redress for foreign consumers. See *de Atucha*, 608 F. Supp. at 517-18. However, this was just one of the *Associated General Contractors* factors

that the court considered. As explained above, the court concluded that the indirect relationship between plaintiff's alleged harm and defendants' alleged wrongdoing "strongly supports the inapplicability of the antitrust laws to de Atucha's claim." *Id. at 516.* [*16]

Plaintiff analogizes its amended complaint to the complaint in *Sanner v. Board of Trade*, 62 F.3d 918 (7th Cir. 1995), in which the Seventh Circuit denied defendants' motion to dismiss. (See Plaintiff's Memorandum at 9-12). Plaintiffs in *Sanner*, soybean farmers, alleged that defendants' actions on the Chicago Board of Trade's soybean futures market resulted in a proportional decline in the soybean cash market. Defendants argued that the cash market for soybeans was distinct from the futures market for soybeans and that, therefore, plaintiffs did not have standing to sue for defendants' actions in the futures market. The Seventh Circuit rejected that argument. It held that the futures and cash markets move in "lockstep" and thus the two markets are "so closely related" that the distinction between them is of no consequence to antitrust standing analysis." *Id. at 929.*

The present case is distinguishable from *Sanner*. In *Sanner*, the alleged antitrust activity occurred in a domestic market, and the claimed injury occurred in a closely related domestic market. Ocean View, on the contrary, alleged that defendants' activity in London affected [*17] the United States' copper cash market. Furthermore, Ocean View's theory of liability requires an additional step that the *Sanner* plaintiffs' theory did not require; Ocean View contends that defendants' trading on the LME affected the COMEX which in turn affect the cash market for copper. The *Sanner* plaintiffs alleged a more direct relationship: defendants' manipulation of future contracts on the Chicago board of Trade affected the soybean cash market. Moreover, in this Circuit, courts consistently have held that in cases involving commodity exchange markets, only those who actually participate in the same market as the defendant have standing under the Clayton Act. See, e.g., *de Atucha*, 608 F. Supp. 510 (S.D.N.Y. 1985) (holding standing did not exist where plaintiff traded in different market than defendant); *Pollock v. Citrus Assoc. of the N.Y. Cotton Exch.*, 512 F. Supp. 711 (S.D.N.Y. 1981) (finding plaintiffs who traded in orange juice futures market had standing to sue defendants who allegedly conspired on same market); *Strax v. Commodity Exch., Inc.*, 524 F. Supp. 936 (S.D.N.Y. 1981) (holding plaintiffs who traded in same [*18] market as defendants had standing to sue for antitrust behavior). For these reasons I do not find *Sanner* controlling.

Plaintiff does allege that although defendants operated in the futures market, they intended to affect adversely the cash market. (See Amended Compl., P 42). Although this buttresses plaintiff's antitrust claim, it is insufficient to render plaintiff's claim cognizable under the Clayton Act. See *Associated Gen. Contractors*, 459 U.S. at 545; *103 S. Ct. at 912* (dismissing plaintiff's complaint despite that plaintiff claimed defendant intended it harm).

Ocean View does make one reference to defendants' transactions on the cash market. Plaintiff alleges that Defendants Sumitomo and Global entered into a series of contracts "for the purchase and sale of physical copper which contained unusual minimum price and price participation provisions." (Amended Compl., P 27b). However, beyond asserting that these transactions gave the appearance of an increase demand for copper, plaintiff does not allege how the contracts caused it harm.

In *Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242 (S.D.N.Y. 1997), plaintiff [*19] consumers alleged that a conspiracy between New Balance, an athletic footwear manufacturer, and several retail shoe dealers caused them harm. The plaintiff class included consumers who purchased New Balance shoes but not from the allegedly conspiring retailers. Plaintiffs contended that all New Balance purchasers were injured by the alleged price-fixing "because the conspiracy, if successful, stifled price competition for, and raised the price of, all New Balance shoes." *Id. at 245.* The Court held that the plaintiff class did not have standing under the Clayton Act. In so holding, the Court reasoned that the alleged injury at best was an indirect result of the general price and could have been caused by independent factors. See *id. at 246-47.*

Similar to the *Gross* plaintiffs, Ocean View does not allege that it purchased copper from either Sumitomo or Global. Nor does Ocean View allege that it purchased the copper subject to the unusual contracts between defendants

Sumitomo and Global. Rather, Ocean View alleges that the contracts inflated the price of copper generally. Harm from general price increases, as exhibited in *Gross*, is not actionable. [*20] ³ See *id.*

Additionally, plaintiff's claim based on the alleged unconventional transactions in the cash market would fail the *Associated General Contractor* five-factor test. As with defendants' futures market conspiracy, plaintiff satisfies the first factor. Accepting [*21] as true plaintiff's allegations, "but for" defendants' allegedly illegal behavior on the cash market, the price for copper on the cash market paid by plaintiff would not have been inflated. The second factor also is in plaintiff's favor. As explained above, Congress enacted the antitrust laws "to assure customers the benefit of price competition" and to protect "the economic freedom of participants in the relevant market." *Associated Gen. Contractors, 459 U.S. at 538, 103 S. Ct. at 908*. In the present case, plaintiff is a consumer in the relevant market, namely the copper cash market. The other factors, however, suggest that plaintiff's claim is not cognizable under the Clayton Act.

First, the injury suffered by plaintiff is not a direct result of defendants' contracts. Rather, it is an indirect result of a general price increase caused by the copper contracts between defendants. See *Gross, 955 F. Supp. at 246-47*. Additionally, there may be intervening causative factors rendering attenuated the link between defendants' conduct and plaintiff's injury. See *id. at 247*. Considering the third factor, there are more direct victims than [*22] plaintiff, such as those who purchased copper directly from the defendants or those who purchased the copper that was subject to the unusual contracts. See *id.* Finally, the determination of damages would be complex because plaintiff would have to show what portion of the inflated copper price was a result of defendants' conspiracy and not the result of some other factor. See *id. at 246*. Considering the five factors in total, plaintiff's claim based on defendants' cash-market copper contracts should be dismissed.

Moreover, the corner stone of Ocean View's amended complaint is defendants' manipulation of the LME futures market, not the United States cash market. In its Memorandum of Law in Opposition to the Sumitomo Defendants' Motion to Dismiss, plaintiff fails to discuss the alleged cash transaction between Sumitomo and Global. Rather, it states that "Sumitomo acted principally on the [LME] and that its action were coordinated with other LME participants." (Plaintiff's Memorandum at 1). Indeed, plaintiff acknowledges that in order to succeed in this case, it must show the causal link between the LME futures market and the copper cash market. (See *id. at [*23]* 4). And, as explained above, this claim is too attenuated to afford Ocean View standing under the Clayton Act.

As for plaintiff's claims under state law, I dismiss this action as well since Rhode Island's antitrust statute expressly provides that it "shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes . . ." *R.I. Gen. Laws § 6-36-2(b)* (1998).

III. The Amended Complaint is Dismissed with Respect to all the Defendants

As mentioned above, several of the named defendants filed motions to dismiss the amended complaint. Only defendants Sumitomo and Global raised the issue of standing. Standing, however, affects jurisdiction, and therefore the Court must consider whether plaintiff has standing *sua sponte*. See *Ramos, et al. v. Patrician Equities Corp., et al., 765 F. Supp. 1196, 1199 (S.D.N.Y. 1991)*. Hence, the amended complaint is dismissed as to all defendants.

Conclusion

³ I do note that courts in this circuit have found standing for plaintiffs who trade in the same exchange market as defendants but who do not allege that they interacted directly with defendants. See, e.g., *Strax, 524 F. Supp. at 938-40*. These courts explain that application of the antitrust laws to the exchange system would be precluded if plaintiffs were required to allege direct interaction with defendants since "it is impossible to show that a particular purchaser bought from a particular seller in such a context." *Id. at 940*. These cases are inapposite to Ocean View's claim regarding defendants' cash market transactions because in the cash market context, it can be determined who purchased from whom.

Although accepting as true all the facts alleged in the complaint plaintiff suffered an injury due to defendants' unlawful actions, plaintiff does not have standing under the Clayton Act. "Congress did not intend the antitrust laws to provide [*24] a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated Gen. Contractors, 459 U.S. at 534, 103 S. Ct. at 906* (quoting *Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14, 92 S. Ct. 885, 891 n.14, 31 L. Ed. 2d 184 (1972)*). The antitrust laws are not designed to provide a remedy for those, such as plaintiff in this case, whose harm is related indirectly to anti-competitive behavior and whose damages are too speculative. Accordingly, the amended complaint is dismissed. The Clerk of the Court shall mark this action "closed" and all pending motions denied as moot.

SO ORDERED:

DATED: New York, New York

December 15, 1999

LORETTA A. PRESKA, U.S.D.J.

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Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.

United States Court of Appeals for the Eleventh Circuit

December 20, 1999, Decided ; December 20, 1999, Filed

No. 98-2498.

Reporter

198 F.3d 823 *; 1999 U.S. App. LEXIS 32873 **; 1999-2 Trade Cas. (CCH) P72,738; 13 Fla. L. Weekly Fed. C 257

MORTON'S MARKET, INC.; J & J Produce and Deli, Inc., Plaintiffs-Appellants, v. GUSTAFSON'S DAIRY, INC., Defendant, Borden, Inc.; T.G. Lee Foods, Inc., et al., Defendants-Appellees.

Subsequent History: [\[**1\]](#) Correction Order of May 5, 2000, Reported at: [2000 U.S. App. LEXIS 8953](#).

Certiorari Denied May 22, 2000, Reported at: [2000 U.S. LEXIS 3442](#).

Prior History: Appeals from the United States District Court for the Middle District of Florida. (Nos. 93-1077-CIV-T-23b, 93-1264-CIV-23A, 94-1437-CIV-T23A, 95-35-CIV-23B). DISTRICT JUDGE: STEVEN D. MERRYDAY.

Disposition: AFFIRM IN PART, REVERSE IN PART and REMAND.

Core Terms

Dairies, conspiracy, price-fixing, milk, conspirator, notice, withdrawal, statute of limitations, tolled, diligence, limitations period, bids, bid-rigging, antitrust, summary judgment, fraudulent concealment, district court, investigate, prices, private plaintiff, rigging, tolling statute, plaintiffs', proceedings, concealed, damages, limitations, wholesale, lawsuit, matter of law

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

[**HN1**](#) **[] Antitrust & Trade Law, Clayton Act**

Under the antitrust laws, a cause of action accrues and the statute of limitations begins to run when a defendant commits an act that injures the plaintiffs' business.

Antitrust & Trade Law > Clayton Act > General Overview

198 F.3d 823, *823LÁ1999 U.S. App. LEXIS 32873, **1

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN2 [down] Antitrust & Trade Law, Clayton Act

An antitrust plaintiff must file his claim within four years following defendant's injurious act. [15 U.S.C.S. § 15\(b\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN3 [down] Antitrust & Trade Law, Clayton Act

Suit may be brought more than four years after the events that initially created the antitrust cause of action only if the action is commenced within four years after the defendant commits (1) an overt act in furtherance of the antitrust conspiracy or (2) an act that by its very nature constitutes a continuing antitrust violation.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN4 [down] Antitrust & Trade Law, Clayton Act

An act constitutes a "continuing violation" of antitrust laws if it injures the plaintiff over a period of time. Even though the illegal act occurs at a specific point in time, if it inflicts "continuing and accumulating harm" on a plaintiff, an antitrust violation occurs each time the plaintiff is injured by the act.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN5 [down] Antitrust & Trade Law, Clayton Act

Antitrust law provides that, in the case of a "continuing violation," say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

Governments > Legislation > Statute of Limitations > General Overview

HN6 [down] Legislation, Statute of Limitations

The commencement of the statute of limitations is a question of fact. It cannot be determined upon motion for summary judgment if there is a genuine question as to when it began to run.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN7 Conspiracy, Elements

Where there is evidence of the continuing nature of an agreement to eliminate competition, absent an affirmative showing of the termination of that agreement, the conspiracy must be presumed to have continued.

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

HN8 Public Enforcement, US Department of Justice Actions

See [15 U.S.C.S. § 16\(i\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN9 Antitrust & Trade Law, Clayton Act

[15 U.S.C.S. § 16\(i\)](#) applies if there is a "real relationship" between the government proceeding and the subsequent private actions. Generally, courts look for this relationship by comparing the allegations of the two complaints.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN10 Antitrust & Trade Law, Clayton Act

[15 U.S.C.S. § 16\(i\)](#) applies to toll the limitations period during the pendency of the government proceeding even when the subsequent private plaintiff claims a different statutory violation.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

[HN11](#)[] Antitrust & Trade Law, Clayton Act

[15 U.S.C.S. § 16\(i\)](#) applies even if, after the government proceeding, the private plaintiff alleges that the defendants used different means to achieve different objectives so long as there is a real relationship between the activities complained of in each proceeding. The conspiratorial acts alleged by the private plaintiff must be intertwined with and fundamentally the same as those alleged in the government action. If there is a significant, although incomplete, overlap of subject matter, the statute is tolled even as to the differences.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

[HN12](#)[] Antitrust & Trade Law, Clayton Act

[15 U.S.C.S. § 16\(i\)](#) applies if the private plaintiffs allege substantially the same sort of conspiracy against a similar cast of characters who relied at least in part on the same means for effecting their conspiracy.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

[HN13](#)[] Antitrust & Trade Law, Clayton Act

Reliance by the private plaintiff on the same documentary and oral proof to establish the conspiracy bolsters the decision that [15 U.S.C.S. § 16\(i\)](#) applies.

Governments > Legislation > Statute of Limitations > General Overview

[HN14](#)[] Legislation, Statute of Limitations

[15 U.S.C.S. § 16\(i\)](#) applies when the private plaintiff alleges a conspiracy that includes the objectives, means, time span, and geographic scope of the conspiracy alleged in the government suit, and the evidence adduced in the government suit is of practical assistance to plaintiffs in proving their own complaint.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

[HN15](#)[] Tolling of Statute of Limitations, Fraud

Fraudulent concealment tolls the Clayton Act's statute of limitations.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Antitrust & Trade Law > Clayton Act > General Overview

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

Governments > Legislation > Statute of Limitations > General Overview

HN16 [blue icon] Tolling of Statute of Limitations, Fraud

To avail themselves of tolling of the Clayton Act's statute of limitations because of fraudulent concealment, plaintiffs have the burden of proving at trial that the defendants concealed the conduct complained of, and that plaintiffs failed, despite the exercise of due diligence on their part, to discover the facts that form the basis of their claim.

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

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

HN17 [blue icon] Burdens of Proof, Movant Persuasion & Proof

On motion for summary judgment, the moving party always bears the initial burden of pointing out the undisputed facts which entitle it to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Governments > Legislation > Statute of Limitations > General Overview

HN18 [blue icon] Legislation, Statute of Limitations

The issue of when a plaintiff is on "notice" of his claim is a question of fact for the jury.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Governments > Legislation > Statute of Limitations > General Overview

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

HN19 [blue icon] Entitlement as Matter of Law, Appropriateness

As a general rule, the issue of when a plaintiff in the exercise of due diligence should have known of the basis for his claims is not an appropriate question for summary judgment.

Governments > Legislation > Statute of Limitations > General Overview

HN20 [blue icon] Legislation, Statute of Limitations

Under inquiry notice, when defendants are guilty of concealing their anti-competitive activities, the plaintiff is not charged with knowledge of his claim until he should have discovered the basis for his claims.

Governments > Legislation > Statute of Limitations > General Overview

[HN21](#) [blue icon] **Legislation, Statute of Limitations**

Although a plaintiff has an obligation of diligence, the plaintiff need not show the actual exercise of diligence in order to "toll" the limitations period. Rather in deciding whether the statute should be tolled, it must be determined whether a "reasonably diligent plaintiff" would have discovered the fraud.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

[HN22](#) [blue icon] **Concerted Action, Civil Conspiracy**

The law recognizes that a conspirator may withdraw from the conspiracy.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

[HN23](#) [blue icon] **Conspiracy, Elements**

Withdrawal marks a conspirator's disavowal or abandonment of the conspiratorial agreement.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

[HN24](#) [blue icon] **Conspiracy, Elements**

A conspirator who withdraws from the conspiracy is no longer a member of the conspiracy and the subsequent acts of the conspirators usually do not bind him. The ex-conspirator remains liable, however, for his previous agreement and all damages inflicted by the acts he committed prior to his withdrawal.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Governments > Legislation > Statute of Limitations > General Overview

[HN25](#) [blue icon] **Inchoate Crimes, Conspiracy**

Withdrawal is not a complete defense to the charge of conspiracy. It becomes a complete defense only when coupled with the defense of the statute of limitations. The statute of limitations begins to run upon the conspirator's withdrawal from the conspiracy. If he is not sued within the limitations period, all claims against him are time-barred. He cannot be held liable for the acts of the other conspirators after he withdrew because his withdrawal effectively ended his membership in the conspiracy. Nor can he be sued for the damages caused by his previous participation because the limitations period has elapsed. Thus, the interaction of the two defenses of withdrawal and statute of limitations operates to shield the ex-conspirator of all liability.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

[HN26](#) [blue icon] **Conspiracy, Elements**

Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

[HN27](#) [blue icon] **Conspiracy, Elements**

Although mere cessation of activity is not sufficient to establish withdrawal, a conspirator may avoid further liability for his actions if he affirmatively and completely disassociates himself from the continued operation of the conspiracy.

Criminal Law & Procedure > Defenses > Abandonment & Withdrawal

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

[HN28](#) [blue icon] **Defenses, Abandonment & Withdrawal**

A conspirator must demonstrate that he undertook affirmative steps, inconsistent with the objects of the conspiracy, to disavow or to defeat the conspiratorial objectives. Merely ending one's activity in a conspiracy may not constitute withdrawal. The defense of withdrawal is not available to one who merely ceases to participate and does not affirmatively withdraw.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

[HN29](#) [blue icon] **Inchoate Crimes, Conspiracy**

In the context of a business conspiracy, one in which the conspiracy is carried out through the regular activities of an otherwise legitimate business enterprise, the law has given effect to a conspirator's abandonment of the

conspiracy only where the conspirator can demonstrate that he retired from the business, severed all ties to the business, and deprived the remaining conspirator group of the services which he provided to the conspiracy.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN30 [blue icon] **Inchoate Crimes, Conspiracy**

In order to effectively withdraw, it is not necessary for the conspirator to disclose the illegal scheme to the authorities. Nor is it necessary that the conspirator notify each co-conspirator of the abandonment.

Counsel: ATTORNEY(S) FOR APPELLANT(S) (J&J): Joel C. Meredith, Daniel B. Allanoff, Philadelphia, PA.

ATTORNEY(S) FOR APPELLANT(S) (Morton's): Leonard Egan, William C. Buckhold, Washington, DC.

ATTORNEY(S) FOR APPELLANT(S) (J&J): Edith F. Canter, Michael J. Freed, Chicago, IL.

ATTORNEY(S) FOR APPELLEE(S) (Gustafson's): John A. DeVault, Jacksonville, FL.

ATTORNEY(S) FOR APPELLEE(S) (Borden): Morris Weinberg, Tampa, FL. Teresa T. Bonder, Atlanta, GA.

ATTORNEY(S) FOR APPELLEE(S) (Pet): Carey DeDyn, Patricia B. Cunningham, Atlanta, GA.

ATTORNEY(S) FOR APPELLEE(S) [**2] (Flav-Rich): Ronald Gaffney, Louisville, KY. David Hanlon, Tampa. Teresa T. Bonder, Atlanta, GA.

ATTORNEY(S) FOR APPELLEE(S) (Southland): William McGowen, William Cary. Wright, D. Matthew Allen, Tampa, FL.

ATTORNEY(S) FOR APPELLEE(S) (TG Lee): Douglas Titus, Jr., Tampa, FL.

Judges: Before ANDERSON, Chief Judge, HILL, Senior Circuit Judge, and COOK *, Senior District Judge.

Opinion by: HILL

Opinion

[*826] HILL, Senior Circuit Judge:

Plaintiffs brought these consolidated antitrust actions against most of the large dairy producers in Florida. The district court held the actions time-barred and granted summary judgment for the defendants. Both plaintiffs appeal.

I.

J & J Produce & Deli, Inc. and Morton's Market, Inc. are retailers of milk. Gustafson's Dairy, Inc., Borden, Inc., Pet, Inc., Flav-O-Rich, Inc., the [**3] Southland Corporation, T.G. Lee Foods, Inc., and McArthur Dairy, Inc. (the Dairies) engaged in the production and sale of milk in Florida. The parties agree on the following facts.

Beginning in the early 1970s, the Dairies conspired and combined to rig their bids for contracts to supply milk to the public school districts in Florida. The Dairies submitted artificial bids and effectively divided the school milk market among themselves.

* Honorable Julian Abele Cook, Jr., Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

In mid-1987, the United States and the State of Florida began investigating anti-competitive activities in the dairy industry. During July and August of 1987, Florida's Attorney General subpoenaed documents from and deposed employees of many dairies operating in Florida. On February 16, 1988, Florida filed a civil lawsuit against ten dairies, many individuals, and certain milk distributors. The complaint alleged that the Dairies violated federal antitrust laws. Florida also alleged that the defendants fraudulently concealed their activities by secretly conducting meetings and confining to key individuals information regarding the Dairies' efforts unreasonably to restrain trade.

The investigations, criminal charges, and civil action were reported in [\[**4\]](#) February 1988, by the major newspapers in Florida. The newspaper articles discussed the Dairies' agreements among themselves to rig bids for school milk and revealed that the federal government was also scrutinizing the industry. Edmund Morton, the president of Morton's Market, read at least some of these articles. The principal of J & J Produce and Deli heard from her spouse that Florida had sued the Dairies. The plaintiffs did not, however, undertake any investigation into whether the Dairies were also fixing the price of milk to retailers.

During late 1987 and early 1988, the United States Department of Justice charged the Dairies and some of their employees with criminal antitrust violations. Several individuals pled guilty to rigging bids for school milk contracts. Between 1990 and 1992, all of the Dairies, except Gustafson's, pled guilty to conspiring to rig bids for school milk contracts. Information regarding price-fixing of wholesale milk prices was contained in each of these guilty pleas, the first of which occurred in December of 1990. Gustafson's was charged with price-fixing in May of 1992, and pled guilty in August to conspiring to fix the prices of milk in [\[*827\]](#) Florida and [\[**5\]](#) Georgia between the early 1970s through at least August of 1988.

On July 1, 1993, subsequent to the government proceedings, plaintiffs each filed an antitrust action under Section 4 of the Clayton Act, [15 U.S.C. § 15](#) (the Act), on behalf of itself and a class of direct purchasers of dairy products in Florida. Both actions assert that the Dairies fixed, raised and maintained the wholesale prices of dairy products to commercial customers by collusive agreements in violation of the Sherman Act, [15 U.S.C. § 1](#).

The Dairies moved for summary judgment, contending that these actions are time-barred by the Act's four-year statute of limitations. [15 U.S.C. § 15\(b\)](#). They assert that their price-fixing activities, if any, terminated in 1987 or 1988, with their school bid-rigging prosecutions, more than four years before these actions were filed in 1993. Plaintiffs countered that the price-fixing conspiracy continued until 1992, when Gustafson's pled guilty to fixing the price of milk in Florida. Plaintiffs also contended that the statute of limitations was tolled in this case by the Dairies' fraudulent concealment of their price-fixing [\[**6\]](#) activities,¹ and by the Clayton Act itself, which tolls the running of the statute during government proceedings concerning related violations. [15 U.S.C. § 16\(i\)](#). Additionally, Pet and Southland claimed that they withdrew from the alleged conspiracy in 1985 and 1988 respectively, and that plaintiffs did not timely file as to them.

[\[**7\]](#) The district court granted the Dairies' motions for summary judgment. We review this grant of summary judgment *de novo* applying the same standards as the district court. [Industrial Partners, Ltd. v. CSX Transp., Inc. 974 F.2d 153 \(11th Cir.1992\)](#). For the following reasons, we reverse those judgments.

II.

There has been considerable confusion in this case over the application of the statute of limitations and the impact of equitable or statutory tolling of it. Some of this confusion has been created by the failure of both parties to

¹ The district judge who originally presided in the J & J Produce case denied Gustafson's motion to dismiss on the statute of limitations issue, specifically holding that the price-fixing conspiracy "had been continuous at least until 1992" and that plaintiff's fraudulent concealment claim "has merit." In December of 1994, plaintiffs in both cases settled with Gustafson's. Upon court approval of the settlement, Gustafson's was to pay \$ 1.5 million to the class and provide cooperation in the action against the remaining dairies. In January, plaintiffs moved for approval of the settlement, but, before it could be granted, the J & J Produce case was transferred to the district judge who had the Morton's Market case, and the two cases were consolidated. After much delay, on October 30, 1997, the district judge, without oral argument, granted the Dairies' motions for summary judgment on the statute of limitations issue. Almost a year later, the district court granted preliminary approval of the settlement with Gustafson's.

distinguish between the accrual of an antitrust cause of action and the scope of damages available in such an action. We cannot know whether plaintiffs' actions are time-barred unless we know when the statute began to run. Once we know when the statute began to run, we can determine whether and how it was tolled in this case and what impact that tolling has on the scope of plaintiffs' damages.

A. The Commencement of the Statute of Limitations

HN1 Under the antitrust laws, "a cause of action accrues and the statute [of limitations] begins to run when a defendant commits an act that injures the plaintiffs' business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971). [**8] **HN2** A plaintiff must file his claim within four years following defendant's injurious act. *15 U.S.C. § 15(b)*. **HN3** Suit may be brought more than four years after the events that initially created the cause of action only if the action is commenced within four years [*828] after the defendant commits (1) an overt act in furtherance of the antitrust conspiracy or (2) an act that by its very nature constitutes a "continuing antitrust violation." *Zenith*, 401 U.S. at 338, 91 S. Ct. 795.²

HN4 An act constitutes a "continuing violation," if it injures the plaintiff over a period of time. Even though the illegal act occurs at a specific point in time, if it inflicts "continuing and accumulating harm" on a plaintiff, an antitrust violation occurs each time the plaintiff is injured by the act. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n. 15, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968). [**9] For example, when sellers conspire to fix the price of a product, each time a customer purchases that product at the artificially inflated price, an antitrust violation occurs and a cause of action accrues. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997). As a cause of action accrues

with each sale, the statute of limitations begins to run anew.

HN5 **Antitrust law** provides that, in the case of a "continuing violation," say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," e.g., each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."

521 U.S. at 189, 117 S. Ct. 1984 (quoting 2 Areeda, P 338b, at 145).

Plaintiffs allege such a continuing price-fixing conspiracy. Plaintiffs claim that the Dairies conspired to fix the retail prices of milk in Florida over a twenty-year period, and that sales at these fixed prices continued at least until 1992, when Gustafson's [**10] pled guilty to price-fixing. Thus, even if there were no price-fixing conversations after 1987, as the Dairies contend,³ if plaintiffs purchased milk at a fixed price after that date, the purchase would constitute an overt act that injured it. A cause of action would accrue with each purchase and a new statutory period would begin to run. See *Zenith*, 401 U.S. at 338, 91 S. Ct. 795.

HN6 The commencement of the statute of limitations is a question of fact. *In re Beef Indust. Antitrust Litig.*, 600 F.2d 1148, 1169-70 (5th Cir. 1979). It cannot be determined upon motion for summary judgment if there is a genuine question as to when it began to run. *Id.* Upon motion for summary judgment, the district court's task was simply [**11] to determine whether a genuine question was presented for trial. The district court held there was not. The court found that "the record reveals that any price-fixing activity occurred concurrently with the bid-rigging"⁴

² Of course, suit may also be brought more than four years after accrual of the antitrust cause of action if the statute is tolled for some reason.

³ The district court also found that there were none, characterizing evidence of a price-fixing conversation in 1988 as "isolated and ambiguous." In weighing the evidence, the district court found a fact against plaintiffs in violation of *Rule 56(c), Fed.R.Civ.P.*

⁴ The court, however, did not point out what this evidence was.

and "the record lacks any competent evidence that the defendants unlawfully contrived the prices they charged commercial customers after 1987."

Even if this were so, these facts would not require a finding that these actions are time-barred. There is evidence in this record, including the Dairies' bid-rigging guilty pleas and Gustafson's price-fixing guilty plea and the factual bases therefor, from which a jury could find that the Dairies participated in a price-fixing conspiracy which resulted in a series of unlawfully high priced sales to plaintiffs over a period of years, continuing into the limitations period. [HN7](#) Where there is evidence of the continuing nature of an agreement to eliminate competition, absent an [\[*829\]](#) affirmative [\[**12\]](#) showing of the termination of that agreement, the conspiracy must be presumed to have continued. [United States v. Portsmouth Paving Corp., 694 F.2d 312, 318 \(4th Cir.1982\)](#). The Dairies do not point to any evidence that they reduced their artificially high prices or returned to competitive pricing prior to 1992. Therefore, whether the conspiracy continued into the limitations period by virtue of continued sales at fixed prices is a genuine question for trial.⁵ Should the jury find that plaintiffs purchased milk at fixed prices beyond 1989, even though plaintiffs could have sued in the 1970s, they were equally entitled to sue in 1993. [Hanover Shoe, 392 U.S. at 502, 88 S. Ct. 2224.](#)

If at trial, however, the jury finds that this conspiracy did not continue into the four-year limitations period immediately preceding July 1, 1993, when plaintiffs filed these claims, then these actions [\[**13\]](#) are time-barred unless the statute was tolled.

B. *Tolling the Statute of Limitations*

Plaintiffs advance both statutory and equitable grounds for tolling the statute of limitations in this case. We consider each in turn.

1. *Statutory Tolling*

Congress has provided for the tolling of statutes of limitations in private antitrust actions which are based in some part on prior government proceedings. [HN8](#) [15 U.S.C. § 16\(i\)](#) provides:

(i) Suspension of limitations. Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws ... the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

The government commenced its antitrust proceedings against these defendants on March 1, 1990. Those proceedings concluded on August 7, 1992, when Gustafson's pled guilty to price-fixing.⁶ Therefore, should it be found that the statute of limitations began to run in 1988, as [\[**14\]](#) the Dairies contend, if [Section 16\(i\)](#) applies, it tolled the statute in 1990, prior to its expiration, and these actions were timely-filed in 1993 (within one year of the termination of the last proceeding in 1992).⁷

The district court held, however, that [Section 16\(i\)](#) does not apply. The district court based its conclusion on its observation that "[bid-rigging] is not the same violation as price-fixing," and its assumption [\[**15\]](#) that such a "direct correlation" between the two causes of action is required. Plaintiffs contend this was error.

⁵ Of course, after the development of the evidence, the jury will ultimately determine these facts.

⁶ Defendants concede plaintiffs may tack together the periods during which the statute was tolled by the various government proceedings against each of these defendants.

⁷ This issue is only relevant to plaintiffs' claims against T.G. Lee Foods, Inc., Borden, Inc., Flav-O-Rich, Inc., and the Southland Corporation. Gustafson's pled guilty to fixing commercial prices so the tolling effect of [Section 16\(i\)](#) is not at issue. Plaintiffs do not contend that [Section 16\(i\)](#) tolls the statute of limitations with respect to Pet Inc. or McArthur Dairy, Inc., both of which were not sued until 1994.

HN9 [↑] [Section 16\(i\)](#) applies if there is a "real relationship" between the government proceeding and the subsequent private actions. [Leh v. General Petroleum Corp., 382 U.S. 54, 65-66, 86 S. Ct. 203, 15 L. Ed. 2d 134 \(1965\)](#).⁸ Generally, we look [*830] for this relationship by comparing the allegations of the two complaints. *Id.* In *Leh*, the Supreme Court was asked whether [Section 16\(i\)](#) applies when the allegations in the subsequent private action are different with respect to time period, geographic scope, and alleged wrongdoers. The Court held that it does, minimizing those distinctions:

The private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants. Rather, effect must be given to the broad terms of the statute itself--"based in whole or in part on any matter complained of"--read in light of Congress' belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. Doubtlessly, care must be exercised to insure [**16] that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief.

Id. The Court made very clear that the courts must not allow a legitimate concern that invocation of [Section 16\(i\)](#) be made in good faith to lead them into a miserly or stingy construction of the statutory language. *Id.*

In a companion [**17] case, [Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 85 S. Ct. 1473, 14 L. Ed. 2d 405 \(1965\)](#), the Court extended *Leh* to hold that **HN10** [↑] [Section 16\(i\)](#) applies to toll the limitations period during the pendency of the government proceeding even when the subsequent private plaintiff claims a different statutory violation.

HN11 [↑] [Section 16\(i\)](#) applies, therefore, even if, after the government proceeding, the private plaintiff alleges that the defendants used different means to achieve different objectives so long as there is a real relationship between the activities complained of in each proceeding. *Id.*; [Leh, 382 U.S. at 59-60, 86 S. Ct. 203](#). The conspiratorial acts alleged by the private plaintiff must be "intertwined with and fundamentally the same" as those alleged in the government action. [Maricopa County v. American Pipe and Const. Co., 303 F. Supp. 77 \(D.Ariz.1969\)](#). If there is a significant, although incomplete, overlap of subject matter, the statute is tolled even as to the differences. [Leh, 382 U.S. at 54, 86 S. Ct. 203](#).

The Tenth Circuit has found this standard to be met where the private [**18] action alleges similarity in proof, means of carrying out the conspiracy, and subject matter. [Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 570 \(10th Cir.1961\)](#). **HN12** [↑] [Section 16\(i\)](#) applies, the court held, if the private plaintiffs allege substantially the same sort of conspiracy against a similar cast of characters who relied at least in part on the same means for effecting their conspiracy. *Id.* **HN13** [↑] Reliance by the private plaintiff on the same documentary and oral proof to establish the conspiracy bolsters the decision that [Section 16\(i\)](#) applies. *Id.* Similarly, the Ninth Circuit has held that **HN14** [↑] [Section 16\(i\)](#) applies when the private plaintiff alleges a conspiracy that includes the objectives, means, time span, and geographic scope of the conspiracy alleged in the government suit, and the evidence adduced in the government suit is of practical assistance to plaintiffs in proving their own complaint. [Chipanno v. Champion Int'l Corp., 702 F.2d 827, 832 \(9th Cir.1983\)](#).

In this case, the private plaintiffs allege a conspiracy that is similar to the government prosecution in terms of defendants, geographical scope, and time frame. There is also a [**19] "real relationship" between the objectives of both conspiracies. In both the bid-rigging and price-fixing conspiracies, the Dairies engaged in collusive behavior designed to eliminate competition [*831] in the wholesale marketplace in Florida during the 1970s, 1980s, and possibly into the 1990s.

⁸ It is at this point that the parties exchange positions. Plaintiffs, who argued that they didn't learn about the price-fixing because price-fixing is nothing like bid-rigging, now assert that "the link between the conspirators' school milk bid-rigging and commercial milk price-fixing is manifest." The Dairies, who contended that bid-rigging was just one form of price-fixing, and that the bid-rigging publicity notified plaintiffs that the Dairies were fixing prices, now argue that the bid-rigging charges involved "an entirely different cause of action" from the price-fixing claims.

The only significant difference between the allegations of the government prosecution and these actions concern the means involved--bid-rigging and price-fixing. Their purpose was the same--to eliminate competition in the wholesale marketplace in Florida. In rigging their bids to school districts, the Dairies sought to divide the wholesale market to schools amongst themselves. Similarly, in fixing their prices to plaintiffs, the Dairies sought to divide the wholesale market to groceries amongst themselves. Although bid-rigging and price-fixing are not the same means, there appears to be a "real relation" between them in the context of this case.⁹

[**20] This same conclusion was reached in a similar set of circumstances in Arizona. In that case, the federal government brought both criminal and civil actions against several Arizona dairies, including one of the defendants in this case, alleging a wholesale price-fixing conspiracy. Subsequently, the state of Arizona and a private plaintiff sued the dairies as well as several grocery stores alleging a retail price-fixing conspiracy. *In re Arizona Dairy Products Litig.*, 1984 U.S. Dist. LEXIS 22199, 1984-2 Trade Cas. (CCH) P66,284 (D. Ariz 1984). In holding that the retail price-fixing conspiracy allegations were based in part on matters complained of by the federal government and bore a "real relation" to the prior proceeding, the court disregarded the difference in the markets. Instead, the court concluded that the conspiracy alleged by the private plaintiff was "at least in part the same conspiracy as was the object of the Government's suit." *Id.*

We too believe that these actions bear a real relation to the prior government proceedings because they are, at least, a part of the Dairies' conspiracy to avoid competition in their sales of milk in Florida during this time period. The Dairies are [**21] alleged, just as in the government's proceedings, to have eliminated competition among themselves by agreeing to divide the wholesale milk market instead of competing for it through the vehicle of price. In the government's proceedings, the Dairies eliminated price competition and divided the market by agreeing on the price of a successful bid to a school district. In these actions, they are alleged to have eliminated price competition and divided the market by agreeing on the price of milk to retailers. Accordingly, these latter price-fixing activities bear a real relationship to the prior price-fixing activities.

In addition, there may be substantial reliance by the plaintiffs on the oral and documentary proof contained in the government's cases because the Dairies' plea agreements all contain uncontradicted statements that they engaged in commercial price-fixing. These statements provide an evidentiary basis for plaintiffs' present claims.

Therefore, because these actions are based in part on the government's proceedings, both factually and in the proof on which these plaintiffs will rely, we conclude that *Section 16(i)* tolled the statute of limitations on plaintiffs' claims from [**22] March 1, 1990 until August 7, 1992. These claims, therefore, were timely filed.¹⁰ Even [*832] though they timely-filed, however, plaintiffs may recover damages for only the four-year period immediately preceding the filing of their claims unless the statute was tolled for some other reason prior to that time. *Zenith*, 401 U.S. at 338, 91 S. Ct. 795. Plaintiffs assert there was another reason.

2. Equitable Tolling by Fraudulent Concealment

HN15 [↑] Fraudulent concealment also tolls the Clayton Act's statute of limitations. *In re Beef Indust. Litig.*, 600 F.2d at 1169. If the Dairies fraudulently concealed their price-fixing activities beginning in the 1970s, [**23] then

⁹ The Dairies cite only two cases in support of their contention that there is no real relationship between their bid-rigging activities and their price-fixing activities. Neither case is helpful. In *Peto v. Madison Square Garden Corp.*, 384 F.2d 682, 683 (2d Cir.1967), a conspiracy to monopolize boxing was not related to a conspiracy to monopolize hockey, especially since the "only similarity between the two actions is found in the fact that some of the defendants are the same." In *Charley's Tour & Transp., Inc. v. Interisland Resorts, Ltd.*, 618 F. Supp. 84, 86 (D.Haw. 1985), Section (i) did not apply because the two complaints alleged different markets, different defendants, different means of proof and "wholly different actions on the part of the defendants as the basis for establishing liability."

¹⁰ This holding does not extend to Pet and McArthur. As to Pet's liability, see Section II. C. McArthur may be liable only on a theory of continuing conspiracy or fraudulent concealment, and then only if it was sued within four years of either the last purchase at a fixed price or plaintiffs' discovery of their claim against it.

the statute of limitations was tolled during the time of the concealment. If so, plaintiffs may recover damages for all the years during which the conspiracy was fraudulently concealed and the statute was tolled. *Id.*

HN16[¹] To avail themselves of this doctrine, plaintiffs have the burden of proving at trial that "the defendants concealed the conduct complained of, and that [plaintiffs] failed, despite the exercise of due diligence on [their] part, to discover the facts that form the basis of [their] claim." *Id.*

HN17[¹] On motion for summary judgment, however, the moving party always bears the initial burden of pointing out the undisputed facts which entitle it to judgment as a matter of law. *Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In re Beef Indust. Litig., 600 F.2d at 1170.* To be entitled to judgment on this issue, then, the Dairies must show that plaintiffs either knew of their claim or had notice sufficient to prompt them to investigate and that, had they done so diligently, they would have discovered the basis for their claims. If the Dairies point to such facts in the record, [^{**24}] then plaintiffs must demonstrate that these facts are in dispute. *Id.*

In determining whether there is an issue of fact for trial regarding plaintiffs claim of fraudulent concealment, we must resolve all doubt against the moving party. *Celotex, 477 U.S. at 323, 106 S. Ct. 2548.* This standard is applied with particular stringency where it is claimed that the defendant's conduct prevented the plaintiff from discovering his claim prior to the expiration of the limitations period. *In re Carbon Dioxide Antitrust Litig., 1993 U.S. Dist. LEXIS 19898, 1993-2 Trade Cas. (CCH) P70,436 at 5 (M.D.Fla.1993).*

In fact, we have held, along with a majority of the circuits, that **HN18**[¹] the issue of when a plaintiff is on "notice" of his claim is a question of fact for the jury. *Ballew v. A.H. Robins Co., 688 F.2d 1325 (11th Cir.1982); Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1387 (10th Cir.1985); Lundy v. Union Carbide Corp., 695 F.2d 394 (9th Cir.1982); Renfroe v. Eli Lilly & Co., 686 F.2d 642 (8th Cir.1982).*

We have also held on numerous occasions that, **HN19**[¹] as a general rule, the issue of when a plaintiff in the exercise of due [^{**25}] diligence should have known of the basis for his claims is not an appropriate question for summary judgment. *Smith v. Duff and Phelps, Inc., 891 F.2d 1567, 1572 (11th Cir.1990)* (due diligence is jury issue); *Durham v. Business Management Assocs., 847 F.2d 1505, 1509 (11th Cir.1988)* (factual issue of due diligence involves state of mind not resolvable by summary judgment).

In order to be entitled to judgment as a matter of law on these issues, then, the Dairies have the burden, as the moving parties, to point to undisputed facts in the record which demonstrate conclusively that plaintiffs had notice of their claims, and, that, had they exercised reasonable diligence, they would have discovered adequate grounds for filing this antitrust lawsuit during the limitations period. *In re Beef Indust. Litig., 600 F.2d at 1171.* It is not enough for summary judgment to [^{*833}] point to facts which *might* have caused a plaintiff to inquire, or *could* have led to evidence supporting his claim. A defendant who does this has succeeded in demonstrating only that there is a jury question regarding the tolling of the statute of limitations by fraudulent [^{**26}] concealment. To award summary judgment on such a showing is error.

The grant of summary judgment in this case was such an error. The district court held that the newspaper articles regarding the Dairies' bid-rigging put plaintiffs on notice in early 1988 that "defendants were accused of acting jointly to the detriment of other substantial commercial customers," and that "had the plaintiffs exercised due diligence during the statutory period, they would have discovered most, if not all, of the facts upon which they now base their claims." The Dairies, however, have shown only that there was information in 1988 that *might* have led plaintiffs to inquire, and have made virtually no showing at all regarding what plaintiffs would have discovered had they done so. This is not enough to entitle the Dairies to summary judgment.

In holding that notice of bid-rigging constituted notice to plaintiffs of possible price-fixing, the district court resolved a question of fact against them in violation of [Rule 56](#).¹¹ The best the evidence can be said to show is that:

[27]** Mr. Morton admitted that he read several articles in *The Sarasota Herald Tribune* about a lawsuit by the Attorney General accusing Defendants in this case of a vast conspiracy to [rig the bids for] milk products sold to Florida schools. These articles were published as early as February of 1988, and Morton was aware from that time forward of *problems the dairy industry was having with the authorities*.

We know of no case, however, in which information regarding one sort of antitrust violation by a defendant has been held, as a matter of law, to constitute notice of all other possible violations. The cases cited by the Dairies for this proposition are all "same violation" cases. In these cases, widely publicized earlier investigations of *exactly the same antitrust violations* were held to constitute adequate notice to others of their possible claims. For example, in the *Beef Industry Antitrust Litigation* case, the prior publicized lawsuit "involved allegations essentially identical to those of the [present lawsuit]." [600 F.2d at 1169](#). In [Ohio ex. rel. Montgomery v. Louis Trauth Dairy, Inc., 1996 U.S. Dist. LEXIS 9176, 1996-1 Trade Cas. \(CCH\) P71,396 \(S.D.Ohio 1996\)](#), **[**28]** press reports of bid-rigging of school milk contracts in Florida put Ohio on inquiry notice regarding Ohio school milk contracts.¹² In [Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 \(6th Cir.1975\)](#), widely-publicized congressional hearings concerned the very same violations sued upon after the expiration of the limitations period by Dayco. Notice that the Dairies were rigging bids to one customer, then, supplies notice that they might be rigging bids to you and triggers a duty to inquire. [In re Beef Indust. Litig., 600 F.2d at 1171](#) ("Those who have learned of facts 'calculated to excite inquiry' must inquire"). The Dairies were not, however, selling to the plaintiffs by a bidding process.

[29] [*834]** None of these cases, however, holds that notice of one wrong by a defendant triggers a duty for potential plaintiffs to investigate all other potential wrongs the defendant might be committing, and we are unwilling to say that it does as a matter of law. Notice that sellers have come up with a method of extracting undeserved profit from the government does not, as a matter of law, supply notice to the private buyer that the sellers have come up with another method to get into his pocket. Whether notice of rigging bids to schools for milk contracts should have excited these plaintiffs to inquire about possible price-fixing as to milk retailers is a question for the jury and may ultimately depend on credibility choices.¹³

[30]** Furthermore, even if it were undisputed that plaintiffs had notice regarding the possibility that Dairies might be fixing their prices, this does not mean that plaintiffs had either actual or constructive knowledge of their claim.

The plaintiffs' knowledge of [circumstances which did or should have excited them to inquire] is not as a *matter of law* tantamount to actual or constructive knowledge of their claim. Although the statute of limitations is not tolled simply because the plaintiffs lack much of the evidence supporting their potential claim, they cannot have notice of a potential claim unless they are aware of some evidence tending to support it. The filing by others of a similar lawsuit against the same defendants may *in some circumstances* suffice to give notice, but to rule that it does so as a matter of law is to compel a person situated like these plaintiffs to file suit, on the pain of forfeiting his rights,

¹¹ Similarly, there are factual disputes on the issue of affirmative acts of concealment. One defendant's brief, for example, claims that there were no acts of concealment because the alleged false statements to customers regarding why milk prices were going up "were, in fact, true." This is a fact question that only a jury should resolve.

¹² The other cases cited by the Dairies are factually dissimilar but they also involve a plaintiff's earlier knowledge of the same wrong later sued upon. [Friedman v. Estate of Presser, 929 F.2d 1151, 1159-60 \(6th Cir.1991\)](#) (later knowledge of role of informant known to plaintiff earlier); [United Klans of America v. McGovern, 621 F.2d 152, 154 \(5th Cir.1980\)](#) (statute of limitations not tolled in action for illegal investigation where Justice Department held a press conference to announce investigation of Klan and notified Klan of investigation prior to termination of statute).

¹³ We find no inconsistency between this holding and our earlier determination that the price-fixing allegations bear a "real relationship" to the prior bid-rigging allegations. Even though there was a real relationship between the Dairies' bid-rigging activities and their price-fixing activities, the newspaper stories were not sufficient, as a matter of law, to reveal this relationship to plaintiffs.

regardless of whether his attorney believes that there is "good ground to support it." [Rule 11, F.R. Civ. P.](#) The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because that suit might well be frivolous or baseless. [\[**31\]](#)¹⁴

[In re Beef Indust. Litig., 600 F.2d at 1171](#) (citations omitted).

The Dairies "had the burden, as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit." *Id.* They did not, [\[**32\]](#) however, address this issue at all in their briefs. Their summary judgment motion refers us only to the newspaper articles and to the fact that plaintiffs did business with some of the individuals criminally charged with bid-rigging. They point to no evidence in this record suggesting that the bid-rigging investigations verified or even publicized any information regarding commercial price fixing prior to Gustafson's guilty plea in 1992. Neither do they point to evidence that plaintiffs had independent access before that time to any information, beyond the newspaper articles, that would have tended to verify their suspicions had they had any.¹⁵ In similar circumstances, we have said:

[\[*835\]](#) At best, the materials on file might support an inference that the plaintiffs would have discovered adequate support before [the expiration of the limitations period] had they been reasonably diligent. The inference, however, is not so compelling as to entitle the defendants to summary judgment. Because the defendants failed to demonstrate the absence of genuine issues of fact ... summary judgment must be reversed.

[In re Beef Indust. Litig., 600 F.2d at 1171](#).

[\[**33\]](#) Dairies' position is that such evidence is unnecessary because plaintiffs conducted no investigation.¹⁶ They contend that the doctrine of fraudulent concealment is unavailable to a plaintiff who, in fact, exercises no diligence at all.

Although there is some authority for this proposition,¹⁷ the overwhelming weight of authority treats "inquiry notice" as an objective standard.¹⁸ Under this standard, [HN20](#)[] when defendants are guilty of concealing their anti-competitive activities, the plaintiff is not charged with knowledge of his claim until he *should have* discovered the basis for his claims. [In re Beef Indust. Litig., 600 F.2d at 1171](#) (no actual or constructive notice of claim until

¹⁴ Since the publicized facts underlying the bid-rigging charges were not relevant to plaintiffs' price-fixing claims, and the court pointed to no other facts available to plaintiffs at that time, it appears that the district court's ruling was predicated on its belief that "had they filed suit at any time between February, 1988, and February, 1992, the plaintiffs could have issued subpoenas, conducted depositions, and propounded interrogatories, as they did after 1993. The plaintiffs could have then formulated the basis for their current action." Thus, the district court's suggestion in this case that plaintiffs should have "filed first and investigated later" seems contrary to [Rule 11, Fed.R.Civ.P.](#)

¹⁵ In fact, in arguing that their denials of price-fixing to the Florida Attorney General do not amount to affirmative acts of concealment because that investigation was required by law to be secret, the Dairies assert that "the information never entered the public domain."

¹⁶ Plaintiffs readily admit they did nothing to investigate their claims prior to the 1992 guilty plea by Gustafson's, because, they argue, they had no reason to suspect that they too had been victimized.

¹⁷ See [Dodds v. Cigna Securities, Inc., 12 F.3d 346, 350 \(2d Cir.1993\)](#) ("equitable tolling will stay the running of the statute of limitations only so long as the plaintiff has exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud").

¹⁸ Such a "discovery" accrual rule is commonly applied by the Circuits in securities fraud cases where the plaintiff's cause of action is held to accrue only when he reasonably should have discovered the fraud. [Klehr, 521 U.S. at 191, 117 S. Ct. 1984.](#)

plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing [**34] suit). See also [Great Rivers Coop. v. Farmland Industries, Inc., 120 F.3d 893, 896 \(8th Cir.1997\)](#) ("inquiry notice exists when the victim is aware of facts that would lead a reasonable person to investigate and consequently acquire actual knowledge of the defendant's misrepresentations"); [Maggio v. Gerard Freezer & Ice Co., 824 F.2d 123, 128 \(1st Cir.1987\)](#) (" 'storm warnings' of the possibility of fraud trigger a plaintiff's duty to investigate in a reasonably diligent manner ... [and] his cause of action is deemed to accrue on the date when he should have discovered the alleged fraud").

[**35] Furthermore, the statute of limitations is tolled until this time. [Duff and Phelps, 5 F.3d 488 at 492 n. 9.](#) See also [Sterlin v. Biomune Systems, 154 F.3d 1191, 1201 \(10th Cir.1998\)](#) (statute of limitations does not begin to run until plaintiff should have discovered the facts underlying the fraud); [Law v. Medco Research, Inc., 113 F.3d 781, 785 \(7th Cir.1997\)](#) (statute runs from time plaintiff learns of facts supporting claim).

The scope of the plaintiffs' damages, therefore, depends upon when they should have discovered the facts supporting their claims. This is true regardless of whether they actually investigated. [Marks v. CDW Computer Ctrs., Inc., 122 F.3d 363, 368 \(7th Cir.1997\)](#). "Inquiry notice does not begin to run unless and until the investor is able, with the exercise of due diligence (*whether or nor actually exercised*), to ascertain the information needed to file suit." *Id.* (emphasis added); [Caviness v. Derand Resources Corp., 983 F.2d 1295, 1303 \(4th Cir.1993\)](#) (the limitations period commences "when the plaintiff knows of the facts on which the action is based or has such knowledge [**36] as would put a reasonably prudent purchaser on notice to inquire, so long as that inquiry would reveal the facts on which a claim is ultimately based"). In a price-fixing case involving some of these same defendants, the Fourth Circuit concluded that:

With regard to the third element of [the fraudulent concealment] test, the [*836] due diligence requirement, it is possible for a plaintiff to satisfy that element without demonstrating that it engaged in any specific inquiry.... Furthermore, if reasonable further investigation would not have revealed the basis for the antitrust claim, the plaintiff's claim is not time barred. (citations omitted)

[Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc. 71 F.3d 119, 128 \(4th Cir.1995\)](#)

The actual exercise of diligence is irrelevant because the standard is an objective one. As the Tenth Circuit recently explained:

HN21 [↑] Although a plaintiff has an "obligation of diligence," the plaintiff need not show the actual exercise of diligence in order to "toll" the limitations period. Rather in deciding whether the statute should be tolled, it must be determined whether a "reasonably diligent plaintiff" would have discovered [**37] the fraud. (citations omitted)

[Sterlin, 154 F.3d at 1201.](#) See also [Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 694-95 n. 16 \(10th Cir.1981\)](#) (while equity required actual diligence, modern federal test requires "hypothetical diligence"). See also [Klehr, 521 U.S. at 195-96, 117 S. Ct. 1984](#) (in Civil Rico, the concealment requirement is satisfied if the plaintiff shows that he neither knew nor, in the exercise of due diligence, *could reasonably have known* of the offense).

Both the diligent and the non-diligent plaintiff are protected from the expiration of claims the factual basis for which was shrouded by the veil of fraudulent concealment. Neither, however, is protected from the expiration of claims the factual basis for which they could and should have discovered through the exercise of due diligence.¹⁹ As the Seventh Circuit has observed:

[**38] Is mere suspicion discovery? Or, at the other extreme, must the investor have learned (or been in a position where he should have learned) all the facts he needs in order to file suit? ... The plaintiff gets [the] period of the

¹⁹ This objective standard accommodates the federal antitrust interest in expediting enforcement of economic competition with the federal judicial interest in avoiding groundless or premature suits. See [Sterlin, 154 F.3d at 1202.](#)

statute of limitations after he learned or should have learned the facts that he must know to know that he has a claim.

Medco Research, 113 F.3d at 785.

In finding that plaintiffs did not act diligently, the district court did not refer to undisputed facts which support a conclusion that a reasonable investigation would have provided plaintiffs with a basis to sue in 1989. Apparently, however, the court relied ²⁰ upon the affidavit of Jay Gurmankin, an attorney who represented Albertson's Supermarkets. Gurmankin's first affidavit states that, prompted by news of the government investigations into bid rigging in Florida in 1988, he conducted an investigation of commercial price fixing, took two sworn statements from bid-riggers, and ultimately negotiated a settlement with one of Albertson's dairy suppliers in 1989. The district court inferred from this affidavit that, if plaintiffs had also investigated in 1988, they too could have **[**39]** discovered the facts which led to Albertson's settlement of their antitrust claims in 1989.

In later testimony, however, Gurmankin conceded that he did not actually take the bid-riggers' statements until 1990 and early 1991. Therefore, they could not possibly have informed Albertson's of the basis for its 1989 settlement. In fact, he acknowledged that the 1989 settlement was in connection with an antitrust lawsuit in Utah, totally unrelated to Albertson's later-discovered antitrust claims in Florida, **[*837]** and that the Florida claims were settled only in the summer of 1991. He also testified that the Florida settlement was achieved during a period when Albertson's was represented not only by himself, but by the same attorneys who, on behalf of the State of Florida, had conducted the investigation into the Dairies bid-rigging activities.

Reliance on these affidavits, which **[**40]** the district court characterized as uncontradicted, is error. They are internally inconsistent and do not establish that Albertson's learned of its Florida claims prior to 1990 or 1991. The Dairies did not, therefore, meet their burden of establishing that there is undisputed evidence in this record which conclusively shows that plaintiffs could have discovered the basis for their claims in 1989, if only they had been duly diligent. The Dairies are not, therefore, entitled to summary judgment on the issue of fraudulent concealment.²¹ If plaintiffs prove fraudulent concealment of price-fixing at trial, they may recover damages co-extensive with the concealment and into the limitations period.

C. Abandonment of the Conspiracy

HN22[↑] The law recognizes that a conspirator may withdraw from the conspiracy. *Hyde v. United States, 225 U.S. 347, 369, 32 S. Ct. 793, 56 L. Ed. 1114 (1912).* **[**41]** **HN23**[↑] Withdrawal marks a conspirator's disavowal or abandonment of the conspiratorial agreement. *United States v. Read, 658 F.2d 1225, 1233 (7th Cir.1981).* **HN24**[↑] A conspirator who withdraws from the conspiracy is no longer a member of the conspiracy and the subsequent acts of the conspirators usually do not bind him.²² *Id.* See also *United States v. Borelli, 336 F.2d 376, 388 (2d Cir.1964)*. The ex-conspirator remains liable, however, for his previous agreement and all damages inflicted by the acts he committed prior to his withdrawal. *Id.*

HN25[↑] Withdrawal, therefore, is not a complete defense to the charge of conspiracy. It becomes a complete defense only when coupled with the defense of the statute of limitations. The statute **[**42]** of limitations begins to run upon the conspirator's withdrawal from the conspiracy. *United States v. Antar, 53 F.3d 568, 584 (3d Cir. 1995).* If he is not sued within the limitations period, all claims against him are time-barred. He cannot be held liable for the acts of the other conspirators after he withdrew because his withdrawal effectively ended his membership in the

²⁰ The district court did rely on these affidavits for its conclusion that plaintiffs were on notice that "where there's smoke, there's fire."

²¹ Of course, the jury will ultimately determine what these plaintiffs should have known and when they should have known it.

²² The exception is where a continuing conspiracy is alleged. Since a continuing conspiracy is alleged as one crime, a conspirator is still liable for the crimes of his co-conspirators even after his withdrawal, so long as he is sued during the limitations period.

conspiracy.²³ Nor can he be sued for the damages caused by his previous participation because the limitations period has elapsed. Thus, the interaction of the two defenses of withdrawal and statute of limitations operates to shield the ex-conspirator of all liability. [Read, 658 F.2d at 1233.](#)

Pet and Southland sold their dairies in 1985 and 1988 respectively. They contend that these sales constituted an abandonment of the alleged price-fixing conspiracy. If so, the statute of limitations began to run as to plaintiffs' claims against them in 1985 and 1988. We have [\[**43\]](#) already decided that [Section 16\(i\)](#) tolled the statute in 1990. Plaintiffs, therefore, timely filed as to Southland. Even if it withdrew in 1988, it remains liable to plaintiffs since they filed during the limitations period. If Pet withdrew in 1985, however, these actions would not be timely filed.²⁴

[*838] The standard for effective withdrawal has been articulated by the Supreme Court:

HN26 Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.

[United States v. U.S. Gypsum Co., 438 U.S. 422, 464-65, 98 S. Ct. 2864, 57 L. Ed. 2d 854 \(1978\).](#) [\[**44\]](#)

HN27 Although mere cessation of activity is not sufficient to establish withdrawal, [United States v. Hogan, 986 F.2d 1364, 1375 \(11th Cir.1993\)](#), a conspirator may avoid further liability for his actions if he affirmatively and completely disassociates himself from the continued operation of the conspiracy. [United States v. Lowell, 649 F.2d 950, 955 \(3d Cir. 1981\).](#)

In this circuit, however, it has long been necessary that **HN28** the conspirator demonstrate that he "undertook affirmative steps, inconsistent with the objects of the conspiracy, to *disavow or to defeat* the conspiratorial objectives." [United States v. Finestone, 816 F.2d 583 589 \(11th Cir.1987\)](#) (emphasis added). "Merely ending one's activity in a conspiracy may not constitute withdrawal." [United States v. Pippin, 903 F.2d 1478, 1481 \(11th Cir.1990\)](#) (citing *Finestone*, *id.*). The defense of withdrawal is not available to one who merely ceases to participate and does not affirmatively withdraw. [United States v. Young, 39 F.3d 1561, 1571 \(11th Cir. 1994\)](#); [United States v. Hogan, 986 F.2d 1364, 1375 \(11th Cir.1993\); United States v. LeQuire, 943 F.2d 1554, 1564 \(11th Cir.1991\).](#) [\[**45\]](#)

Pet asserts that its exit from the dairy business constituted an affirmative step sufficient to effectively withdraw it from the conspiracy, and that this act was communicated to the other Dairies by the extensive publicity regarding the sale at the time. Plaintiffs contend that Pet did nothing more than cease its participation in the conspiracy and did nothing to disavow or defeat the purposes of the conspiracy. Furthermore, they contend that Pet did not communicate its withdrawal to the other conspirators.

There is merit to plaintiffs' contentions. The sale of Pet's dairy was not a disavowal of the conspiracy so much as a business decision not to produce milk anymore. Nor did it do anything to defeat the continuation of the other dairies price-fixing.²⁵ It simply sold its dairy and walked away.

Plaintiffs argue that we should adopt the time-bomb theory [\[**46\]](#) of conspiratorial liability. This theory holds that, having set in motion a criminal scheme, a conspirator will not be permitted by the law to limit his responsibility for its consequences by ceasing, however, definitively, to participate.

Such cessation may or may not be effective withdrawal in a lay sense, but this is one of those places where the law uses a word in a special sense. You do not absolve yourself of guilt of bombing by walking away from the

²³ The continuing conspiracy is the exception.

²⁴ These actions may also be timely-filed against both Pet and Southland on a theory of fraudulent concealment. Under this theory, they would be liable for all damages inflicted by the conspiracy so long as plaintiffs timely filed after they discovered or should have discovered their claims.

²⁵ In fact, as we have noted above, plaintiffs allege that Pet left in place the principal conspirators who continued to fix milk prices for the new owners.

ticking bomb. And similarly the law will not let you wash your hands of a dangerous scheme that you have set in motion and that can continue to operate and cause great harm without your continued participation.

[United States v. Patel, 879 F.2d 292, 294 \(7th Cir. 1989\).](#)

In an alleged price-fixing conspiracy such as this one, the requirement for affirmative steps to defeat the objectives of the conspiracy is especially relevant. Once prices have been set at an artificially high level, no further action by the conspirators is required to effect the objectives of the conspiracy. In such a continuing conspiracy, each sale at the fixed price continues to benefit the conspirators, regardless of whether some **[**47]** members of the conspiracy drop out.

[*839] The issue, then, is whether Pet's sale of its dairy, without more, effectively withdrew it from the milk price-fixing conspiracy, or whether some further affirmative step was required to end its liability.

HN29 In the context of a business conspiracy, one in which the conspiracy is carried out through the regular activities of an otherwise legitimate business enterprise, the law has given effect to a conspirator's abandonment of the conspiracy only where the conspirator can demonstrate that he retired from the business, severed all ties to the business, and deprived the remaining conspirator group of the services which he provided to the conspiracy. [Lowell, 649 F.2d at 955.](#) Resignation from the conspiring business has frequently been held to constitute effective withdrawal. [United States v. Nerlinger, 862 F.2d 967, 974 \(2d Cir. 1988\).](#) A conspirator "unquestionably disavows the conspiracy" to fraudulently divert the proceeds of customers' stock trades when he resigns his employment and closes the illicit account. *Id.* Similarly, an employee of a corporation involved in bribery conspiracy effectively withdrew from conspiracy **[**48]** when he resigned and permanently severed his employment relationship with the corporation. [United States v. Steele, 685 F.2d 793 \(3d Cir. 1982\).](#)

The conspirator's break with the other conspirators, however, must be both clean and permanent. [United States v. Pippin, 903 F.2d 1478 \(11th Cir. 1990\)](#). For example, a Borden manager involved in the same school milk bidding conspiracy involved in this case, told the other dairies he would no longer participate in that conspiracy, but, nonetheless, honored the prior agreement not to bid for the school milk contracts that remained. [Id. at 1481.](#) We held that these actions did not constitute an effective withdrawal. [Id. at 1482.](#) See also [United States v. Eisen, 974 F.2d 246, 269 \(2d Cir. 1992\)](#) (attorney who, despite resigning from the conspiratorial enterprise, continued to be entitled to a percentage of the conspiratorial proceeds did not effectively withdraw).

HN30 In order to effectively withdraw, however, it is not necessary for the conspirator to disclose the illegal scheme to the authorities. [Gypsum, 438 U.S. at 464-65, 98 S. Ct. 2864.](#)²⁶ **[**49]** Nor is it necessary that the conspirator notify each co-conspirator of the abandonment. [Nerlinger, 862 F.2d at 974](#) ("nothing in *Borelli* or any other case requires the hiring of a calligrapher to print formal notices of withdrawal to be served upon co-conspirators").

Did Pet effectively withdraw? With the sale of its dairy, Pet certainly "retired" and totally severed its ties to the milk price-fixing conspiracy. It did nothing more to assist or participate in the price-fixing activities of the other dairies. This retirement was communicated to the other dairies by the media. They knew that from that time on, Pet would not lend its services to the conspiracy. Thus, the purposes of the conspiracy were defeated at least as to Pet. We conclude, therefore, that Pet did effectively withdraw from the price-fixing conspiracy upon **[**50]** the sale of its dairy.

III.

We hold that [15 U.S.C. § 16\(i\)](#) tolled the statute of limitations prior to its expiration and thereafter plaintiffs timely filed these actions as to all defendants except Pet and McArthur. As to Pet, we hold that it effectively withdrew from the conspiracy in 1985 and, as to it, these actions are not timely-filed. McArthur may be liable only on a theory of

²⁶ Such a requirement would militate against withdrawal in some cases, thereby undermining the mitigation of danger to society which the defense is designed to encourage.

continuing conspiracy or fraudulent concealment. As to damages, we hold that there remain genuine issues of material fact as to whether defendants fraudulently concealed their price-fixing activities, thereby tolling the statute at an earlier date and expanding the limitations [*840] period. Therefore, defendants are not entitled to summary judgment on this issue.

Accordingly, we AFFIRM IN PART, REVERSE IN PART and REMAND.

End of Document

Santana Prods. v. Sylvester & Assocs.

United States District Court for the Eastern District of New York

December 29, 1999, Decided

98 CV 6721

Reporter

121 F. Supp. 2d 729 *; 1999 U.S. Dist. LEXIS 22550 **; 2001-1 Trade Cas. (CCH) P73,147

SANTANA PRODUCTS, INC., Plaintiff, -against- SYLVESTER & ASSOCIATES, LTD. and FREDERICK E. SYLVESTER, Defendants.

Subsequent History: Reconsideration denied by, Motion denied by *Santana Prods. v. Sylvester & Assocs.*, 121 F. Supp. 2d 729, 2000 U.S. Dist. LEXIS 20213 (E.D.N.Y., 2000)

Prior History: [*Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 69 F. Supp. 2d 678, 1999 U.S. Dist. LEXIS 13500 \(M.D. Pa., 1999\)](#)

Disposition: [**1] Defendants' Motion for Judgement on Pleadings DENIED. Defendants' Motion for More Definite Statement pursuant to [Rule 12\(e\)](#) DENIED. Defendants' Motion for Partial Judgement on Pleadings dismissing Plaintiff's claim under [Section 2](#) of Sherman Act GRANTED.

Core Terms

partitions, toilet, monopolize, Sherman Act, monopoly, alleges, competitors, conspiracy, pleadings, plaintiff's claim, conspired, conspiracy to monopolize, Lanham Act, partial judgment, overt act, co-conspirators, manufacturers, antitrust, statute of limitations, restraint of trade, market power, polyethylene, misleading, non-party, videotape, interstate commerce, definite statement, distributed

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

[**HN1**](#) Responses, Defenses, Demurrsers & Objections

The standard for obtaining a judgment on the pleadings under [Fed. R. Civ. P. 12\(c\)](#) is the same as that applicable to a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#). Under this test, the court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint 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.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Sherman Act

Governments > Legislation > Statute of Limitations > General Overview

HN2 [↓] Remedies, Damages

Damages are recoverable under the Sherman Act only if the suit is commenced within four years after the cause of action accrued. [15 U.S.C.S. § 15b](#).

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN3 [↓] Consumer Protection, False Advertising

Though the Lanham Act, [15 U.S.C.S. § 1125 et seq.](#), does not provide a statute of limitations period, the United States Court of Appeals for the Second Circuit applies a six-year statute of limitations to Lanham Act claims.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN4 [↓] Antitrust & Trade Law, Sherman Act

A cause of action under the Sherman Act is not barred simply because anti-competitive conduct began outside the statutory period, so long as some overt act injuring the plaintiff is committed within the limitations period. Under these circumstances, a plaintiff generally is entitled to recover damages for post-limitations but not pre-limitations overt acts.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN5 [↓] Regulated Practices, Monopolies & Monopolization

See [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

121 F. Supp. 2d 729, *729 (1999 U.S. Dist. LEXIS 22550, **1

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

[HN6](#) [PDF] Monopolies & Monopolization, Conspiracy to Monopolize

A claim of conspiracy to monopolize requires proof of (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > 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 > 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 > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

[HN7](#) [PDF] Conspiracy to Monopolize, Elements

The offense of conspiracy to monopolize proscribed by [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), requires proof of the existence of a conspiracy, a specific intent to monopolize, and an overt act in furtherance of the conspiracy. Unlike the offense of attempted monopolization, it is not necessary to establish the existence of market power in a relevant market or a dangerous probability of success in achieving a monopoly in such market.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

[HN8](#) [PDF] Sherman Act, Claims

Unlike a claim under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), which is aimed at restraint of trade and does not require proof of a fundamental alteration of market structure, a claim under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), is aimed primarily not at improper conduct but at a pernicious market structure in which the concentration of power saps the salubrious influence of competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

[HN9](#) [PDF] Monopolies & Monopolization, Conspiracy to Monopolize

The essence of monopoly is the power to effect the exclusion of competition generally in a field for the benefit of a particular person or class. The exclusion of a single person from competition is not monopoly. Thus, where only one competitor is alleged to be targeted, as opposed to an entire market, a conspiracy to monopolize claim must fail.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy 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

HN10 [blue] **Conspiracy to Monopolize, Elements**

To allege a conspiracy to monopolize an entire market, the plaintiff must allege more than unfair trade practices directed at one competitor. The plaintiff must allege overt acts by which the defendants intended to gain sufficient market power to raise prices or exclude competition when it desired to do so. If intent to restrain trade was synonymous with intent to monopolize, §§ 1 and 2 of the Sherman Act, [15 U.S.C.S. §§ 1](#) and [2](#), would be redundant. There must be an area between the two provisions in which a plaintiff alleges a conspiracy in restraint of trade that may stop short of monopoly.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN11 [blue] **Monopolies & Monopolization, Actual Monopolization**

Traditionally, the offense of monopolization occurs where one firm possesses monopoly power.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN12 [blue] **Monopolies & Monopolization, Actual Monopolization**

The idea that a monopoly is composed of a single economic entity is reflected in the requirement in an actual monopolization claim that the requisite market power be held by a single defendant. This idea in no way precludes the possibility of a group of firms conspiring to monopolize, if the aim of the conspiracy is to form a single entity to possess the illegal market power. When, however, two or more competitors conspire to create a market environment in which competition and market entry is improperly restricted, but in which market power continues to be shared among these otherwise unrelated entities, there is no conspiracy to monopolize claim stated under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), and the claim must therefore be dismissed.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

HN13 [blue] **Defenses, Demurrers & Objections, Defects of Form**

Fed. R. Civ. P. 12(e) provides that a motion for a more definite statement of the plaintiff's claims must be made before interposing a responsive pleading.

Counsel: For Defendants: FREDERICK A. NICOLL, ESQ., Law Offices of Frederick A. Nicol, New York, NY.

For Plaintiff: PAUL J. ESATTO JR., ESQ., PETER I. BERNSTEIN, ESQ., Scully, Scott, Murphy & Presser, Garden City, NY.

Judges: JACOB MISHLER, U.S.D.J.

Opinion by: JACOB MISHLER

Opinion

[*731] Memorandum of Decision and Order

December 29, 1999

MISHLER, District Judge:

This action was brought pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, the Lanham Act, 15 U.S.C. § 1125 et seq. and the Donnelly Antitrust Act, New York Gen. Bus. L. § 340. Plaintiff Santana Products, Inc. ("Santana") alleges that Defendants Sylvester & Associates and Frederick E. Sylvester ("Sylvester") (collectively, "Defendants") have contracted and conspired to unreasonably restrain trade in and monopolize a portion of the toilet partition market. Plaintiff further alleges that Defendants have published, distributed [*2] and disseminated advertising brochures and other advertising statements which include false and/or misleading representations and disparaging accusations regarding Plaintiff's product.

Defendants move for judgment on the pleadings or, in the alternative, for partial judgment on the pleadings or, in the alternative, for a more definite statement. For the reasons below, we grant Defendants' motion for partial judgment on the pleadings and deny the remainder of Defendants' motions.

BACKGROUND

Santana manufactures and sells restroom and toilet partitions made of high density polyethylene ("HDPE"). According to the Complaint, HDPE is more durable and cost-effective than conventional materials such as metal, marble and solid phenolic. Plaintiff claims that as demand for HDPE grew, efforts were initiated to exclude HDPE from the field of materials used for toilet partitions. Specifically, "Sylvester, Sylvester & Associates, and the non-party co-conspirators conspired to use scare tactics to discourage specification and acceptance of Santana's HDPE partitions in lieu of or as a replacement material for conventional materials by falsely alleging that Santana's partitions posed a dangerous [*3] fire hazard." (Complaint P 23.) As a result of these allegedly false allegations, HDPE toilet partitions were often misclassified by specifiers and building code officials as "interior wall finish" which are required to meet additional fire safety standards.

In late 1989, several alleged non-party co-conspirators formed the Toilet Partitions Manufacturer's Council ("TPMC") but excluded Plaintiff from membership. According to a memorandum from the Formica Corporation, a TPMC member, the TPMC met in November 1989 to "address the competitive threat of HD Polyethylene (Santana) against our thick stock for construction of toilet partitions". (Ex. B to Complaint.) Plaintiff alleges that Sylvester, while employed by Metpar Corporation in 1989, assisted in the creation of a videotape for the Formica Corporation wherein small samples of Santana's HDPE product were ignited and burned. (Complaint P 32.)

The Complaint further alleges, *inter alia*:

[*732] . In November 1989, Sylvester, while employed by Metpar, exhibited a portion of what was later incorporated into the Formica videotape at a meeting held at the New York Office of General Services ("OGS") in an effort to have the OGS switch [**4] from HDPE to phenolic partitions. (Complaint P 34.)

. In November 1989, Sylvester sent a letter to the Nassau County Fire Marshall stating that HDPE toilet partitions previously provided at the Nassau Coliseum did not meet the proper fire code standards. (Complaint P 37.)

In 1992, Sylvester & Associates was formed. Between 1992 and 1994, Defendants were local architectural representatives of Bobrick Corporation and Bobrick Washroom Equipment, Inc. (collectively, "Bobrick"). During that time, Defendants allegedly sold Bobrick's plastic laminate toilet partitions without obtaining the required approval for such sales from the Materials and Equipment Acceptance Division of the City of New York Department of Buildings. (Complaint PP 44, 45.) The Complaint specifically alleges:

49. "On information and belief, since at least 1992, [Defendants] have received and distributed Bobrick's "Advisory Bulletin TB-73" to specifiers and architects providing a comparison of the results of an ASTM E-84 test performed on its 1080 Duraline Series toilet partitions and on HDPE toilet partitions without fire retardant additives. Advisory Bulletin TB-73 falsely and/or misleadingly states among [**5] other things: 'Polyethylene paneling without fire retardant additives should not be used in buildings where Class B Interior Wall and Ceiling Finish is required.'

50. On information and belief, [Defendants] distributed a "Fact Sheet" (containing false and/or misleading statements relating to Santana's product) to prospective purchasers of Bobrick toilet partitions within the time period of November 1992 to present. . . . The "Fact Sheet" compared characteristics of solid phenolic toilet partitions to Santana's HDPE toilet partitions. On information and belief, the "Fact Sheet" falsely and/or misleadingly stated that HDPE had a smoke developed rating greatly exceeding National Fire Protection limit

51. On information and belief, [Defendants] conducted "box-lunch presentations" between 1992 and 1997 [which included the showing of a slide which] falsely and/or misleadingly illustrates the characteristics of Santana's HDPE toilet partitions."

(Complaint PP 49-51.)

Aside from the Formica videotape, Plaintiffs allege that Bobrick created a videotape comparing its phenolic toilet partitions with the polyethylene partitions made by Santana. The narrator [**6] on the tape states that the polyethylene partitions generate excessive smoke when lit and conducts a flame exposure test presented in time-lapse photography, giving the impression that the polyethylene partitions burn quickly. Plaintiffs allege that Defendants and non-party co-conspirators have shown the Bobrick videotape to building code officials and other administrative officers on numerous occasions to prevent contractors from specifying use of Santana's HDPE partitions. (Complaint P 62.)

In support of its antitrust claim, Plaintiff alleges that beginning in the 1980's and continuing to the present time, Defendants and non-party co-conspirators have "contracted, combined and conspired to unreasonably restrain trade in the relevant market for toilet partitions in interstate commerce in violation of [Section 1](#) of the Sherman Act." (Complaint P 67.) The alleged illegal conduct includes:

- . Knowingly acting in concert with co-conspirators to exclude HDPE toilet [*733] partition manufacturers and sellers from the toilet partition market;
 - . Knowingly making false statements regarding the flammability of Plaintiff's product;
 - . Knowingly making false statements regarding the [**7] flame and smoke protection standards HDPE must meet, thereby frightening and misleading architects and other specifiers for toilet partitions and discouraging the inclusion of Santana in the competitive bidding process;
 - . Knowingly making false and/or misleading statements to municipalities and other governmental agencies in an effort to influence them to adopt or modify regulations relating to HDPE partitions and to preclude use of HDPE partitions in government contracts.
- (Complaint P67(a-d).)

Plaintiff further alleges that based on conduct from 1992 to the present time, Defendants and non-party co-conspirators have "conspired to monopolize at least a part of the trade in interstate commerce for toilet partitions and to maintain power to exclude or restrain manufacturers of HDPE partitions from marketing and selling their goods in interstate commerce in violation of [Section 2](#) of the Sherman Act." (Complaint P 72.) The alleged illegal conduct is similar to that underlying the claims under [Section 1](#) of the Sherman Act.

Finally, Plaintiff alleges that Defendants violated the Lanham Act by publishing videotapes and distributing advertising brochures and other materials [\[**8\]](#) which included false and/or misleading representations and disparaging accusations with regard to the alleged flammability of Santana's HDPE product. These promotional materials are alleged to have been designed to deceive potential purchasers and discourage them from purchasing Santana's HDPE product. (Complaint P 77.)

PROCEDURAL HISTORY

This is the third action filed by Plaintiff alleging antitrust and Lanham Act violations by its competitors in the toilet partition industry. In November 1994, Plaintiff filed an action against the TPMC, eleven toilet compartment manufacturers and the Formica Corporation in the Middle District of Pennsylvania (the "1994 Litigation"). The 1994 litigation was settled with a confidential release and covenant not to sue dated January 27, 1995 which released and forever discharged the signatory entities and their respective officers, directors, parents, subsidiaries, employees, agents and attorneys from any and all claims up to that date.

On October 1, 1996, Plaintiff filed another complaint in the Middle District of Pennsylvania with the caption [Santana Products, Inc. v. Bobrick Washroom Equipment, Inc.](#), 3:CV:96-1794 (the "Pennsylvania action"). [\[**9\]](#) The complaint in that action alleged, *inter alia*, a conspiracy among Plaintiff's competitors in violation of the antitrust laws. Among those named in the suit were Sylvester & Associates and Frederick E. Sylvester, Defendants here. On July 24, 1998, the court in that action dismissed Plaintiff's claims against Sylvester & Associates and Frederick E. Sylvester for lack of personal jurisdiction. The remaining parties to the Pennsylvania action are still engaged in extensive discovery.

On October 30, 1998, Plaintiff filed the instant Complaint against Defendants only, reiterating many of the same antitrust and Lanham Act claims alleged in the first two actions. Plaintiff also alleged the violation of the Donnelly Antitrust Act ([N.Y. Gen Bus. Law § 340](#)) and included several factual allegations specific to Defendants. On June 1, 1999, Defendants filed that instant motion as well as a motion to stay discovery. On October 19, 1999, we stayed discovery pending resolution of this motion.

[*734] JUDGMENT ON THE PLEADINGS

[HN1](#) [↑] The standard for obtaining a judgment on the pleadings under [Federal Rule of Civil Procedure 12\(c\)](#) is the same as that applicable to a motion to dismiss under [Rule 12\(b\)\(6\)](#). [\[**10\]](#) [Sheppard v. Beerman](#), 18 F.3d 147, 150 (2d Cir. 1994). Under this test "the Court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint 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". [Sheppard](#), 18 F.3d at 150 (quoting [Ad-Hoc Comm. of Baruch Black and Hispanic Alumni Ass'n v. Bernard M. Baruch College](#), 835 F.2d 980, 982 (2d Cir. 1987)) (citations omitted).

Defendants assert that all of Plaintiff's claims (1) were previously released by Plaintiff, (2) are time-barred, and/or (3) are pleaded too conclusorily to state an adequate claim.

As part of the settlement in the 1994 Litigation, Plaintiff co-executed a confidential release and covenant not to sue with, among others, Metpar Corporation, the company with which Frederick Sylvester was employed until November 1989. That agreement released and forever discharged Metpar and its employees from any and all claims up to January 27, 1995, the date of execution. (Ex. B to Answer, attached to Def. [\[**11\]](#)'s Mem.) Because

this release would, at most, only affect actions taken by Sylvester prior to November 1989, which would fall outside all applicable statutes of limitations (see below), we need not address the applicability of the release to the claims asserted herein.

Defendants next assert that Plaintiff does not adequately allege specific acts committed within the applicable statutes of limitations. Plaintiff alleges violations of two federal statutes -- the Sherman Act and the Lanham Act. [HN2](#)[↑] Damages are recoverable under the Sherman Act only if the suit is "commenced within four years after the cause of action accrued." [15 U.S.C. § 15b](#). [HN3](#)[↑] Though the Lanham Act does not provide a statute of limitations period, this circuit has applied a six-year statute of limitations to Lanham Act claims. See [Conopco, Inc. v. Campbell Soup Co., 95 F.3d 187, 191 \(2d Cir. 1996\)](#). Plaintiff filed its Complaint on October 30, 1998. It may therefore recover for injury caused by any antitrust violation committed after October 30, 1994 and for any Lanham Act violation committed after October 30, 1992.

Defendants spend much time in their brief pointing out that most of [\[**12\]](#) the facts alleged in Plaintiff's Complaint took place before the four year period. (Def.'s Mem. at 17-20.) [HN4](#)[↑] A cause of action is not barred, however, simply because anti-competitive conduct began outside the statutory period, so long as some overt act injuring the plaintiff is committed within the limitations period.¹ [\[**13\]](#) Under these circumstances, a plaintiff generally is entitled to recover damages for post-limitations but not pre-limitations overt acts.² This issue may be moot, however, as Plaintiff concedes that it is only "entitled to rely on facts occurring outside the statute of limitations as background to demonstrate the state of mind of Defendants". (Pl.'s Mem. at 2.)

[\[*735\]](#) We find that Plaintiff has adequately pled overt acts in violation of both the Sherman Act and the Lanham Act within the statutory periods. For example, Plaintiff alleges that between 1992 and the present, Defendants have distributed the "Advisory Bulletin TB-73" and Fact Sheets and conducted box-lunch presentations in which false and misleading statements were made regarding Plaintiff's product. (Complaint PP 49-51.) We further find that these allegations are stated with sufficient particularity to satisfy the notice pleading requirement of [Federal Rule of Civil Procedure 8\(a\)](#).

Accordingly, Defendants' motion for judgment on the pleadings is denied.

PARTIAL JUDGMENT ON THE PLEADINGS

Defendants move, in the alternative, for partial judgment on the pleadings dismissing Count II for failure to state a claim [\[**14\]](#) under [Section 2](#) of the Sherman Act. Count II alleges that "Defendants and the non-party co-conspirators have conspired to monopolize at least a part of the trade in interstate commerce for toilet partitions . . .". (Complaint P 72.)

[Section 2](#) of the Sherman Act states in pertinent part:

[HN5](#)[↑] 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.

¹ Plaintiff alleges a continuing violation of the antitrust laws dating back to 1989. The Supreme Court in [Zenith Radio Corporation v. Hazeltine Research, Inc.](#) explained how continuing violations are treated under the statute of limitations:

Each time a plaintiff is injured by an act of the Defendants a cause of action accrues to him to recover the damages caused by that act and . . . as to those damages, the statute of limitations runs from the commission of the act. [401 U.S. 321, 339, 91 S. Ct. 795, 806, 28 L. Ed. 2d 77 \(1971\)](#) (citations omitted).

² The exception to this is if the Plaintiff were injured during the statutory period as a result of conduct outside the statutory period where damages were speculative or uncertain at the time the act was committed. [Zenith Radio Corp.](#), 401 U.S. at 339, 91 S. Ct. at 806.

15. U.S.C. § 2.

HN6 [↑] A claim of conspiracy to monopolize requires proof of (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize. See, e.g., The Sample Inc. v. Pendleton Woolen Mills, Inc., 704 F. Supp. 498, 505 (S.D.N.Y. 1989).

In their supporting Memorandum of Law, Defendants assert that Plaintiff's claim under Section 2 should fail because Plaintiffs fail to allege that Defendants possesses the requisite market share to threaten a "dangerous probability" of monopolization. (Def.'s Mem. at 23.) Plaintiff correctly responded that it asserted only a claim for "conspiracy [**15] to monopolize" and not "attempt to monopolize" under Section 2 and that proof of a "dangerous probability" of success at monopolization is not required to state a claim for conspiracy. (Pl.'s Mem. at 15.) Defendants, in their Reply brief, dismiss Plaintiff's response and maintain that "whether plaintiff's claim is for conspiracy to monopolize or attempt to monopolize, market share remains a necessary element of a claim under Section Two of the Sherman Act, and plaintiff can point to no authority to the contrary." (Def.'s Reply at 4 n. 2.) In response to Defendants' call for authority on this point, the Court offers the following excerpt from American Jurisprudence:

HN7 [↑] "The offense of conspiracy to monopolize proscribed by Section 2 of the Sherman Act requires proof of the existence of a conspiracy, a specific intent to monopolize and an overt act in furtherance of the conspiracy. Unlike the offense of attempted monopolization, it is not necessary to establish the existence of market power in a relevant market or a dangerous probability of success in achieving a monopoly in such market."

54 Am.Jur.2d Monopolies, Restraints of Trade and Unfair Trade Practices § 69 (1996) (citations [**16] omitted); accord, H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 879 F.2d 1005, 1019 (2d Cir. 1989).

While it is clear that proof of market power is not a necessary element in a conspiracy to monopolize claim, the most troubling question for the Court is whether Plaintiff has adequately asserted Defendants' "" "intent to monopolize", an issue addressed only briefly in Defendants' Reply brief.

[*736] Plaintiff claims that by several overt acts falling within the four year statute of limitations, Defendants have conspired with their fellow competitors in the toilet partition industry to disseminate false information regarding Plaintiff's product. By doing so, Defendants "conspired to monopolize at least a part of the trade in interstate commerce for toilet partitions." This argument appears to be a novel one in this district. Plaintiff, in essence, argues that by their actions Defendants intended to affect the general market structure of the toilet partition industry and that as a matter of law a large number of competitors may band together to monopolize an industry. Both questions deserve greater review than they were granted in the parties' briefs.

[**17] First, the Court is not convinced that Plaintiff adequately alleged Defendants' intent to affect competition in the toilet partition market generally, as opposed to competition with Plaintiff alone. **HN8** [↑] Unlike a claim under Section 1 of the Sherman Act which is aimed at restraint of trade and does not require proof of a fundamental alteration of market structure, a claim under Section 2 is "aimed primarily not at improper conduct but at a pernicious market structure in which the concentration of power saps the salubrious influence of competition." Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979).

HN9 [↑] The essence of monopoly is the power to effect the exclusion of competition generally in a field for the benefit of a particular person or class. Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286, 298 (S.D.N.Y. 1954) (citing American Tobacco Co. v. United States, 328 U.S. 781, 784-787, 809, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)). The "exclusion of a single person from competition is not monopoly". Id.; Los Angeles Land Co. v.

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Brunswick Corp., 6 F.3d 1422, 1426-7 (9th Cir. 1993)(same). Thus, where only one [**18] competitor is alleged to be targeted,³ as opposed to an entire market, a conspiracy to monopolize claim must fail. See, e.g., *Interborough News Co., 127 F. Supp. at 298* (finding no violation of *Section 2* where the most the evidence showed was a refusal to deal with one competitor due to real or imagined deficiencies in its operation).

Here, the only actions alleged in support of Plaintiff's *Section 2* claims relate to Defendants' efforts to disseminate allegedly false information regarding Plaintiff's product. *HN10*[¹] To allege a conspiracy to monopolize an entire market, Plaintiff [**19] must allege more than unfair trade practices directed at one competitor. Plaintiff must allege overt acts by which Defendants intended to gain sufficient market power to "raise prices or exclude competition when it desired to do so." *American Tobacco, 328 U.S. at 811, 66 S. Ct. at 1140*. If intent to restrain trade was synonymous with intent to monopolize, *sections 1* and *2* of the Sherman Act would be redundant. There must be an area between these two provisions in which a plaintiff alleges "a conspiracy in restraint of trade that may stop short of monopoly". *American Tobacco, 328 U.S. at 788, 66 S. Ct. at 1128* (noting the "reciprocally distinguishable" proof required for claims under *Section 1* and *Section 2*). The actions alleged in the Complaint, if true, would fall in this area.

In *H.L. Hayden*, a distributor of dental x-ray equipment sued a manufacturer and two other dealers under the Sherman Act alleging, *inter alia*, conspiracy in restraint of trade and conspiracy to monopolize. The second circuit broke down plaintiff's claims as follows:

"... plaintiff's claim of a section one conspiracy is directed primarily to the [*737] elimination of [**20] Hayden ... as a competitor, whereas its claim of a section two conspiracy is directed to attaining 'a monopoly over the sale of dental equipment and dental x-ray equipment to dentists in the United States'."

H.L. Hayden, 879 F.2d at 1019 (affirming district court finding that plaintiff did not proffer adequate evidence to withstand summary judgment on the conspiracy to monopolize claim).

We find that Plaintiff has failed adequately to allege that Defendants' actions were aimed at monopolizing a portion of the toilet partition market in general and not merely at the elimination of plaintiff as a competitor. Accordingly, Defendants' motion for partial judgment on the pleadings as to Plaintiff's *section 2* claim is granted.

The second issue presents one of first impression in this district and an alternative basis for granting Defendants' motion for partial judgment on the pleadings on Plaintiff's *section 2* claim. Plaintiff appears to argue that Defendants intended to monopolize the toilet partition market not alone, but rather in concert with their fellow competitors. (Complaint P 72.) Without mention, Plaintiff has alleged a conspiracy to form a "shared monopoly" [**21] - a theory of liability that has not been addressed by the second circuit and that has been rejected by several other courts. Like the issue above, the "shared monopoly" theory requires further review.

HN11[¹] Traditionally, the offense of monopolization occurs where one firm possesses monopoly power. See *15 U.S.C. § 2* (stating that "Every person who shall monopolize . . . shall be deemed guilty..."); see also, e.g., *Oksanen v. Page Memorial Hospital, 945 F.2d 696, 709 (4th Cir. 1991)*("*Section 2* involves the actions of a single firm to control a market"). Some commentators, however, have posited that *Section 2* may be invoked against shared monopolies in which "no single firm possesses sufficient power to be considered a 'monopolist' but nevertheless a relatively few firms achieve monopoly-like" results. P. Areeda & H. Hovenkamp, *Antitrust Law* 810 (1996). Professors Areeda and Hovenkamp admit, however, that "courts and the Federal Trade Commission have universally rejected claims that *Section 2* condemns 'shared' monopoly". P. Areeda & H. Hovenkamp, *Antitrust Law*, at P 810g.

³ Though Plaintiff does allege that Defendants' conduct harmed "Plaintiff and other HDPE manufacturers" (Complaint PP 68, 73), Plaintiff does not identify these other manufacturers or even specify how many there are. The Court, therefore, does not consider Plaintiff to be a representative of a large group of manufacturers, but rather understands Plaintiff's claim to be that Defendant has targeted Plaintiff's product specifically.

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We are cognizant that the Supreme Court in American Tobacco affirmed the [**22] conviction of horizontal competitors for conspiracy to monopolize, but the issue of whether competitors are capable of conspiring to monopolize was never squarely presented to or addressed by the Court. 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575; see also H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 672 F. Supp. 724, 742 (S.D.N.Y. 1987) (discussing the "discreet question" addressed in American Tobacco), aff'd on other grounds, 879 F.2d 1005 (2d Cir. 1989). The only circuit court to have addressed the issue is the ninth circuit in Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477 (9th Cir. 1988). The court there refused to hold that the shared monopoly theory can never be viable, but rejected the theory in that case holding that because the market at issue was small with numerous sellers, the shared monopoly theory could not support a claim under Section 2. Id. at 490.

Most district courts that have addressed the viability of a shared monopoly theory under Section 2 have rejected it as contrary to the plain language and legislative intent of the Sherman Act. See, e. [**23] g., Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc., 535 F. Supp. 225, 229 (S.D.N.Y. 1982) (holding that shared monopoly does not violate § 2 of the Sherman Act absent an allegation that a particular Defendant, as opposed to all Defendants, monopolized or attempted to monopolize the market); Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 867 F. Supp. 925, 941 (D. Or. 1994) (where many competitors are alleged to form a shared [*738] monopoly, claim under § 2 fails); see also H.L. Hayden, 672 F. Supp. at 741 (expressing "considerable discomfort" with shared monopoly theory and noting that the "notion that two competitors could conspire to monopolize is, seemingly, antithetical").

A district court in Maryland stated the issue as follows:

HN12[↑] "The idea that a monopoly is composed of a single economic entity is also reflected in the requirement in an actual monopolization claim that the requisite market power be held by a single defendant. This idea in no way precludes the possibility of a group of firms conspiring to monopolize, if the aim of the conspiracy is to form a single entity to possess the illegal market [**24] power. When, however, two or more competitors conspire to create a market environment in which competition and market entry is improperly restricted, but in which market power continues to be shared among these otherwise unrelated entities, this Court holds that there is no conspiracy to monopolize claim stated under Section 2, and the claim must therefore be dismissed."

Sun Dun. Inc. of Washington v. Coca-Cola Company, 740 F. Supp. 381, 391-92 (D. Md. 1990).

Similarly, under the facts presented here, Plaintiff cannot assert a claim for conspiracy to form a shared monopoly under Section 2 of the Sherman Act. Assuming Plaintiff's allegations are true, the result of Defendants' actions would be the elimination of Plaintiff as a competitor in the toilet partition market. Plaintiff has not alleged, however, that competition among the many remaining manufacturers of toilet partitions would be diminished in any way. Absent such an allegation, Plaintiff's conspiracy to monopolize claim must fail. Thus, as an alternative basis to the one mentioned above, Defendants' motion for partial judgment on the pleadings on Plaintiff's Section 2 conspiracy claim is granted.

[**25] MOTION FOR A MORE DEFINITE STATEMENT

Lastly, Defendants seek an order from the Court requiring Plaintiff to submit "a more definite statement with regard to its allegations after October 30, 1992 on the Lanham Act claim and after October 30, 1994 on the Sherman Act claims" pursuant to Federal Rule of Civil Procedure 12(e). HN13[↑] Rule 12(e), however, provides that such motion must be made "before interposing a responsive pleading". Fed.R.Civ.P. 12(e). Defendants interposed their Answer on March 12, 1999. Accordingly, Defendants' motion for a more definite statement is denied.

CONCLUSION

Defendants' Motion for Judgement on the Pleadings is DENIED.

Defendants' Motion for a More Definite Statement pursuant to [Rule 12\(e\)](#) is DENIED.

Defendants' Motion for Partial Judgement on the Pleadings dismissing Plaintiff's claim under [Section 2](#) of the Sherman Act is GRANTED. There being no just cause for delay, the Clerk of the Court is directed to enter judgment dismissing Plaintiff's claim under [Section 2](#) of the Sherman Act.

Because the instant Order involves "a controlling question of law as to "which there is substantial ground for difference of opinion and . . . an immediate appeal [**26] from the order may materially advance the ultimate termination of the litigation", [28 U.S.C. § 1292\(b\)](#), we hereby certify the order for immediate appeal pursuant to [28 U.S.C. § 1292\(b\)](#).

SO ORDERED.

JACOB MISHLER, U.S.D.J.

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